

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021



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FOREWORD

By Roman Pecenka, Partner, PRK Partners



Commercial real estate is the third-most-popular investment asset worldwide. Although it is generally professional investors closing the most prominent deals that we hear about, real estate, thanks to its reliability, security, and stable increase in value, is also attracting the attention of non-professional investors.

With its amazing diversity of nationalities, languages, and cultures packed into small, easily traversable borders, Central and Eastern Europe certainly offers tourists a wide assortment of enjoyments.

But the many differences in legislation between these countries can make cross-border deals a massive headache without the right legal guidance.

Although most of CEE belongs to the EU, which contributes to a certain level of unification of the legal rules, the legal systems of CEE continue to be quite different, especially with regard to real estate. While you may be able to acquire real estate in around an hour in one country, without the mandatory involvement of

third parties (such as share deals in certain countries), that entire process can become much more expensive and lengthier in other countries (such as asset deals with mandatory involvement of a notary public in many other countries).

There are jurisdictions with a single reliable land register, accessible online and free of charge (such as the Cadastal Register in the Czech Republic) and countries with two parallel systems which are not easily accessible, if at all. Similar diversity continues to apply with respect to disposals of real estate – in one country the old system of deeds, which are the only proof of an acquired right, continues to prevail, while in other countries this is guaranteed by fully digitalized cadastral registers.

The aim of this guide is to offer at least basic guidance to both professional and non-professional investors considering investing in real estate in the region. As a result, this guide focuses only on selected topics that we believe are of the utmost interest to investors in real estate and does not address them as a whole.

We believe that you will find the information presented in this guide useful, albeit somewhat limited. Our goal in writing it is to help you in your path to a successful closing by getting rid of unexpected surprises and unnecessary burdens. ■



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Letters to the Editors:

If you like what you read in these pages (or even if you don't) we really do want to hear from you. Please send any comments, criticisms, questions, or ideas to us at: press@ceelm.com

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1. Real estate ownership

1.1. Legal framework

In the *Constitution of the Republic of Albania* (Constitution), it is stipulated as one of its essential principles, that the right to private property (which includes the concept of real estate ownership) is guaranteed and protected by the Constitution. Furthermore, private real estate property is equally protected by law as state-owned property. The real estate property can be gained through donation, purchase, or any other means provided in the *Civil Code* and specific laws. The major means for gaining real estate property pursuant to the Albanian legislation are through contract, inheritance, adverse possession, connection, and a mixture of property, processing, etc.

Moreover, the Constitution provides that real estate property can be expropriated or restricted only for public interests and against fair compensation. The process of expropriation for public interests is regulated by means of *Law No. 8561* dated December 22, 1999, *On expropriation and taking into temporary use of private property for public interests* as amended, along with a set of secondary legislation which thoroughly regulates the expropriation process.

Pursuant to the *Civil Code* the property is the right to possess, enjoy and freely dispose of the property within the limits defined by law. Obviously, the Real Estate owners have broader rights in comparison with other categories of beneficiaries from real rights (*i.e.* lease, usufruct, etc.) which usually have the right to possess and enjoy the real estate property in accordance with the contract but do not have the right to dispose of the property.

The Albanian legislation has some restrictions in connection with the acquisition of lands from foreigners. More specifically, it is not allowed the purchase of agricultural lands, woodlands, meadows, and pastures from foreigners. However, the foreigners who acquire such lands through an Albanian commercial entity (existing or by establishing a new one), are able to purchase such land. Restrictions are applicable also for the purchase of lands within the city areas. The foreigners are able to acquire such lands in the case they lease the land with the purpose of investment and perform an investment which according to the construction permit, exceeds three times the value of the land determined by Council of Ministers Decisions. The same as with agricultural land, even in this scenario, foreigners may acquire land by establishing an Albanian commercial company.

1.2. Registration of ownership

The ownership of real estate is duly registered in State Cadaster Agency which organizes, maintains the real estate registers for privately-/state-owned lands and in which are registered the real estate rights over such properties. The activity of the

State Cadaster Agency is regulated through *Law No. 111/2018 On the cadaster*. The State Cadaster Agency and is under the direct supervision of the Prime Ministers' Office.

All the private or state-owned properties should be registered in the State Cadaster Agency. With the entry into force of *Law No. 111/2018* is supposed to be finalized the whole process of digitalization of the cadastral registers/maps and to be concluded the process of the initial registration of all the real estate properties. This means that while digitalizing all the existing real estate properties, the State Cadaster Agency scrutinizes the legality of the property registration and invites the owner to remedy any deficiencies that might be noted. This process decreases considerably the risk of having overlaps of properties and overlaps of cadastral maps.

Pursuant to the *Civil Code*, the following transactions must be registered in the State Cadaster Agency:

- contracts for the transfer of the ownership of the real estate and the acts for their voluntary separation;
- contracts through which are established, recognized, amended, or cease to produce effects real rights over the properties, such as usufructs, usage, emphyteusis, easements, and other real rights;
- legal acts by means of which are waived the above real rights;
- legal acts through which is established a commercial entity which has under ownership a real estate or enjoys other rights *in rem* over these properties; and
- court judgments related to real estate matters and the bailiff actions for the seizure or sale of real estate property in auction.

1.3. Publicity of real estate register

The information in the real estate registry is not publicly available. Such information may be accessed by the relevant state authorities, prosecutions, or courts based on a valid legal reason. Also, the public notaries have access to the real estate register however this information can be used and/or processed by them only for reasons of effectuating transactions with real estate properties.

1.4. Protection of ownership

Any transaction with a real estate property (at least the ones specifically provided in the law) should be registered in the State Cadaster Agency, however, such registration is not always a condition precedent for the validity of the transaction. The *Law on Cadaster* provides that any transaction or legal action which is necessary to be registered in the real estate registry, should be registered within 30 days from the execution of the agreement, otherwise a fine of approximately USD 30 per day is applied.

The Constitution provides that property rights are protected by law and real estate rights can be deprived only upon a due process of law. While the *Civil Code* specifically regulates the procedural means for the protection of real estate rights. More specifically such modalities are the claim for restitution of property, the claim for the cease of violation of property (*actio negatoria*), and the claim for the determination of the boundaries. Basically, these procedural means are the available modalities provided in the Albanian law for remedies against unauthorized disposal or use of the real estate.

2. Real estate acquisition

2.1. Share deal or asset deal?

In the Albanian jurisdiction, the most encountered modality of real estate disposal is the asset deal in which the owner sells to the investor the real estate property through Sale Purchase Agreement (SPA). In the case the real estate belongs to a commercial entity, the investor may purchase the company which is the owner of the real estate asset (share deal). However, the share deal is rarely used as a modality of transfer of real estate and is used in cases when the main interest of the investor is the company (owner of the real estate) and not the real estate asset itself.

From the perspective of Albanian law, the purchase of real estate through asset deals is more a straightforward process in comparison with the share deal. In these cases the buyer usually conducts a real estate due diligence on the ownership documents and if necessary technical measurements of the property and it is conducted the process of signing the SPA in front of the public notary, who performs afterwards the registration of the SPA in the State Cadaster Agency and obtains the ownership certificate in the name of the buyer.

While in the share deal, the investor should perform in addition to the real estate due diligence also a full legal and financial due diligence which is usually a time consuming and expensive process. The SPA for the share deal must cover in addition to the real estate matters also other important elements necessary for the purchase of the company.

2.2. Share deal

It has to be noted that in Albania, to the best of our knowledge are almost nonexistent the companies which have as their scope of activity the ownership of a real estate asset and the managing of such asset. For this reason, the share deal is very rarely used and practically it is encountered in the case the main interest of the investor is the acquisition of the company and not of the real estate.

As a matter of practice, a share deal process starts with full financial and legal due diligence which may be produced by the seller and/or the buyer as the case may be. Afterward, the parties negotiate the terms and conditions of the SPA by means

of which is basically transferring the ownership of the shares from the seller to the buyer. The SPA is filed with the Business Registration Center and the shares are transferred to the buyer. In the share deal, if the name of the company is not changed, then no other bureaucratic procedures are performed with the State Cadaster Agency for the RE. In the case the name of the company is changed, then the SPA for the share deal is deposited to the real estate registry and another ownership certificate is issued with the new name of the company.

The main pieces of legislation used for this kind of transactions are the *Civil Code*, *Law No.9901* dated April 14, 2008, *On Commercial Entities and Entrepreneurs*, and *Law No.131/2015 On the National Business Center*.

.In the transaction document (SPA), the risk is transferred to the purchaser however usually the SPA contains the necessary representations and warranties in order to protect the purchaser's rights to the maximum extent possible.

2.3. Asset deal

As explained above, the asset deal is a rather more simple transaction in comparison with the share deal. The transaction is focused almost exclusively on the real estate and the buyer should thoroughly review the property documents. Depending on the value of the asset, a real estate due diligence would be highly recommended for the Albanian jurisdiction, which might significantly mitigate any potential risk related to the property documents.

The transaction document for the purchase of real estate (SPA) must be signed in front of a public notary (thus must be in notarial form) and the latter performs all the necessary procedures for the registration of the SPA with the State Cadaster Agency. Prior to the execution of the SPA, the public notary verifies electronically that the real estate is free of any liens, restrictions, pledges, and encumbrances and afterward collects the signatures of the buyer and seller in the SPA. The latter is filed with the State Cadaster Agency for registration only in the case the buyer, deposits in the escrow account held by the notary, the full sale price. After the Cadaster transfers the ownership of the real estate to the buyer and issues the Ownership Certificate (within a maximum of 30 days), the sale price is transferred to the seller's bank account.

The public notaries fees are paid in accordance with a joint instruction of the Ministry of Justice and of Finance and are calculated as a percentage over the sale price.

The applicable legislation for the asset deal is the *Civil Code*, *Law No. 110/2018 On the public notary*, *Law No. 111/2018 On the cadaster*, and other important legislation and secondary legislation depending on the nature of the real estate.

2.4. Disposal process

According to the *Civil Code*, the SPA must be in written form

and entered into in front of a public notary, who follows the procedure for the registration of the SPA with the State Cadaster Agency as explained in section 2.3. above.

There are no specific consents, approvals, or proceedings for real estate disposal, unless the real estate is mortgaged in favor of a financial institution, or is seized by the tax authorities or a bailiff. In this scenario, the transaction can be performed only in the case the tax obligation or the debt is duly paid and the seizure order is lifted.

2.5. Registration of change of ownership

Please refer to section 2.3.

2.6. Risks to be considered

As a matter of principle, there are no hidden, or pre-emptive, or first refusal rights to real estate. However, in the case the real estate is under co-ownership of two or more owners, and one of them would like to sell the property, the other co-owners have the pre-emption right for the purchase of a share of the property belonging to another co-owner who is selling the property.

The *Civil Code* provides that the unsatisfied Purchaser can claim remedy of defects in the case within 10 days from the moment of noticing such defects. In any case, such defects must be claimed within two years from the handing over moment. In the case the building is constructed agreement, such deadline can be extended up to 10 years from the handing over moment.

3. Real estate financing

3.1. Key sources of financing

The classical and most encountered practice of sources of financing in Albania is the mortgage. This activity is conducted through commercial banks and is an activity regulated by *Law No. 9662* dated December 18, 2006, *On the Banks in the Republic of Albania* and closely supervised by the Bank of Albania (regulatory authority) which has adopted a significant number of regulations which are binding for the commercial banks. In addition, the mortgage is also specifically regulated in the *Civil Code*.

3.2. Protection of creditors

The mortgage is the main type of security in real estate financing. The *Civil Code* defines the mortgage as the real right which is placed over the debtor's property in favor of the creditor in order to ensure the fulfillment of an obligation. Another modality for the protection of creditors which is frequently used in real estate financing is the guarantee which can be a personal guarantee and/or a corporate guarantee. In addition, there could be pledges or securing charges agreements placed over movable assets which could be used as securities in

real estate financing. Usually, the pledges and securing charges are taken as additional guarantees to the mortgage in real estate financings.

4. Real estate taxes

4.1. Transfer taxes

Individuals are subject to a personal income tax at a rate of 15% applicable on the capital gain (*i.e.* difference between the registered value of the immovable property and the sale price). However, it should be emphasized, the sale price cannot be lower, for tax purposes, than the references issued by the state authorities.

Legal entities (in addition to the corporate income tax in the case the seller is a corporate/entrepreneur) are also subject to the local tax on the transfer of immovable properties. In the case of a sale of land, the applicable tax is at the rate of 2% of the sale price. In the case of a sale of a building, the tax is calculated based on the surface of the building and its location (the tax may vary from ALL 100 to ALL 2,000 per square meter).

4.2. Specific real estate taxes

Ownership of immovable property is subject to the annual tax on immovable properties based on the below categories:

- Buildings with residential purposes – 0,05% of the value;
- Buildings with commercial purposes – 0,2% of the value;
- Agricultural Land – from ALL 700 to All 5,600 per year, depending on the location; and
- Construction Land – from ALL 0.14 to ALL 20 per square meter, depending on the location and purpose of use.

5. Condominiums

5.1. Legal framework for condominiums

Condominiums do exist in the Albanian jurisdiction and are regulated by *Law No. 10112 On the administration of co-ownership in residential buildings*. The law aims to regulate the legal relations in the field of administration of co-ownership in residential buildings with two or more owners, land and ancillary facilities, which are in compulsory co-ownership, determination of subjects, relations between them and with third parties, rights, and obligations of mutual, as well as the relevant sanctions, in the case of non-fulfillment of these obligations.

In units where there are two or more owners, the co-ownership relations between the owners are regulated in accordance with the provisions of the *Civil Code*, the law mentioned above, and the *Council of Ministers Decision (CMD) No. 447*, dated June 16, 2010, on Approval of the standard regulation for the

administration of co-ownership in residential buildings, which establishes general rules on the administration and maintenance of condominiums in residential buildings.

Law No. 10 112 On the administration of co-ownership in residential buildings specifies that the deed of co-ownership shall be registered and it is done in the immovable property registration office, under whose jurisdiction the residential building is located, in accordance with the laws and rules of immovable property registration of the *Civil Code*. The co-ownership title is registered in the name of the creator.

5.2. Rights and duties of co-owners

The rights and obligations of the co-owners are focused on the maintenance of the condominium, informing the co-owners on the changes or damages that may occur, the monetary investment needed for the building as well as participating in decision-making on the administration of the condominium in co-ownership, according to *Law No. 10 112 For the administration of co-ownership in residential buildings*, the owner of the condominium has the right to:

- a) to request from the other co-owners, in the obligatory co-ownership where he belongs, or from the users of these special units not to infringe the use and enjoyment of indivisible objects, as well as to request compensation or correction of the damage, when the damage is caused by their actions;
- b) participate in decision-making;
- c) be informed by the assembly or the administrator/management company about the decisions taken in his absence;
- d) to be regularly informed by the administrator and by the assembly about the use of the administration fee;
- e) to be informed by the administrator/management company about the non-payment of the administration fee by other owners;
- f) to submit to the assembly proposals for the administration of the residential building.

Along with these rights, the owner is obliged to:

- a) to respect the norms of ethics and coexistence, defined in the regulation of building administration;
- b) not to hinder other co-owners in the enjoyment of objects that are in compulsory co-ownership;
- c) to pay the administration fee even in the cases when he does not live or has rented the unit;
- d) to allow inspections and repairs of the common property within the unit owned by him.

The co-owners of the units, including the “creator of the co-ownership” as long as he owns one or more units, represent the Assembly. In the first meeting, the assembly elects the board, determines the mandate, and decides the amount of the

administration fee.

5.3. Liability of co-owners

The co-owners will be liable to other co-owners, the associations, and/or third parties related (e.g. the occupants of the condominium) for any action they take on the building or damage caused to it that violates their rights over the condominium.

The *CMD no. 447*, dated June 16, 2010, on *Approval of the standard regulation for the administration of co-ownership in residential buildings* presents a more extensive relationship between the co-owners, mentioning the norms related to the maintenance of the building, the physical stability of the building, the safety of life and public health, ethical norms of coexistence which, of course, are mandatory to the co-owners. The maintenance of quietness, the rules of usage of common areas, restrictions on the usage of individual property, and the keeping of pets are the key points that the article consists of as an integral part of the specific regulation of each co-ownership, regardless of the specifics of co-ownership.

5.4. Rights and duties of condominium associations

The association of the condominium performs the tasks defined in the contract entered into between the co-owners or in the agreement with the board, depending on the chosen form of administration. According to *Law No. 10 112 For the administration of co-ownership in residential buildings*, there are two forms of condominium administration which consist in the administration through a condominium association or an administrator (physical person) who may be one of the co-owners or an outsourced person/entity. Whichever form is chosen for the condominium administration, shall be registered in the Administrators Book (Register) at the municipality, under which jurisdiction the individual/association exercises this activity.

Condominium associations, in addition to the administration service, can cover with their activity also maintenance services, if they have the necessary qualification for specific maintenance activities, such as maintenance of elevators, restoration or reconstruction of facades or interiors, and any other type of activity, which requires special qualification, in a certain field. As mentioned above in section 5.2., the assembly of co-owners approves the criteria and costs of administration, the administration fee, as well as the manner and time of its payment for each co-owner, which will finance the administration activity.

6. Commercial Leases

6.1. Form and contents of a lease agreement

The *Civil Code* provides that the lease agreements concluded

for a period of more than one year must be in written form. In this case, the written form is mandatory only for probatory purposes (*ad probationem*), this means that the lease agreement is valid but it cannot be proved in the court through witnesses or any other means. According to Article 197 of the *Civil Code*, the lease agreements used for renting real estate for a period of over nine years must be mandatorily executed in front of a public notary and registered with the State Cadaster Agency.

The Albanian jurisdiction does not make major distinctions between the properties leased for commercial reasons and the ones leased for other purposes *i.e.* living purposes. Basically, the legislator leaves to the discretion of the parties to freely insert provisions in the lease agreement which might be necessary for the lease of commercial real estate.

The usual content of a lease agreement in Albania includes *inter alia* the description of the leased property, the term of validity, the lease reason, the modalities and purpose of exploitation of the real estate, the rights and obligations of the parties, termination clause, dispute resolution mechanism, *etc.*

6.2. Regulation of leases

As a matter of principle, the rules for lease do not substantially differ according to the type of property however there is a certain categorization in the *Civil Code* which makes a distinction between the real estate used for agricultural reasons and other real estates used for different reasons such as living purposes and/or commercial reasons.

On the other hand, there are no mandatory provisions in a commercial lease that cannot be contractually excluded.

6.3. Registration of leases

Pursuant to Article 197 of the Civil Code, all the lease agreements for real estate properties, entered into for a period of more than nine years must be registered in the State Cadaster Agency. The latter registers documents (in this case the Lease Agreement) only in notarial form, which means that it is mandatory to be executed in front of a public notary in Albania. This registration is performed in the relevant section of the real estate register, according to the provisions of *Law no. 111/2018 On the Cadaster*.

6.4. Termination of leases and renewals

The lease agreement may contain a specific term of validity or the parties may not stipulate any term at all. The lease agreement with a determined term, automatically terminates at the end of the expiration period, without the need that any of the parties notify in advance the counterparty of their intent for termination. On the other hand, the lease agreement which does not contain a validity term terminates either when one of the parties notifies the counterparty of the termination of

the agreement or in the cases when expires 30 years from the entering into force of the lease agreement. While the lease agreements for living purposes have a validity period of a maximum of five years.

In addition to the *Civil Code's* chapter which specifically regulates the Lease Agreement, the general termination provisions which apply to all the contracts are also applicable to the lease agreement. More specifically, in these general provisions is stipulated that when one of the contracting parties fails to fulfill its contractual obligations, the other contracting party, may either request the fulfillment of the obligation, or the termination of the contract, in addition to the claims for compensation. The contracting party may notify in writing the other party that has failed to fulfill the obligation, asking for its fulfillment within an appropriate period, stating that, if after this period the breach is not remedied, the lease agreement will be considered as terminated.

As for the renewal of the lease agreement, its renewal is done automatically in the case after its term has expired, the lessee is allowed to use the leased property without any claims from the lessor. The automatically renewed lease agreement is regulated under the same conditions as the previous one, but its duration is set as for fixed-term leases.

6.5. Rent regulations and rent reviews

The *Civil Code*, in the framework of rent regulations and reviews, focuses on the object of the lease, its handing over to the lessee and vice versa at the end of the lease agreement, maintenance, and the behavior of the parties regarding their rights and obligations in connection with the leased property.

Pursuant to such principles the lessor must:

1. deliver the item to the lessee on time and in a position to allow the usage for which the parties have agreed in the contract;
2. maintain and keep the leased property in the same condition;
3. guarantee peaceful enjoyment during the rental period;

While the lessee has the following rights and obligations:

1. receive and use the leased property for the purpose provided in the contract and in the case, this is not specifically regulated, use it in accordance with the nature of the leased property;
2. effectuate the lease the payment on time;
3. is liable for the loss and damage of the leased property which might occur during the lease term of the lease;
4. hand over the leased property to the lessor in the same condition that was handed over to him/her and in accordance

with the description made by the parties in the lease agreement, except for damages deriving from wear and tear.

6.6. Services to be provided together with the lease

In our jurisdiction, there is no specific regulation on the services rendered together with the lease. On the other hand, the legislator leaves it to the discretion of the parties to insert any provisions in the lease agreement as they deem fit and/or necessary for the regulation of their commercial relationship.

6.7. Fit-out works and their regulation

The *Civil Code* regulates the relationship between the lessee and the lessor in the cases when the leased property needs fit-out works in order to adapt it to the requirements of the lessee or there is a need for maintenance during the lease term.

When the leased property needs repairs which could be classified as usual maintenance, such expenses must be covered by the lessee. While in the cases when the repairs are substantial, the lessee is obliged to notify the lessor.

In the cases of urgent repairs, the lessee can perform the investment directly and such costs are borne by the lessor, the latter is immediately notified. On the other hand, the lessee should collaborate with the lessor in the cases of necessary urgent repairs. If the leased property is not repaired within a reasonable time by the lessor, the lessee is entitled to a proportional reduction of the rent.

Further, Article 816 of the *Civil Code* stipulates that the lessee should not be compensated for the improvement (fit-out works) of the leased property unless this is specifically performed with the consent of the lessor. In this scenario, the lessor is obliged to compensate the lessee with whichever is less, the investment value or the value of the useful result (*i.e.* in the case such investment can be exploited by the lessor), at the handing over moment.

The lessee who has made additions to the leased property has the right to remove them at the end of the lease, when this is possible without damaging the leased property, except when the lessor agrees to keep the additions himself. In this case, he must pay the lessee a compensation equal to the minimum amount between the costs and the value of the surcharges at the handing over time.

Regarding the tax implications of investments made by the lessee, there are no specific provisions that regulate this matter, however, such expenses are usually recognized as deductible expenses by the tax authorities.

6.8. Transfer of leases and leased assets

The transfer of leases and leased assets is allowed in Albanian jurisdiction through a sublease agreement or when the ownership of the leased property is transferred to a third party.

Except otherwise agreed in the lease agreement, the lessee has the right to sublease the property, but cannot assign the contract to a third party without obtaining first the written consent of the lessor.

In the case of assignment of the lease agreement the lessor, is entitled to initiate legal action claiming the payment of the rent from the lessee also from the sublessee and to oblige the sublessee to fulfill any pending other obligations arising from the sublease agreement.

The contractual provisions regulating the annulment of the lease agreement or its termination, apply also to the sublessee, and the decision was taken between the lessor and the lessee also applies to him.

When the leased asset is acquired by a third party, the lease agreement continues to be in force and the buyer has the obligation to observe its provisions in the case the lease agreement is entered into before the sale of the property.



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1. Real estate ownership

1.1. Legal framework

The right of ownership is a fundamental right under the Bulgarian Constitution. Article 17 of the Constitution explicitly provides that real estate ownership, including the right to inheritance, is guaranteed and protected by law.

In Bulgaria, property (including real estate) is private or public (state or municipal property). State and municipal property are differentiated into public state and private state property, or public municipal and private municipal property. The law expressly defines which real estate constitutes public state or public municipal property. Any real estate which is state or municipal property but is not defined as a public state or public municipal property constitutes private state or private municipal property.

The rights of all real estate owners (private or public) and the protection given by the law to such rights are equal, except for the possibility of real estate constituting public state or public municipal property to be subject to disposition or encumbrance and acquisition by prescription (continuous possession for five years in good faith or otherwise continuous possession for 10 years). Forfeiture and acquisition by prescription are possible only in relation to real estate constituting private state or private municipal property as well as any type of individual private ownership. However, a special legislative provision stopped the term for acquisition by prescription in relation to private state/municipal property from running between May 31, 2006, until December 31, 2022, thus preventing the possibility to acquire private state/municipal property by prescription.

Bulgarian law allows for limited ownership rights over real estate, such as the usufruct right and the right to build. The latter allows the owner of a piece of land to grant to a third party right to construct a building on the land, in which case the third party becomes the owner of the constructed building.

The current applicable legislation allow for expropriation of ownership based on special procedures prescribed by the applicable laws for such needs which may not be satisfied otherwise. The Bulgarian Constitutional Court applies this protection strictly and recently invalidated certain newly introduced amendments to a law allowing for a faster expropriation procedure.

Under Bulgarian law, there are certain restrictions regarding the acquisition of agricultural land by foreigners. Natural or legal persons who have been a resident or established in Bulgaria for more than five years are eligible to acquire titles to agricultural lands. Legal persons with registrations under Bulgarian law

less than five years old may acquire titles to agricultural lands if the shareholders in or founders of the company have been resident or established in Bulgaria for more than five years (Domiciles Conditions).

The following are ineligible to acquire and hold titles over agricultural lands: **(i)** commercial companies in which the shareholders directly or indirectly are companies, registered in jurisdictions with preferential tax regimes; **(ii)** commercial companies in which the shareholders do not meet the Domiciles Conditions, as stated above; and **(iii)** joint-stock companies that have issued bearer shares.

In 2021 the Bulgarian real estate market continues to grow rapidly, as it did in the second half of 2020 following the first shock of the COVID-19 pandemic. The focus is on residential areas and the increasing interest of buyers in larger apartments and houses near big cities and mainly the capital, Sofia. The second half of 2021 also shows increased interest in the purchase and lease of office areas, as transactions in this sector almost halted with the start of the pandemic.

1.2. Registration of ownership

The Real Estate Register (RER) is maintained by the Registry Agency which has offices with the regional courts across the country. Each real estate transaction is registered in that office of the RER, in the parish of which the particular real estate is located. The RER is a public register.

Registration in the RER as the owner of a piece of real estate does not automatically mean that the registered person is the real owner. Ownership is proved by title documents and not merely by the fact of registration in the RER. Therefore, it is recommended that title due diligence be conducted when acquiring real estate.

The RER is still organized by the so-called “personal system” and not by the “lot system.” This means that the batches in which the registered information is filed are created not by lots but by title holders. The “lot system” was recently initiated, but the process has not finished yet.

All rights *in rem* over real estate must be registered, namely, **(i)** ownership (sole ownership, co-ownership), **(ii)** limited real rights to construct buildings, **(iii)** limited real right of use, **(iv)** mortgages, **(v)** easements, **(vi)** leases for a term of more than one year, and **(vii)** attachments (*i.e.* seizure of a property to secure a judgment or to be sold in satisfaction of a judgment). Claims for rescinding agreements transferring ownership or establishing limited real rights, claims for proclaiming such agreements null and void, and claims for proclaiming a preliminary agreement as final are also entered in the RER.

1.3. Publicity of real estate register

The RER is public. Anyone may make an inquiry in both the electronic database and the paper-based files of any RER office about any real estate located in the region of the respective regional court. The RER also provides distant access to the underlying documents as well as online access to the electronic database in all real estate offices in Bulgaria.

1.4. Protection of ownership

In Bulgaria, private real estate is, in principle, transferred by notarial deed. When real estate is private state or municipal property, it is transferred by an agreement in writing. The execution of the notarial deed or of the written agreement has a constitutive effect. The registration of real estate transfers with the RER has only a declaratory effect. The document by which a natural or legal person proves their title over certain real estate is a notarial deed or an agreement in writing or other documents depending on the manner of acquisition.

The level of protection of real estate ownership provided by the law is in line with EU standards. An owner who claims unauthorized disposal or use of real estate may file a civil claim and may request the opening of criminal proceedings against the alleged intruder.

Bulgarian law provides that a person who has possessed a real estate property in good faith continuously for five years becomes its owner. Hence, if an owner has possessed the real estate in good faith continuously for five years, it is very likely that its title cannot be challenged by raising new restitution and eviction claims. It is also admissible to add the periods of possession in good faith of consecutive owners in order to achieve the required five-year term and acquire the title by prescription.

A title to real estate becomes absolutely stable after a ten-year period of continuous possession (without any good faith requirement) unless this period is interrupted or terminated. Where the five-year period has elapsed, however, it is likely that an owner's title to the real estate will endure third-party challenges.

2. Real estate acquisition

2.1. Share deal or asset deal?

Both share and asset deals are used in Bulgaria in transactions involving real estate. The transaction structure usually depends mostly on tax considerations rather than legal ones, as from a legal perspective there is no great difference.

Our expertise and experience in the field show that investors usually prefer a share deal. If there are significant risks related to this type of transaction, then other means of acquisition may be discussed.

2.2. Share deal

A share deal requires due diligence of both the real estate and the company that owns it. The key factors considered by investors in such a case are the financial history of the owner, the risk of insolvency or the existence of hidden obligations, and the status of the seller, *i.e.* the person/party who owns the shares and to what extent the potential investor may expect any claims for breach of representations and warranties related to the company's standing to be successfully collected.

There are no significant taxes and fees associated with a share deal, which is one of the main reasons why many investors use this transaction structure.

As stated above, the main risk associated with such a transaction structure is the financial standing of the company being acquired. This risk is usually addressed by conducting tax and legal due diligence of the company as well as providing for extensive representations and warranties in the share purchase agreement (SPA). The SPA may also provide for certain guarantees (bank or parent company), insurance policies, *etc.*

2.3. Asset deal

An asset deal is preferred in the case of smaller transactions or if there are certain risks (*e.g.* outstanding obligations, pending claims, *etc.*) related to the company that owns the respective real estate. The parties usually sign a preliminary agreement that regulates the terms and conditions for completing the title transfer. The preliminary agreement may be binding for both parties or only one of them. Usually, the purchaser has an option to decide whether to go on with the acquisition after completing due diligence. The next step is the signing of the transfer agreement in the form of a notarial deed, by which the title of ownership to the real estate also transfers.

The taxes associated with an asset deal are usually around 3% of the transaction value and this is why some investors prefer a share deal, especially in major deals.

The owner usually provides standard representations and warranties as to the title of ownership and lack of any liens on the real estate.

2.4. Disposal process

The agreement (in case of an asset deal) must be made in the form of a notarial deed and must be certified by a notary public in whose region the real estate is located. The parties or their representatives must be present in person before the notary public for the signing of the notarial deed. The notary must read the notarial deed to the parties. These formal requirements affect the validity of the agreement. When the real estate to be transferred is state or municipal property, the agreement must be made in writing. The notary fees depend on the transaction value and are fixed by law.

In the case of a share deal, there may be certain requirements as to the form of the share purchase agreement depending on the type of shares. Further registration with the Commercial Registry or other relevant registries may also be required in this case.

The time for handover and passing of all risks is stipulated in the purchase contract. Usually, the parties agree to hand over the real estate at the time of transferring the purchase price to the seller's account. All risks pass to the buyer upon signing the agreement if the agreement itself does not stipulate otherwise.

2.5. Registration of change of ownership

Once the agreement for the transfer of ownership is signed before the notary public the latter must register it with the RER on the same day. The registration fee is 0.1% of the transaction value. The judges with the respective regional RER office review only the description of the property for whether it meets the legal requirements.

As stated above, the fact that a person is registered as the owner of certain real estate with the RER does not automatically mean that they are the actual owner of the real estate. Therefore, it is recommended to conduct a title due diligence prior to acquiring real estate in Bulgaria.

2.6. Risks to be considered

Sales contracts on real estate frequently contain warranties relating to the defective or faulty performance by the seller.

The statutory warranty period for real estate defects is one year. This can be extended or shortened by mutual agreement. The time starts running from the handover. If the seller disputes the defect, the purchaser has to file a claim within the relevant warranty period in order to prevent the claim from becoming statute-barred. The burden of proof that the defect

existed upon transfer of possession is borne by the purchaser. The seller is not liable if the purchaser was aware of the defects when the sale contract was executed.

If third-party rights on the real estate are discovered after the sale, the statutory warranty period is five years from title transfer. The purchaser is entitled to cancel the contract in court, whereupon the seller is obliged to pay back the purchase price together with compensation for the costs of the transfer and for damages caused. However, if the purchaser was aware that such third-party rights existed at the time of the sale, the seller is obliged to pay back only the purchase price.

There are no pre-emptive rights or rights of first refusal under Bulgarian law, except in the case of co-ownership, *i.e.* if a co-owner wishes to transfer their share in the real estate, they are obliged to offer the share to the other co-owner under the same terms and conditions as to the potential purchaser.

Any other rights (*e.g.* mortgages, ownership claims, lease agreements, *etc.*) must be registered in order to be opposed to the new owner.

3. Real estate financing

3.1. Key sources of financing

The most common method used to finance the purchase of real estate is a mortgage loan. The creditor registers a mortgage simultaneously with the purchase of the real estate. The mortgage must be registered with the RER in order to be both valid and opposable to third parties.

3.2. Protection of creditors

As stated above, the main type of security used in real estate financing is a mortgage. If the transaction and/or financing is more complex (*e.g.* involves a lot of properties), a special pledge over the commercial enterprise also may be considered.

Mortgage enforcement is a rather swift process. To enforce a mortgage, a creditor can file an application requesting the court to allow immediate execution and to issue a writ of execution. The court procedure takes approximately seven days without informing the debtor. If the creditor is a bank, it must provide the court with an excerpt from the accounting books certifying the amount of the debt and the mortgage agreement/application. The mortgage agreement does not have to contain a clause certifying that it establishes an executory right. On the grounds of the issued writ of execution, the creditor

can initiate execution proceedings.

The special pledge enforcement is out-of-court enforcement and in certain cases may be preferable to mortgage enforcement. The start of the enforcement is registered with the Special Pledge Register and the creditor is entitled to sell the pledged assets directly to third parties.

4. Real estate taxes

4.1. Transfer taxes

There is a transfer tax in the range of 2.5%-3% for any real estate transfer. The exact amount depends on the municipality where the real estate is located.

4.2. Specific real estate taxes

Real estate owners must pay an annual property tax and garbage collection fees. The amount of these taxes and fees, again, depends on the municipality where the real estate is located.

5. Condominiums

5.1. Legal framework for condominiums

The concept of condominiums is recognized by Bulgarian law and there is a special act in this respect – the *Condominium Management Act* (CMA).

The CMA regulates public relations involving the management of common areas of buildings under condominium ownership arrangements and the rights and obligations of the owners, users, and occupants of individual units.

The management of common areas of buildings under condominium ownership in closed-type residential complexes (residential parks) is regulated under a written agreement concluded between the investor and the owners of individual units. Such an agreement may be registered with the RER and is binding for any new owner of a unit in such a complex.

5.2. Rights and duties of co-owners

The owners of units in a condominium are entitled to **(i)** use the common areas of the building in accordance with their designation and **(ii)** participate in the management of the condominium.

The condominiums are governed by **(i)** the general meeting of the owners and **(ii)** the management council or manager elected by the general meeting. At the general meeting, the owners have the right to vote in proportion to the undivided shares which they own in the condominium.

5.3. Liability of co-owners

The owners also have certain obligations, amongst which the most important ones are: **(i)** not to obstruct the other owners, users, and occupants from using the common areas of the building; **(ii)** not to engage in repair and overhaul activities in their unit, which result in impairment of the design parameters of the construction; **(iii)** to fulfill the requirements set out in the respective statutory regulations when keeping animals in their units and not to cause inconvenience to their immediate neighbors; **(iv)** to comply with the decisions of the condominium management bodies; **(v)** to pay the costs of repairs, major overhaul and major renovation of the common areas of the building, replacement of common installations or equipment, and contributions to the repair and renovation fund in a proportion corresponding to their undivided shares in the common areas; and **(vi)** to pay the costs of management and maintenance of the common areas of the building.

5.4. Rights and duties of condominium associations

The owners in condominiums may establish an association with the purpose of obtaining money from European Union funds and/or the public or municipal budget, from grants and subsidies, and/or use of own resources for the purposes of major overhaul and/or major renovation of buildings under condominium ownership arrangements. Such an association has the status of an independent legal entity established under the CMA and is registered with the local municipality.

6. Commercial Leases

6.1. Form and contents of a lease agreement

There is no standard form of a lease agreement in Bulgaria. The parties are free to negotiate all lease terms, provided they are in accordance with the *Bulgarian Obligations and Contracts Act*. The law does not require the lease to be in written form in order to be valid. However, a written form of the lease agreement with notary-certified signatures is required if the agreement is to be registered with the RER.

The standard terms and conditions of the commercial lease agreements are related to the term of lease, termination rights, rent, service charge, indexation, maintenance and repair obligations, subletting, *etc.*

Commercial lease agreements related to offices, shopping centers, and even industrial buildings have developed a lot in the past decade. The entry of major EU and US companies has introduced in Bulgaria the standard terms and conditions used for commercial lease agreements in the EU and USA.

6.2. Regulation of leases

There is no difference in the regulation of lease agreements according to the type of property. Moreover, the law is rather liberal when it comes to regulating leases and there are no rules for commercial leases that cannot be contractually excluded.

6.3. Registration of leases

A lease agreement may be registered with the RER if the agreement is signed in writing with notary-certified signatures. If a lease agreement is registered with the RER, it is binding for the registered term for the new owner in case of transfer of the leased real estate.

6.4. Termination of leases and renewals

If a lease agreement is signed for a fixed term it may not be terminated without cause if not explicitly agreed in the agreement. The lease agreement may be terminated with cause on the grounds agreed in the agreement.

If the lessee continues to use the real estate after the expiry of the agreed lease term, the lease agreement is deemed to be prolonged as a lease agreement without term. In such a case, the lessor may terminate the lease at any time with one-month

notice.

6.5. Rent regulations and rent reviews

There are no statutory rent regulations and reviews.

6.6. Services to be provided together with the lease

The lessor may provide for additional services (*e.g.* cleaning, maintenance, *etc.*) if agreed with the lessee, but is not required to by law.

6.7. Fit-out works and their regulation

Fit-out works are agreed upon between the parties. There are no statutory regulations. Under the law, the lessee is obliged to return the real estate in the state in which it was delivered taking into account normal wear and tear.

6.8. Transfer of leases and leased assets

If a lease agreement is registered with the RER, it is binding for the registered term for the new owner in case of transfer of the leased real estate.



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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

The *Constitution of the Republic of Croatia* guarantees the right to property and its inviolability and explicitly prescribes that the right to property is binding and holders of the right to property and their users are obliged to contribute to the common good. The basic act that regulates the right to property in the Republic of Croatia is the *Act on Property and Other Real Rights* (AP).

Article 30 of the AP defines the right to property as a real right on a particular thing authorizing the holder to use the thing and any benefits arising from it as he sees fit and to exclude any person from it unless it is contrary to such other person's rights or limitations imposed by law.

However, according to the conditions prescribed by law, the right to property may be limited, where the AP distinguishes between general (which implies the duty of the owner to contribute to the common good), special restrictions (sequestration, expropriation), and restrictions based on legal transactions.

In respect to the acquisition of ownership of real property, Art. 48 of the *Constitution of the Republic of Croatia* prescribes that a foreign person may acquire the right to a property only under the conditions defined by law, which are specified in Art. 356 of the AP.

In particular, foreign natural and legal persons may, under the presumption of reciprocity, acquire property on the territory of the Republic of Croatia on the basis of inheritance, while for other ways of acquiring rights to property by foreign natural and legal persons, presuming reciprocity, it is necessary to obtain the consent of the minister competent for judicial affairs of the Republic of Croatia.

At the same time, the *Act on Agricultural Land* stipulates that the holders of rights of ownership may not be foreign legal entities and natural persons unless otherwise provided by an international agreement and a special regulation. Exceptionally, foreign legal entities and natural persons may acquire the right of ownership to agricultural land by inheritance provided there is reciprocity.

The expropriation procedure, in addition to the provisions of the AP, is regulated in detail by the *Act on Expropriation and Determination of Compensation*, which regulates the expropriation system, the manner of determining the interests of the Republic of Croatia in that system, the bodies competent for the implementation of the expropriation procedure, the preliminary actions and the expropriation procedure, the manner of

determining compensation for expropriated real property, the manner of determining compensation for real property that is considered expropriated according to a special regulation, and other issues in this regard.

1.2. Registration of ownership

The system of registering real property and rights to it in the Republic of Croatia is based on two registers – the cadastre and the land register. The cadastre is a record that contains data on plots of the earth's surface and buildings that permanently lie on the earth's surface or below it, and on special legal regimes on the earth's surface. Cadastral records are kept by cadastre regional offices of the State Geodetic Administration and the City Office for Cadastre and Geodetic Affairs of the City of Zagreb. Land registers are public registers in which data on the legal status of real property relevant to legal transactions are entered. The land register consists of the main ledger and a collection of documents. Land registers are kept in the land registry departments of the municipal courts. The *Land Register Act* regulates the organization, arrangement, keeping, and safeguarding of land registers, determines the subject and types of registration, and the management of land registry procedures, while the *Act on State Survey and Real Estate Cadastre* regulates the issue of state surveys, real estate cadastre, infrastructure cadastre, building register, register of spatial units, register of geographical names, competence over state surveying, real estate cadastre, infrastructure cadastre, register of buildings, register of spatial units, register of geographical names and the performance of these tasks, tasks of the State Geodetic Administration, the storage and use of data, and supervision of activities regulated by this act. In accordance with Croatian legislation, all real property, real rights to them, as well as other facts relevant to the legal real estate transactions are entered in the cadastre and land register.

1.3. Publicity of real estate register

Pursuant to Art. 7 of the *Land Register Act*, the land register is public and anyone can request access to it, while the data of the real estate cadastre are public unless otherwise provided by the *Act on State Survey and Real Estate Cadastre* in accordance with Art. 6 of the Act.

1.4. Protection of ownership

Pursuant to Art. 8 of the *Land Register Act*, extracts, excerpts, and transcripts from the land register are public documents, which means that they prove the truth of what is confirmed or determined in them, and from which aspect we can say that entries in the register are binding. The AP provides for mechanisms for the protection of rights to property, stating in particular that the owner has the right to require the person who possesses his property to hand over his possession of

the property to him and that his right does not become time-barred. The types of legal instruments that the act distinguishes when applying the mechanism of protection of rights to property are the true action for recovery of ownership, the action for recovery of ownership by the presumed owner, action for protection against harassment, while the *Land Register Act* provides for the action for removal and appeal as protection instruments. An owner who claims that someone is using his property without authorization has a true action for recovery of ownership at his disposal, and in proceedings, before a court or another competent body he will have to prove that the thing claimed is his property and is in the possession of the defendant.

2. Real estate acquisition

2.1. Share deal or asset deal?

The investor can acquire the real property of a certain company in two ways, by acquiring a share in a certain company or on the basis of an agreement on the sale of the company's assets, which transaction is popularly called asset deal. The main difference lies in the fact that the transaction is better known as the so-called share deal (acquisition of all or part of the shares in the company) implies that the buyer will buy shares *i.e.* equity shares from the owner of the company. By taking over the shares, the buyer becomes the owner of the legal entity and acquires the company's assets, as well as all its existing and potential liabilities and debts. In this way, the company's contracts with the associated rights and obligations arising from them are taken over. On the other hand, the buyer and the owners of the company can agree that the buyer will take over the property with a part of precisely defined obligations, certain contracts, employees, *etc.*, which is a so-called asset deal. Trends in the real estate market are led by the most important investment financial institutions, *i.e.* real estate investment funds. Real estate investment funds publicly issue investment units, and the collected capital is further invested in various real estate investment activities. The Investment Funds Act in force in the Republic of Croatia prescribes the possibility of establishing real estate investment funds exclusively in the organizational form of a closed-end fund with a public offering.

2.2. Share deal

The transfer of a share of a certain company to the acquirer in the Republic of Croatia is regulated by the provisions of the *Companies Act*, namely para. 3 of Article 412 which stipulates that the transfer of a business share requires a contract concluded in the form of a notarial deed (legal transaction document drawn up by a notary public) or a private document confirmed (certified as to its content) by a notary public or a court decision replacing such a contract. Such a contract is also required to assume the obligation to transfer the business

share. The lack of a prescribed form of contract assuming the obligation to transfer the business share is eliminated by concluding a contract on the transfer of a business share in the form of a notarial deed or a private document certified by a notary public. No change in the articles of association is required for the transfer of the business share. At the same time, the *Companies Act* stipulates that the articles of association may set other conditions for the transfer of a business share, in particular, that the consent of the company is required. The business share to which the obligation to perform additional actions is related can be transferred only with the company's consent. Regarding possible risks, all benefits, costs, rights, and obligations arising from existing assets and liabilities (debts) remain with the company and all possible risks associated with the realization of the same, as a rule, are assumed by the buyer. A share deal is a transaction that is not subject to taxation and the seller of the shares (if it is a natural person who owns the shares in question for more than two years) does not have to pay any income or income tax. For example in the case of a share deal where the risks pass to the buyer, it is possible for the buyer to request a longer period for the conduct of due diligence or offer a lower price to include the additional risk compared to the asset deal, or seek additional guarantees from the seller.

2.3. Asset deal

In order to implement an asset deal transaction, there needs to be a valid contract for the purchase of the assets by which the seller's assets, such as real property, equipment, machinery, patents, *etc.*, are transferred to the buyer, where the buyer does not take over shares or equity shares *i.e.* ownership of the company as a legal entity. The contract includes details such as total fee, payment structure, time, objections, guarantees, *etc.* By concluding the contract, the buyer acquires a legal basis for the acquisition of the ownership right, while the ownership right to the real property (or other assets) is acquired by registering the acquirer's ownership in the land register (or the corresponding register) on the basis of a duly declared will of the previous owner directed at the transfer of his ownership to the acquirer, in accordance with Art. 119 of the AP. In such a transaction the buyer is exposed to less risk because the possibility of occurrence of adverse events arising from contingent liabilities is minimized because in the case of *asset deals*, in addition to assets, only certain liabilities are targeted. Comparing the *share deal* and the *asset deal*, we can conclude that in the *asset deal* the buyer potentially bears the cost of real estate transfer tax (3% of the market value), while in the *share deal* this is not the case. Also, in an *asset deal*, the seller potentially makes a taxable profit on the difference between the purchase price of the property and the book value in the balance sheet, and if the owner of the seller's company will pay the money received through the payment of the share in the profit from the company he must

pay additional tax and surtax. On the other hand, a *share deal* is a transaction that is not subject to taxation and the seller of the shares (if it is a natural person who owns the shares in question for more than two years) does not have to pay any income or income tax. In the Republic of Croatia, the main risks with *asset deal* transactions may result from the fact that the process of harmonization of land registers and cadastre may not have been completed, since there are still cadastral municipalities in which cadastre and land register data differ and therefore it is recommended to perform due diligence of the property status.

2.4. Disposal process

See under 2.2. and 2.3. The role of the notary in a share deal is the certification of the contract as to its content. In determining the notary's fee, in accordance with the *Ordinance on the temporary notary tariff*, while transferring the shares in a company, the value of the transferred share is relevant if it is higher than the compensation, while, if it is lower, it is the value of compensation that is relevant. Certification of a contract as to its content implies its confirmation, *i.e.* certification of private documents by a notary public during which he/she checks whether the legal transaction contained in the document has been concluded in the prescribed form and explains to the participants the meaning, consequences, and all legal effects of the document, *i.e.* of the legal transaction contained in the document. In the case of an asset deal, it is necessary to verify the seller's signature with a notary public, for which a notary fee is also paid. The implementation of the contract in question in the land register requires evidence that the acquirer is a Croatian citizen (copies of identity card or passport) as well as evidence that it is a real property that can be acquired by a foreign person. The contract transferring the right of ownership to the real property shall be in written form, while the implementation in the land register requires a certified authenticity of the signature of the alienator of the real property. Proof that the acquirer is a Croatian citizen (copies of an identity card or passport) is required for the implementation of the contract in question in the land register. At the same time, the energy certificate must be attached to the sale-purchase agreement by the seller, otherwise, he could be liable for a misdemeanor.

2.5. Registration of change of ownership

In the case of an asset deal, as stated earlier under 2.3., it is necessary to register the right of ownership to the acquired property if an appropriate register in relation to it is kept. The right of ownership to real properties must be registered with the land registry of the competent municipal court by submitting an application for registration. The amount to be paid as court fees for the submission is set by the Ordinance on Court

Fees. Please note that a fee is not payable if the application for registration has been drafted on the basis of a notarial deed or a private document certified as to its content by a notary public, *i.e.* a private document certified by a judge of the competent court. Furthermore, a court fee is payable for the decision on the application for registration. In the case of a share deal, an application for registration in the court register is submitted to the competent commercial court. A court fee is applicable to both this application as well as its entry, the amount of which is prescribed by the Ordinance of the Court Tariff. When the application is submitted electronically via the e-Tvrtka system, the fee is half of the prescribed amount.

2.6. Risks to be considered

Regarding the right of first refusal, it should be noted that there are two types of right of first refusal – contractual and legal. The legal right of first refusal cannot be excluded, while the contractual one depends on the disposition of the parties. Regarding legal rights of first refusal, the Act on Protection and Preservation of Cultural Heritage stipulates that an owner who intends to sell a cultural property protected by a special decision or a cultural property within a protected cultural-historical entity included on the World Heritage List or the List of the World Heritage in Danger is obliged, prior to its sale, to offer it at the same time to the Republic of Croatia, the county, the City of Zagreb, or the city or municipality in whose territory the cultural property is located, stating the price and other conditions of sale. The priority in exercising the right of first refusal belongs to the city or municipality in relation to the county and the City of Zagreb, and then to the Republic of Croatia. At the same time, Art. 71 of the *Forest Act* stipulates that agricultural land may not be alienated within 10 years from the date of concluding the sale contract, while, after the expiration of that period, the Republic of Croatia has the right of first refusal of the sold agricultural land at market price. On the other hand, the contractual right of first refusal must be registered in the land register. If the acquirer acted fairly and the right of first refusal was not registered, guided by the principles of trust in the land register, he has the right to legal protection before the competent authorities.

3. Real estate financing

3.1. Key sources of financing

The key method of financing the purchase of real properties in the Republic of Croatia is concluding a loan agreement with banks, which is regulated primarily by the provisions of the Civil Obligations Act, Article 1021. It defines a loan as an agreement by which the bank undertakes to make available the funds, and the user undertakes to pay the agreed interest to the bank and return the used amount of money on time and in the manner agreed. The loan agreement must be in writing.

3.2. Protection of creditors

The most common collateral instrument contracted in lending operations is the establishment of a voluntary lien, *i.e.* a mortgage on the real property of the debtor. As a loan security instrument, fiduciary ownership to real property which is the subject matter to the loan agreement may be established, whereby the bank is registered as the owner of the real property, while the user has the right to register as the real property owner only after the payment of the entire amount owed. The borrower is obliged, at his own expense, to ensure the real property on which the lien/mortgage or fiduciary is created for the benefit of the bank. At the same time, a bill of exchange and promissory notes can be used as security instruments, both of which must be signed and confirmed by a notary public.

4. Real estate taxes

4.1. Transfer taxes

In the Republic of Croatia, in the case of real estate transactions, in accordance with the Real Estate Transfer Tax Act, a real estate transfer tax is applied. A taxpayer is an acquirer of real property in the Republic of Croatia and the tax base is the market value of the real estate at the time the tax liability arises. The market value of a real property is the price of real property that is or can be achieved in the market at the time the tax liability arises. Real estate transfer tax is paid at a rate of three percent. At the same time, and in accordance with the *Income Tax Act*, property income tax is paid on the basis of the alienation of real property. Income is considered to be the income that the taxpayer earns from the alienation of real property and property rights, while alienation is considered to be the sale, exchange, and other transfers. Exceptionally, when it comes to the acquisition of real property by a company that is a VAT payer and when it comes to the sale of a real property that has not been moved into within 2 years of construction, the acquirer is not required to pay the real property transfer tax.

4.2. Specific real estate taxes

Please see our answer under 4.1.

5. condominiums

5.1. Legal framework for condominiums

N/A

5.2. Rights and duties of co-owners

N/A

5.3. Liability of co-owners

N/A

5.4. Rights and duties of condominium associations

N/A

6. Commercial leases

6.1. Form and contents of a lease agreement

The provision of Art. 552 of the *Civil Obligations Act* (COA) prescribes that rental agreements are concluded in writing (the same is prescribed by Art. 5 of the *Act on Lease of Apartments*), while the form of the lease agreement is regulated by the provision of Art. 4 of the *Act on Lease and Sale of Business Premises* in such a way that an agreement on the lease of business premises must be drawn up in writing, and when it is concluded by the Republic of Croatia, *i.e.* a unit of local and regional self-government, as a lessor it also has to be confirmed (certified as to its content) by a notary public. An agreement on the lease of business premises that has been concluded contrary to the above provision is null and void.

A rental agreement, in accordance with Art. 5 of the *Act on Lease of Apartments* should contain the contracting parties, description of the apartment, amount of rent and method of payment, type of costs to be paid in connection with housing and manner of payment, data on persons who will use the apartment together with the tenant, the duration of the lease, provisions on the maintenance of the apartment, provisions on the use of common areas, common parts and facilities of the building and the land that serves the building, as well as provisions on the handover of the apartment. An agreement on the lease of business premises, in accordance with Art. 5 of the *Act on Lease and Sale of Business Premises*, should contain the name and surname or company name, address of residence or registered office, the personal identification number of the contracting parties, data for the identification of business premises, the activity to be performed in the premises, provisions on the use of common facilities and premises, the deadline for the handover the premises, the time for which the contract is concluded, the amount of the monthly rent, the assumptions and the manner of changing the lease amount, and the place and time of concluding the contract. The agreement on the lease of business premises concluded contrary to the above provision is null and void. The agreement certified as to its content by a notary public is an enforceable document under legally-determined conditions, and, on the basis of it, due and outstanding amounts of rent may be collected by enforcement.

6.2. Regulation of leases

Depending on the type of property (business or residential premises), a lease agreement or a rental agreement is concluded, which are regulated by different (previously mentioned) legal regulations. The provision of Art. 3.3 of the *Act on Lease of Apartments* stipulates that the conditions for concluding a contract on the rental of an apartment that are not prescribed by the act in question are freely agreed by the parties, while the provision of Art. 1.5 of the *Act on Lease and Sale of Business Premises* stipulates that general regulations of the law on obligations on lease apply to leases that are not regulated by this act. In terms of provisions that cannot be excluded by the agreement, please note that Art. 6 of the *Act on Lease and Sale of Business Premises* stipulates that business premises owned by the Republic of Croatia, local and regional self-government units, and legal entities owned or predominantly owned by them are leased by public tender and this can be exceptionally excluded by the agreement.

6.3. Registration of leases

Pursuant to the *Act on Lease and Sale of Business Premises*, when the lease agreement is not notarized or when the lease agreement has not been confirmed (certified as to its content) by a notary public, the lessor is obliged to submit a copy of the lease agreement to the competent tax administration.

6.4. Termination of leases and renewals

Pursuant to the provisions of the COA, a rental agreement, the duration of which is neither determined nor can be determined from circumstances or local customs, is terminated by a notice that each party may give to the other in compliance with a certain notice period.

Additionally, the tenant can terminate the agreement if:

- the rented asset is in such a condition that its use presents a health threat, irrespective of the fact whether they were aware of such a condition at the time of entering into the contract; or
- due to the alienation of the rented asset, the rights and obligations of the landlord are transferred to the acquirer.

On the other hand, the landlord can terminate the agreement if:

- the tenant defaults on two consecutive rent payments or a significant portion thereof; or
- the tenant continues, even after being warned by the landlord not to do so, to use the asset contrary to the contract or its intended use, neglects its maintenance, and causes damages to the asset, particularly where the asset is given to a third party to use of.

The Act on Lease of Apartments in the provision of Art. 19

explicitly stipulates that the landlord may terminate the rental agreement if the tenant or other occupants of the apartment use the apartment contrary to the act and the rental agreement and lists cases that involve such use of the apartment, such as if the tenant does not pay rent and other contracted costs related to housing within the agreed period, if the tenant sublets the apartment or part of the apartment, if the apartment is used by a person not specified in the rental agreement, namely for more than 30 days without the permission of the landlord, or if the tenant or other users of the apartment do not use the apartment for housing.

With regard to the automatic renewal of an agreement, a fixed-term rental agreement shall be deemed to be tacitly renewed for the same duration if neither party notifies the other party in writing, at least thirty days before the expiration of the stipulated time, that it does not intend to enter into a fixed-term contract for a further period. With regard to a fixed-term contract, if, after the expiry of the term stipulated in the contract, the tenant continues to use the asset and the landlord does not object, the duration of the contract shall be deemed to be extended indefinitely under the same conditions.

A lease agreement whose duration is neither determined nor can be determined from circumstances or local customs may be terminated by cancellation by either party in accordance with the stipulated period of notice.

Pursuant to the provisions of the COA, a lease agreement may be terminated by the lessor:

- if the leased asset has been sublet without their permission where that is required by law or contract;
- if the lessee fails to pay the rent within 15 days from the date when they were invited by the lessor to make the payment; or
- If the lessee continues, even after being warned by the lessor, to use the asset in a manner which is in contravention of the contract or the asset's intended purpose, or neglects its maintenance and there is a threat that serious damage might be inflicted on the lessor.

Pursuant to the provisions of the COA, the lease agreement may be terminated by the lessee:

- due to alienation of the leased asset, in which case the rights and obligations of the lessor are transferred to the acquirer; or
- if the leased asset poses a health threat, even if the lessee was aware of that at the moment of entering into the contract.

Furthermore, in addition to the above reasons for termination of the contract by the lessor, the Act on Lease and Sale of Business Premises stipulates that the lessor may terminate the lease at any time, regardless of contractual or legal provisions on the duration of the lease if the lessor, for reasons for which

they are not responsible, cannot use the business premises in which they performed their activity, and therefore intends to use the premises held by the lessee, while the lessee may terminate the lease agreement for business premises at any time, regardless of contractual or legal provisions on the duration of the lease, if the lessor does not bring the business premises in a condition in which they are obliged to hand them over, *i.e.* maintain them, within a reasonable period of time left by the lessee.

In addition, Article 28 The Act on Lease and Sale of Business Premises prescribes the right of each contracting party to terminate the agreement on lease of business premises concluded for a definite or indefinite period of time if the other contracting party fails to fulfill its obligations under the agreement or this act.

6.5. Rent regulations and rent reviews

Please see our answers under 6.1 and 6.4

6.6. Services to be provided together with the lease

N/A

6.7. Fit-out works and their regulation

Regarding the tax implications on the lessee's investments, please note that they are not envisaged by legal provisions. In respect to legal implications regarding the investment of the lessee, please also note that Art. 11 of the Law on Lease and Sale of Business Premises stipulates that the lessee is obliged to notify the lessor in writing without delay if during the lease there is a need for repairs necessary for the maintenance of the premises. If the lessee has made the repairs themselves and has not previously notified the lessor in writing of the need for repairs and left them a reasonable period, they are not entitled to compensation for the work performed and are liable to the lessor for the damage suffered due to this omission, except in the case of urgent repairs.

6.8. Transfer of leases and leased assets

The transfer of the lease agreement is regulated by the Civil Obligations Act. The acquirer of the leased property takes the place of the lessor and the rights and obligations arising from the lease arise between the acquirer and the lessee. The acquirer may not request the lessee to hand over the property to them before the expiration of the time for which the lease was contracted, and if the duration of the lease is not defined by contract or law, then before the expiry of the notice period.

Furthermore, Art. 543 stipulates that when a property on which a lease contract has been concluded is handed over to the acquirer and not to the lessee, the acquirer takes the place

of the lessor and assumes their obligations to the lessee if at the time of concluding the alienation contract they knew of the lease agreement.

On the other hand, the acquirer who at the time of concluding the alienation contract was not aware of the existence of the lease agreement is not obliged to hand over the property to the lessee, and the lessee can only claim damages from the lessor. As far as the transfer of property is concerned, our legislation recognizes the transfer of property in the process of restitution of property, which is regulated by the provisions of the Act on Compensation for Property Confiscated during the Yugoslav Communist Rule.

Article 41 stipulates that the owner (person to whom the space is returned to ownership in the process of restitution), may not request the vacating and handing over of the business premises before the expiry of one year (counting from the day the decision on determining the ownership right becomes final) if the agreement on lease of business premises is concluded for an indefinite period.

On the other hand, if the lease agreement is concluded for a definite period of time, the owner cannot request the vacation and handing over of the business premises before the expiry of the agreed term, and no later than within five years from the day the decision on determining the ownership right becomes final.



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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

Full ownership of real estate is recognized under Czech law. Ownership rights of real estate benefit from constitutional protection, which also sets forth crucial rules for expropriation – permitted only in exceptional circumstances, driven by the public interest, and subject to strict rules set forth by law and payment of compensation.

The *Czech Civil Code* (Act No 89/2012 Coll.), which came into effect in 2014 as part of the entire private law recodification, governs all matters related directly to real estate, including fundamental provisions for conveyance contracts, rights related to liens and encroachments, condominium rights and obligations, commercial leases, and others. Since the recodification of private law, no further major changes to real estate ownership regulation can be expected for some years to come.

In principle, any entity (a company or person) may acquire and own real estate in the Czech Republic with few restrictions. This means that not only Czech or EU residents, but also residents from third countries may acquire real estate in the Czech Republic.

1.2. Registration of ownership

All land and most buildings in the Czech Republic are registered in the Real Estate Register (Cadastral Register), which is administered by the Czech State (through a specialized cadastral office authority). Records in the Cadastral Register are legally determinative, except in specific circumstances, such as proven fraud.

Ownership rights – including mortgages, easements, pre-emptive rights, and other *in rem* rights concerning real estate registered in the Cadastral Register – originate, change, and cease to exist upon their registration therein.

In addition to transfers under an agreement, the ownership title to real estate can also be acquired: **(i)** based on a decision of a state authority; **(ii)** by operation of law; **(iii)** upon being built (in the case of buildings); **(iv)** through a public auction; **(v)** by positive prescription (the lawful (good faith) possessor of real estate is entitled to become its owner if it keeps the real estate in its possession for 10 consecutive years); and **(vi)** by other means (*e.g.*, inheritance). In all these cases, the relevant change must also be registered in the Cadastral Register, the effect of registration is, however, of a declaratory nature only.

The ownership right of real estate that does not need to be registered in the Cadastral Register – such as minor constructions (such as fences) and underground constructions – follows a similar regime as those of movable assets. Nevertheless, there are some formal requirements that apply to all real estate irrespective of its need to be registered in the Cadastral Register (see below).

1.3. Publicity of real estate register

The Cadastral Register contains information on land parcels (including information about any buildings constituting a part of the given parcel, if any), buildings, housing and non-residential units within condominiums, rights to build, and other real estate established by operation of law. It also includes geometric descriptions of land parcels and most surface constructions along with their classification.

The Cadastral Register is publicly available, and information on a particular real estate can be obtained through an extract, which represents proof of ownership of the given real estate or a right to it. An extract from the Cadastral Register contains, in particular, the following information about the real estate:

- (a)** identification of the owner(s), and their ownership shares,
- (b)** the surface area in square meters,
- (c)** type of protection applicable (such as a *historical area*, if applicable),
- (d)** reference to the purchase agreement or other title deed used as the basis for registering the current owner's title to the real estate in the Cadastral Register, including the file numbers under which such contracts or other documents are kept in the archives of the cadastral authority,
- (e)** restrictions on the ownership title to the real estate, *i.e.*, mortgages, easements, rights to build, or pre-emptive rights – with a specification of the parties in favor of which the rights corresponding to such restrictions exist – the contracts or other titles under which such restrictions came into existence, as well as the file numbers under which such contracts or other documents are kept in the archives of the cadastral authority,
- (f)** other rights registered in Cadastral Register to the real estate in question,
- (g)** an indication that the real estate or right vested in the real estate in question has been affected by ongoing judicial proceedings or proceedings before the cadastral authority.

The archives of the Cadastral Register represent an additional source of information regarding real estate.

A simplified extract is free and freely accessible on the web of the cadastral office. The official extract is easily accessible from every official administrative point of contact for a modest fee.

Similarly, all documents kept in the archives of the cadastral office are accessible either at the competent cadastral office or online. However, this is a special service restricted to registered users only.

1.4. Protection of ownership

The principle of *material publicity of entries in the Cadastral Register* (introduced under the current *Civil Code*) has applied since January 1, 2015. This means that each acquirer of real estate (or any right *in rem* to such property) who purchased it (in a

form of an asset deal) for consideration and in good faith can rely on the correctness of the relevant entry in the Cadastral Register and is protected against any third-party claims of ownership, save for very limited circumstances.

Similarly, any person concerned by a change in a Cadastral Register entry has one month from the moment that person learned about the change (but no more than three years from its registration in the Cadastral Register) to challenge the change. In order to protect the claimed right against third parties, the person disputing the change must file a claim with the competent cadastral office, and the real estate concerned will be marked with a 'note of disputability.' A note of disputability does not prohibit transfers of ownership, but any ownership transfer of real estate marked by a note of disputability would interrupt ownership in good faith.

The above is without prejudice to the general right of anyone to challenge an entry in the Cadastral Register that affects them. The outcome will, in such a case, be opposable only against the person who acquired the right after registration of the note of disputability in the Cadastral Register.

2. Real estate acquisition

2.1. Share deal or asset deal?

It is possible and typical in the Czech Republic to structure deals both as *direct sales* of real estate (asset deal) as well as *indirect sales* by selling a shareholding in a special purpose vehicle company owning the real estate (share deal).

Asset deals are most common in disposals of real estate among private investors, whereas share deals are most common in business deals. Share deals have the following key advantages:

- (a) share deals are subject to fewer formalities since the relevant share purchase agreement (SPA) must not be registered in a public register (unlike an asset deal, which must be registered in the Cadastral Register – after first filing the related application);
- (b) the disposal is completed on one closing date (as opposed to an asset deal, which is only completed upon its registration in the Cadastral Register);
- (c) even though the property transfer tax has been abolished in the Czech Republic, with retroactive effect from December 1, 2019, share deals continue to be less burdensome from a tax point of view (this especially applies to the application of VAT to asset deals, as the tax treatment remains unclear in specific cases, and asset deals may not benefit from an exemption, unlike share deals under certain circumstances);
- (d) gains made on asset sales are generally subject to corporate income tax (if realized by corporations) or personal income tax (if realized by individuals) and will be taxed at the appli-

cable rate (progressive rates of 15 percent or 23 percent for individuals, and a flat rate of 19 percent for corporations). Under certain circumstances, capital gains realized by individuals could be exempt at their level as well; and

(e) share deals have, in most cases, no negative impact on the contractual relationships of the SPV owning the real estate, as there is no change in the contracting parties (except for contracts with change of control clauses and similar undertakings).

In this respect, it should be noted that acquiring an SPV through a share deal involves other risks not necessarily related to the property, but to the SPV itself, such as past or even hidden corporate, contractual, or tax liabilities.

2.2. Share deal

A share deal is a commonly used term for disposals of a shareholding in a corporation. In terms of real estate, the two most common entities used are the limited liability company (in Czech *společnost s ručením omezeným*) and the Czech joint-stock company (in Czech *akciová společnost*). Thanks to its simplicity and variability, a limited liability company is the most commonly used form while joint-stock companies are often used as a holding entity. There are no specific restrictions with respect to real estate holding entities and, as a result, other types of Czech or foreign entities are available to investors. Both entities can have only one shareholder.

In most real estate share deals the closing occurs within the same day as the signing since the transfer is completed and effective upon the execution of the SPA. For limited liability companies, the signed and effective SPA must also be delivered to the company; for transfers of book-entered shares in a joint-stock company, the transfer becomes effective upon registration in the Central Depository of Securities. Although registering the transfer in the Commercial Register is mandatory, it is of a declaratory nature only.

The price for the shares (derived from the value of the underlying real estate owned by the SPV) is usually split between a full repayment of the shareholder's loans and the purchase price of the shares. The market standard is direct payment to the seller's bank account, which is done on the closing day.

The fees associated with a share deal are quite modest and include the costs of verification of signatures and registration of changes in the Commercial Register.

2.3. Asset deal

In asset deals, if the transfer relates to a real estate which must be registered in the Cadastral Register (all land and most buildings), the transfer only becomes effective upon registration; if the ownership title to the real estate is not subject to registration in the Cadastral Register (if it is transferred by agreement), ownership is acquired on the effective date of the relevant agreement.

The transfer document (*i.e.*, a purchase agreement) must properly define and delineate the land parcels and buildings to the extent stated in the law. Non-compliance with this obligation can result in a defective transfer. The transfer document must be in writing, with the signatures of both parties officially verified and located on the same document. Unlike many other jurisdictions, the involvement of a notary public is not required, and the transfer document does not have to be in the form of a notarial deed.

If the real estate is purchased by or sold to municipalities or public authorities, there are additional obligations and processes as set out in specific laws.

The mandatory registration of a real estate transfer in the Cadastral Register means there is a lag of approximately 30 days between the signing of the deal and its closing. As a result, the purchaser generally deposits the purchase price in an escrow account of a notary public or a bank, with the funds released to the seller only after successful registration in the Cadastral Register of the purchasers' title to the real estate.

The fees associated with an asset deal are a bit higher than the fees associated with a share deal, but they remain modest and cover verification of signatures, registration of changes in the Cadastral Register, and escrow charges.

2.4. Disposal process

A standard real estate transaction usually starts with a due diligence performed by the purchaser. In larger deals, or deals where participation of more institutional investors is expected, the purchaser's due diligence is preceded with the seller's own vendor due diligence, the outcome of which is shared with interested investors. Although the investors are allowed access to a data room in order to check the vendor report and present their bids, an in-depth analysis of all assets is typically only open to selected (winning) bidder(s).

A proper real estate due diligence will include a 10-year historical review of the acquisition title chain, review of encumbrances, construction compliance, environmental issues, and all other aspects that are relevant to the nature of the property in question. While some local purchasers forego proper due diligence and rely solely on the information set forth in the Cadastral Register, clients are advised to conduct a full independent review of all matters that may interfere with their future intended use of the property. In addition, all corporate, financial, and tax aspects should be investigated by the purchaser as well, in order to limit the risk of undisclosed liabilities or other defects without a proper reduction of the purchase price.

Once due diligence has been successfully completed, the parties can launch negotiations over the share purchase agreement.

A purchaser wishing to protect its interests against undisclosed defects in the acquired SPV, underlying real estate, or shares

thereon, must negotiate various remedies in the SPA either to improve the statutory rules on the seller's liability for defects or to replace it with purely contractual regulations (usually as monetary compensation for the decrease in the value of the acquired assets) since a common issue is that deficiencies in an acquired asset are not easily categorized as defects. The most common remedies consist of agreed remedy or claim processes, indemnities for known risks, seller's post-closing covenants, which are secured by various schemes of deferred payments, escrows, guarantees, or contractual penalty clauses.

Several types of consents might be required, depending on the specific circumstances. They include:

- (a) consent of a beneficiary of a pre-emption right,
- (b) corporate consents, including consents of the Ministry of Finance or municipal assembly,
- (c) consent of a bank in cases where a mortgage is vested in the real estate (this only applies to asset deals),
- (d) spousal consent if the seller is married, or with a divorce in process, or
- (e) architect's consent in the event authors' rights can apply with respect to the real estate.

For asset deals, the seller is obliged to hand over to the purchaser the original energy certificate pertaining to the real estate as well as complete up-to-date project documentation.

2.5. Registration of change of ownership

Both share deals and asset deals must be registered in their respective registers. Registration of a share deal is of a declaratory nature only; registration does not affect the signing and closing of the deal. On the other hand, registration of an asset deal is a mandatory condition for transfer of the title (with respect to real estate that must be registered in the Cadastral Register).

Therefore, once the relevant transfer agreement with respect to an asset deal is executed at least one of the parties to the deal, if not both together, must fill in and file to the cadastral office the application for registration along with the underlying transfer document. Procedural aspects of title and other record registration in the Cadastral Register are governed by the *Act on the Cadastral Register* (Act No. 256/2013 Coll.).

Once the cadastral office receives the application for registration of a change, it informs the owner of the subject real estate and other entitled persons that proceedings have been initiated. There is a 20-day mandatory wait period before a registration can be approved; this is to give sufficient time for all concerned parties to raise objections to the registration process, if necessary.

If all statutory requirements are met, the cadastral office will register the ownership right and inform the participants of the proceedings. The registration is retroactive – meaning that the

transfer's effectiveness begins from the date of submission to the cadastral office of the application for registration, even though the registration process generally takes three to four weeks.

The fees for registration are symbolic.

2.6. Risks to be considered

Without prejudice to the principles and rules governing the Cadastral Register, it is important to note that there are still unrecorded encumbrances vested in real estate (such as utility protection areas, municipal or state pre-emption rights, unrecorded easements, and ownership rights acquired through positive prescription or public paths, ways, and roads). A pledge over a property (including real estate, movables, shares, and receivables) might exist or be created by a decision of the tax administrator or other competent public authority without the existence or creation of this pledge being necessarily apparent from a Cadastral Register extract.

Similarly, titles to even duly registered rights might still be successfully challenged and annulled due to, for example, breach of mandatory rules protecting disposals with state or municipal property, breach of public tendering rules, *etc.*

Therefore, prudent investors go beyond just legal due diligence, they may also arrange for technical due diligence as well as an on-site inspection. Such steps minimize unexpected post-closing complications and trouble. In case of any doubts, a smart purchaser will request strict and broad representations and warranties from the seller, together with liquid security, or will ensure that the appropriate W&I insurance has been obtained.

3. Real estate financing

3.1. Key sources of financing

Acquisitions of real estate in the Czech Republic are typically financed by a combination of debt and equity. Most debt financing for local real estate transactions is provided through secured bank loans.

Alternatively, finance leasing of real estate is also available on the market. In this case, a regulated financial institution acquires real estate from the original owner; at the same time, the financial institution concludes a long-term lease agreement with the ultimate investor. At the end of an agreed period, the investor is usually obliged to acquire ownership of the real estate at a pre-agreed residual value.

3.2. Protection of creditors

Investors looking for a bank loan will most likely need to provide a wide range of security, including in most cases, a mortgage over all of the real estate, subordination of any shareholder loans, a pledge over cash and receivables, and oth-

er securities. A mortgage over real estate registered in Cadastral Register is perfected upon its registration.

Enforcement of a claim is subject to obtaining an Execution Order issued by a court or a recognized arbitration proceeding or by the (future) debtor voluntarily executing a Deed of Enforcement. Private enforcement of a mortgage/pledge is also possible if explicitly agreed upon in the underlying mortgage/pledge agreement.

4. Real estate taxes

4.1. Transfer taxes

The real estate acquisition tax was abolished in 2020 with a retroactive effect on all real estate property transfers effected as from December 1, 2019.

4.2. Specific real estate taxes

The real estate tax is generally payable by every owner of land or a building located in the Czech Republic. Generally, real estate taxes are calculated according to the size of the property rather than based on market value. Consequently, real estate taxes in the Czech Republic are not as significant as they may be in other countries.

The tax base for land depends on the area of land occupied (residential land) or the price of the land (agricultural land). The tax on buildings depends on the size and number of above-ground floors of the building. Yearly rates for residential land range from CZK 0.20 to CZK 5 per square meter; agricultural land is taxed 0.25 percent to 0.75 percent of the average price of land per square meter; and the buildings are taxed CZK 2 to CZK 10 per built-up square meter. All the rates can be multiplied by a coefficient from one to five, depending on the type and location of the property (for example, the yearly real estate tax for a 100-square meter apartment in Prague without a parking space or adjoining land would be CZK 1,200).

A real estate tax return generally must be filed by January 31 of the calendar year (with certain exemptions) immediately following a calendar year during which any changes occur to the real estate (including ownership change).

5. Condominiums

5.1. Legal framework for condominiums

Condominiums do exist in the Czech Republic and provide an important alternative to housing cooperatives. The *Civil Code* provides full regulation of condominiums.

Czech legislation characterizes a 'condominium' as a combination of exclusive ownership of a unit (apartment, or non-residential unit, represented by a delimited part of a building) with co-ownership of what is left after deducting all the units located in the building (common premises). The exclusive

ownership of the unit and co-ownership of common premises are inseparable in the event of disposal. The unit has the status of immovable property and, as such, is registered in the Cadastral Register.

Where there is a condominium, there is usually a condominium association (in Czech *společenství vlastníků jednotek*). The law obliges unit owners to establish a condominium association in buildings with at least five units, where at least four are owned by four different owners. The condominium association then manages the building for all unit owners, provided that the unit owners form the highest decision-making body of the condominium association – the assembly of co-owners.

5.2. Rights and duties of co-owners

The unit owner(s) is entitled to use the unit exclusively and to manage it at their will, with respect to other unit owners and their rights. However, the unit owner's management must not affect the common parts located inside the unit (including load-bearing walls, central heating, *etc.*) and the common premises reserved for his exclusive use (such as balconies). Unit owners must not jeopardize the functionality of such common premises through their interventions.

The unit owners have the right to use premises common to all co-owners (such as lifts, corridors, stairs) as well as the obligation to follow the rules issued by the condominium association for common premises management. This obligation, however, is conditioned by the owners' acquaintance with the content of these rules. Furthermore, the unit owners are obliged to contribute to the management of the building in proportion to their co-ownership share (generally according to the proportion of their unit's floor size to all units in the building).

We also note that a court may order the sale of a unit of an owner who breaches a duty imposed on them by an enforceable court decision in a manner substantially limiting or precluding the rights of other co-owners.

5.3. Liability of co-owners

Once a condominium association is established, all unit owners are obliged to guarantee that the condominium association's debts will be paid. This obligation was introduced to protect debtors since the rights and duties of a condominium association are strictly limited to the "usual needs" of the building and its management and, as a matter of example, even though its liabilities are financed by contributions of the unit owners, the assembly of the condominium association can decide not to collect these contributions.

5.4. Rights and duties of condominium associations

Czech law sets out that a condominium association is a legal entity determined by its purpose, *i.e.* to manage the building and the land plot underneath the building. "Management" includes all activities to which unit owners are not bound to,

but that are necessary or appropriate for the proper care of the managed real estate and maintenance of the common premises. It means that all activities of the condominium association as well as all the rights and duties that are vested in it must be directed toward this purpose.

The condominium association is entitled to acquire rights and commit to obligations, but only for the purpose of managing the real estate. The condominium association must not carry on business or participate directly or indirectly in the business activities of its members, as that is not in line with its purpose.

6. Commercial leases

6.1. Form and contents of a lease agreement

Commercial leases in the Czech Republic are private agreements; a written form is not mandatory.

A standard commercial lease agreement is usually very detailed and overrules non-mandatory statutory provisions. It generally addresses in particular:

- (a) proper identification of both parties, of the real estate in which the leased premises are located and clear identification of the leased premises,
- (b) agreed purpose of the lease including agreed location(s) of the tenant's signage,
- (c) amount of rent and annual review,
- (d) amount of private charges and common service charges paid by the tenant and their precise scope and calculation,
- (e) lease term – most commercial leases are concluded for a definite period of time and give the tenant only a very limited possibility to prematurely terminate the lease,
- (f) renewal clauses, rights of first refusal, expansion options as well as other options that give the tenant some flexibility with regard to, in particular, the size of the premises,
- (g) landlord's financial incentives and fit-out contributions (if agreed),
- (h) sublease and setoff restrictions,
- (i) security provided by the tenant in the form of a bank guarantee, corporate guarantee, or cash deposit, generally amounting to three or six monthly payments, and
- (j) the division of maintenance and repair obligations (landlords are usually responsible for structural repairs and maintenance of the common premises).

6.2. Regulation of leases

Although the *Civil Code* regulates leases, the provisions applicable to commercial leases are mainly non-mandatory, and contractual parties can freely deviate from the statutory provisions.

This is not the case for residential leases. Here, contractual par-

ties may only deviate from statutory provisions for the benefit of the tenant. Although rents are not regulated, the landlord cannot freely increase an agreed-upon rent and must follow certain specific rules.

6.3. Registration of leases

If the subject of the lease is registered in the Cadastral Register, the lease agreement may then be registered in the Cadastral Register, but it is not a legal prerequisite. This decision is left up to the parties and is rarely utilized. The registration process is burdensome and the parties tend not to be willing to disclose the agreed commercial terms to third parties (see 1.3 above – Publicity of real estate register).

6.4. Termination of leases and renewals

Most commercial leases are concluded for a definite period of time, with limited possibilities for the tenant to prematurely terminate the lease. These tend to be strictly limited to only a few termination reasons specified in the lease agreement. Statutory termination reasons – which are vague and non-mandatory – are in most cases replaced by contractual terms.

Typically, a party may terminate the lease if the other party grossly violates its obligations under the lease agreement or goes bankrupt. The landlord is usually entitled to prematurely terminate the lease if the tenant is in default with payment of the rent or service charges, if the tenant uses the subject of the lease contrary to the agreed use, or if the tenant subleases the subject of the lease or a part of it without the landlord's prior consent, *etc.*

We note in this respect that during an insolvency proceeding the insolvency administrator can prematurely terminate a lease without being bound by statutory or contractual terms.

Similarly, parties generally replace the lease renewal rules set out in the Civil Code with more sophisticated and bespoke contractual terms.

6.5. Rent regulations and rent reviews

The parties are free to determine the rent amount. Czech law sets no limitations on rent with respect to leases of commercial premises.

In retail commercial leases, turnover rents are commonly used. Annual rent reviews are based either on European harmonized indexes (such as MUICP), with respect to leases denominated in EUR, or the Czech consumer price index published by the Czech Statistical Office, for leases denominated in CZK.

Unless there is a mechanism for a change or increase of the rent in the lease agreement, such as an indexation clause, the amount of new rent is subject to the parties' agreement.

6.6. Services to be provided together with the lease

As a rule, all costs related to the leased premises and/or the entire real estate paid by the landlord are recoverable from the tenant (including real estate tax, insurance, *etc.*), if agreed in the lease agreement. However, the landlord cannot recover private charges (electricity, water, telecommunications) from the tenant at a higher amount than the sum actually paid by the landlord to the service providers, unless the landlord is officially authorized to commercialize such commodities.

Tenants are obliged to pay a pro rata share of the common service charges according to the size of the leased area, usually as regular fixed advance payments that are reconciled after the end of the respective year.

With respect to the actual use of utilities consumed in the premises, tenants pay the costs according to consumption, either measured by separate meters or calculated on the basis of the size of the leased area.

6.7. Fit-out works and their regulation

The tenant may carry out fit-outs, improvements, and alterations to the leased premises only with the landlord's prior consent. Landlords usually require a copy of all documentation related to alterations and improvements to be submitted and maintain the right to inspect how the works are performed and to stop the performance of any works if they are not carried out in accordance with the provided specifications or rules and regulations set forth by the landlord or competent authority. The related permits are usually the tenant's responsibility.

For tax reasons, the tenant is, as a primary option, requested to surrender the leased premises in the same condition as at their handover at the beginning of the lease. Any other situation has various tax impacts on both the tenant and landlord.

The tenant can only be reimbursed for the costs of improvements from the landlord by agreement. If the landlord consented to the improvements but did not undertake to reimburse the tenant, the tenant may obtain compensation for the increase in value of the leased premises at the end of the lease. The increase in value is to be determined by the parties (on the basis of the costs incurred by the tenant) or by an expert if they fail to agree.

If the tenant's improvements carried out in the premises meet the statutory definition of technical improvement and the landlord agrees not to increase the acquisition book value of the real estate, the tenant may depreciate the costs of improvements of the leased premises performed and paid for by the tenant.

6.8. Transfer of leases and leased assets

As a general rule, the tenant is entitled to assign wholly or partially its rights and obligations under the lease agreement,

or to sublease the premises, but only with the landlord's prior written approval. The landlord's approval is very often granted even in advance for a tenant's intragroup assignments or subleases.

A share deal has no negative impact on the lease relationship, as there is no change of contractual party (unless the lease agreement contains special covenants of the landlord in this respect, which is rather unusual).

With regard to an asset deal, under statutory provisions of the Civil Code if the owner of the leased premises (and/or real estate) changes, the rights and duties arising from the lease agreement pass to the new owner by operation of law, and none of the parties are entitled to prematurely terminate the lease for this reason. This rule applies towards the new owner – unless the new owner had no reasonable cause to doubt that the purchased real estate was free of all leases (which would be very unusual as regards business leases).

Nevertheless, if the landlord transferred ownership of the leased premises (and/or real estate), the new owner is not bound by any stipulations on the landlord's duties which are not provided by a statute. However, this rule does not apply if the new owner was aware of the former landlord's stipulations. Because of this more and more tenants now oblige the landlord to ensure that the potential new owner has been duly informed about the terms and conditions of their lease.



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W A L L E S S

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

Ownership of real estate is highly valued and protected in Estonia, enshrined already in the constitution (Section 32). Detailed rules on ownership of real estate and so-called restricted real rights (servitudes, real encumbrances, right of superficies, right of preemption, security (mortgage)) are found in the *Law of Property Act*. This law dates to 1993, being drafted right after the restoration of Estonia as an independent republic after the end of Soviet occupation. The framework provided by the law has been rather stable, with the last large set of amendments made in 2002, when some of the regulation was moved to the General Part of the *Civil Code Act* as part of codification of Estonian private law.

The *Law of Property Act* is not the only law containing restrictions on real estate ownership and restricted real rights. Restrictions to real estate ownership are also found in the *Nature Conservation Act*, *Heritage Conservation Act*, and other laws protecting human health, property, environment, and cultural heritage.

Rules on expropriation of privately owned real estate were reviewed quite recently, with the current law on acquisition of immovables in public interest in force from July 1, 2018. The idea of the law was to make the procedures more transparent and less time-consuming and allow the state to offer better terms to those owners who voluntarily agree on the acquisition of real estate by the state. The law also includes a clause that requires the state or local authority to acquire (for fair compensation) real estate the use of which for its intended purpose has been made impossible by administrative decisions. Special rules apply to the acquisition of private land in nature conservation areas.

As a general trend, different restrictions on ownership rights over real estate have become more numerous and complex over the past decades. The latest example of this is a draft law (still debated and considered) that would restrict the use of higher-quality agricultural land for other purposes, especially covering this land with buildings, roads, etc.

1.2. Registration of ownership

Ownership of real estate as well as restricted real rights are registered in the Land Register. The latter is a national register, which falls under the responsibility of the Ministry of Justice and is being kept by the Tartu County Court. Rules governing Land Register are found in the *Law of Property Act* and in the *Land Register Act* (and a few technical regulations based on the latter).

All immovables and limited real rights related to them must be registered in Land Register. The register has a constitutive character, *i.e.*, ownership of real estate and restricted real rights are transferred, or their contents changed only after an agreement has been concluded, and the relevant information entered or changed in the Land Register.

1.3. Publicity of real estate register

Entries in the register are publicly available. However, the service is not free, but subject to fees (currently 3 EUR per immovable for the whole entry).

1.4. Protection of ownership

As noted above, entries in the Land Register are needed to create or modify ownership and restricted real rights. Owners of real estate can rely on the Land Register entries to protect their ownership rights. In case an entry would be incorrect, the rightful owner or a person having a restricted real right can demand that the person who has been wrongfully noted as an owner of immovable or restricted real right in the Land Register would give its consent to correct the Land Register (if need be, such claims can be brought to a civil court).

A presumption of the correctness of the Land Register has also been established, meaning that a person acting in good faith can rely on the information in the Land Register for transactions (and acquire ownership or other rights *bona fide*). In case a person acquires ownership of real estate or restricted real rights in good faith, they would keep these rights even if it is later determined that the Land Register entry was false. The person, whose rights have been affected by such a situation (*e.g.*, the real owner of real estate) has only a monetary claim against the person who transferred the right to a third party acting in good faith.

2. Real estate acquisition

2.1. Share deal or asset deal?

In Estonia, disposing of real estate directly to an investor can only be made as an asset deal (concluding an agreement on the sale of the immovable, see 2.3 - 2.5 for more details).

As another option, an investor may gain ownership of real estate indirectly. Instead of directly purchasing the immovable, an investor may purchase shares of a company that owns or will purchase a real estate asset, and via this share transaction, acquire the role of the owner of the real estate.

The second option can be more efficient in terms of time and costs for the investor, provided that the share transaction can be done without notarial authentication (see section 2.2). With this option, the investor can invest its money via a simple

share purchase agreement without going through the process involving notaries public. The purchase of real estate assets (including involving the notary public) will be done then by the company of which shares the investor purchased.

2.2. Share deal

There are different options in Estonia to purchase shares. The options depend on the type of entity whose shares are being purchased. The most common two types are a public limited company (*aktsiaselts*) and a private limited company (*osahing*).

The shares of a public limited company can be transferred via a simple agreement that is signed digitally or by handwritten signatures. The agreement does not need to be authenticated or certified by a notary public.

The sale of shares of a private limited company must, as a rule, be done via a transaction that is certified by a notary public (more details on the certification are provided in 2.4). However, there are two exceptions when private limited company shares can be transferred without notarial certification:

- i. the share of a private limited company has been registered in the Estonian register of securities; or
- ii. the share capital of the company which share is purchased is at least EUR 10,000, there are specific clauses stipulated in the articles of association and a necessary exemption note is made to the Estonian Commercial Register.

The applicable fees depend on whether the transaction is certified by the notary or not. With transactions certified by a notary public, there are notary fees, state fees, translation fees (if applicable). The size of the notary fee is calculated based on the transaction fee. Notary fees can be skipped in the case a notarial certification is not required. With either option advisory fees should be always considered.

Usual risks transferred to the purchaser of shares are:

- i. The investor acquires a share of the company, not only the property, and there may also be liabilities held by the company. This may include liabilities that are not reflected in the balance sheet and/or are not disclosed to the buyer.
- ii. If the investor does not acquire 100% of the shares, control of the company and as well as the real estate, may not be guaranteed.

To minimize the above risks, it is recommended to carry out a due diligence check before the transaction is concluded. Relevant clauses (warranties) should also be stipulated in the share purchase agreement.

2.3. Asset deal

The disposal of real estate as an asset requires the conclusion

of a written agreement authenticated by the notary public and registering the change of ownership in the Land Register (more details at 2.4 and 2.5).

The Land Register and publicly available databases contain a lot of information on incumbrances of the immovable which should be explained to the parties by the notary public. Therefore, the main issues to consider for minimizing risks by the investor are, on the one hand, contractual obligations related to the asset (most relevantly, leases, see 6.) and, on the other hand, the factual, the (technical) condition of the asset (*e.g.*, the state of the buildings on the real estate and their potential defects). In practice, addressing risks in the transaction documentation mostly include warranties given by the seller which can be relied upon by the investor. Such warranties may be backed by contractual penalties due to providing incorrect information to the buyer.

Fees for the notary public and state fees for changes made to the registry must be paid in case of an asset deal, for more details see 2.4 and 2.5. With regard to taxes, see 4.1.

2.4. Disposal process

To dispose of the ownership of immovable or restricted real rights, an agreement authenticated by a notary public must be concluded. The notary public is obligated to take an active role when authenticating an agreement. They are required to clarify the will of the parties and relevant facts of the case. The notary public is also obligated to clarify the meaning, legal consequences of the transaction, and alternative ways of concluding it.

Fees of the notary public are set by the government and, for transactions concerning real estate ownership and restricted real rights, are dependent on the value of the transaction. For example, for a sale of an immovable worth EUR 500,000, the fee would be EUR 1,857.48, for an immovable with the price of EUR 1,000,000, it would be EUR 3,515.31. An online calculator for the fees can be found on the web page of the Chamber of Notaries (www.notar.ee).

Notaries are liable for damages arising from their professional activities only if these are considered wrongful. This essentially means that notaries' liability is not a strict liability (they are not liable for any damages they cause) but instead a fault-based liability *i.e.*, liability only arises in case the notary public has failed to apply the required level of duty of care.

All documents, maps, plans, and projects related to acquisition and possession of an immovable as well as construction on it are accessories to the immovable and should be handed over to the new owner if the ownership is transferred.

2.5. Registration of change of ownership

Change of ownership is registered by the registry department of the Tartu County Court. The application for changing the ownership entry is forwarded to it by notaries public via a specific electronic system. Notaries are also responsible for explaining to the parties to a sale agreement what documents are needed for the registration. The court checks the documents sent to it for completeness and ensures that the entry can be lawfully made *i.e.*, this would not be prevented by rights of third parties or statutory provisions.

The deadline for registering changes in ownership is one month from receipt of application; in practice, however, the entries to the Land Register are made sooner (in many cases in a matter of few days).

Fees for registering changes of real estate ownership are provided in Annex 2 of the *State Fees Act* and are dependent on the value of the immovable. For example, for an immovable with the value of EUR 500,000, the fee is EUR 755; with the value of EUR 1,000,000, the fee is EUR 1,600. The maximum amount of the fee is EUR 2,560.

2.6. Risks to be considered

As part of its tasks in authenticating a real estate transaction, the notary public is obligated to determine all encumbrances and rights of pre-emption applicable to the object of the transaction. The right of pre-emption must be entered into the Land Register to be valid, therefore if it exists then it would be clearly visible.

Any defects of real estate known to the seller should be communicated to its buyer. In case the real estate acquired has defects, *i.e.*, it does not correspond to the qualities expressly agreed on or is of sub-standard quality, and the defects were already present at the time of the sale of the immovable, the purchaser should immediately notify the seller of defects. As a rule, the purchaser can require the seller to remove the defects at their own expense. If the seller refuses to do so, the purchaser may have the defects removed and claim compensation from the seller for reasonable costs.

Disputes related to defects are handled by the civil courts. The key issue in such disputes is proving that defects existed already at the time of concluding the purchase agreement.

3. Real estate financing

3.1. Key sources of financing

Real estate is mainly financed by bank loans and the developer's or acquirer's equity. In the case of new developments, the necessary funds are sometimes also raised from capital markets

by issuing notes. In addition, to finance the expenses of the early stage of real estate development, smaller developers sometimes also raise debt via various crowdfunding platforms.

3.2. Protection of creditors

The main types of security used in real estate financing include the mortgage over the real estate, the pledge of shares of the company developing or acquiring the real estate, and in the case of cash-flow generating real estate, pledge of the cash-flow (mainly rental income). Pledge on movables and personal sureties are also options, although less often used. In addition, the borrower must usually ensure the real estate and appoint the lender as the first beneficiary of the insurance.

If the real estate is financed from multiple sources, the financing documents may include an inter-creditor agreement, and a collateral agent collectively appointed by the lenders could take the collateral. In such a case, the collateral agent holds the collateral for all creditors' benefit and distributes the proceeds according to the inter-creditor agreement. However, as an alternative, the above-referred collateral could be established only for the benefit of the senior lender and the junior lenders may only be given a right to receive a lower ranking mortgage over the respective real estate.

4. Real estate taxes

4.1. Transfer taxes

Estonia's tax system is relatively simple. In connection with the disposal of real estate, two taxes are relevant.

First is the value-added tax (VAT). If the seller of a real estate is a person subject to VAT requirements (legal persons with annual revenue over EUR 40,000), VAT (currently 20%) must be added to the sale price. If the real estate is purchased by a legal person who is also subject to VAT requirements and the real estate will be used for its business activity, they can deduct it as 'input' VAT from the overall sum of VAT it should pay.

Second is the income tax (currently at 20%). Estonia's system for taxing legal persons (corporations) is based on the principle that profits are taxed only at the time of their distribution (generally when dividends are paid out). If the income is reinvested or kept as a reserve, no income tax would therefore be due. Individuals are taxed on a yearly basis, and income tax from selling real estate becomes due without delay. The purchase price may be deducted from the sale price. As an exception, income tax is not due when an individual sells their home – this can only be done if they have lived in the apartment/house right before the sale agreement and only once every two years.

In the case of a share purchase transaction, income tax is

applicable to the seller if the seller is an individual.

4.2. Specific real estate taxes

Owners of immovables, or persons having a right of superficies or usufruct, are obliged to pay a land tax. The land tax is based on the taxable value of the land (it can be 0.1% – 2.5% of that value, with the exact percentage being determined by municipalities). Currently, the taxable value of land determined by the authorities is rather outdated in many parts of the country and does not reflect the actual value of the land (the actual value is often significantly higher). As there are plans to review the taxable values, an increase in land tax can be expected.

Immovables used as the main residence by individuals are exempt from land tax.

5. Condominiums

5.1. Legal framework for condominiums

Condominiums (apartment associations) exist in Estonia and are, in practice, the most common form of ownership of apartment buildings. According to the regulation, apartment buildings and the plot of land surrounding it are divided into physical spheres (single apartments/units) of a building that belong to specific owners. The rest of the immovable is in the common ownership of all apartment owners who own a legal (non-physical) share of it.

The distinction between specific units and commonly owned parts of the immovable is important as the commonly owned parts cannot be modified or disposed of by an owner of a single unit. The distinction is made based on the functionality of the building and its parts and not merely on the spatial location of different parts of the building. For example, the plumbing or central heating pipelines located in an apartment are part of the common ownership if these are used by all unit owners. The same applies to the outer walls/facade of the building as well as its roof.

All owners of units in a condominium form an apartment association, a legal person in charge of managing the condominium. The highest decision-making body of the apartment association is the general meeting of apartment owners. The number of votes that owners of units have is commonly dependent on the number of units (one vote per unit), but the association may provide in its statutes that every owner may have one vote (regardless of the number of units they hold) or that the number of votes a person has is related to their share of commonly owned property. The day-to-day management of the apartment association within the budget and other limits set by the general meeting is carried out by the management

board. The management board may be replaced by a legal person (administrator; commonly a property management company), who appoints a specific person (building manager) to perform its duties.

Matters of regular administration (*e.g.*, regular maintenance and repairs, liability insurance, concluding contracts for services) are decided by a simple majority of votes. Some decisions, such as taking on new debt, where this would lead to the total debt of the association exceeding the management cost of the previous year, require a qualified majority (more than half of the owners who own more than half of the commonly owned share of the immovable must agree). For some decisions, such as making non-essential rearrangements and restoration of the building (*e.g.*, changing the heating system of the building) an agreement of all unit owners is required.

5.2. Rights and duties of co-owners

Owners of single units must use and maintain their units in good faith and take into consideration the legitimate interests of other unit owners. For example, they are required to keep the humidity and temperature in their units within boundaries that ensure that the object of common ownership is preserved (*e.g.*, warm enough so that the water pipes do not freeze or dry enough to avoid mold in the ventilation systems) and other units may be used as intended. On the other hand, they are also required to tolerate the regular use of other units in accordance with their intended purpose. An owner of a unit must ensure that their family members, visitors, or tenants also comply with these rights and duties.

5.3. Liability of co-owners

Co-owners are all separately liable for any damages created because of not fulfilling their duties as a unit owner. For example, in case a water pipe bursts in an apartment, because the owner did not ensure that it is properly maintained and/or failed to notify the condominium association of its poor condition, they are liable for damages to owners of other units. On the other hand, if the condominium association neglects to fulfill its duties despite being warned by a unit owner, the association is responsible for damages.

In a recent judgment (case *No 2-18-13649*), the Supreme Court explained that in the case damages are caused by the commonly owned parts of the immovable (*e.g.*, burst water pipelines within an apartment building), but both the apartment owner and association have fulfilled their duties, the apartment association will be liable for damages related to the restoration of the damaged unit and parts of the common ownership to its previous state.

5.4. Rights and duties of condominium associations

Condominium associations as such are entitled to carry out the decisions made by the general meeting of apartment owners (see 5.1). The management board of the condominium association has, in addition to the general duty of care when performing its activities, also an obligation to provide information and documents on the activities of the association to the apartment owners.

6. Commercial leases

6.1. Form and contents of a lease agreement

There are no requirements to the form of the lease agreement, *i.e.*, it may also be concluded orally. However, in practice, the most common form of lease agreements, also for commercial properties, is unattested written form. This means that the contract is either signed by the parties on paper or by using electronic signatures (the latter method is already more common in practice).

Commercial lease agreements should, as a standard, include **(a)** the parties to the agreement, **(b)** determination of the object (immovable), **(c)** the purpose of use, **(d)** the term of validity (when applicable) and cancellation of the contract, **(e)** the amount of rent due and the way this may be revised, **(f)** covering of accessory expenses (usually covered by the lessee), **(g)** rights and obligations of the parties, *e.g.*, regarding repairs, improvements and alterations to the immovable; **(h)** liability for non-performance, including penalties for late performance/payment.

In terms of the most recent trends in the commercial lease market in Estonia, the following are worth mentioning:

- Sale and leaseback deals are gaining popularity, especially in industrial and retail sectors, pushed by rising property prices and the reduced availability of investment options.

- Industry and logistic companies are well catered for by the market. Out-of-date assets are losing lessees, with the availability of modern, well-equipped premises with lower accessory expenses (for water, electricity, heating).

- The rise of e-commerce has increased the demand for real estate for logistic centers.

- The office space market is under significant pressure, with the rise of teleworking. New developments are well placed to attract remaining workplaces at the office, with older premises facing vacancies and pressure to reduce prices.

- Investments in retail real estate have been shifting to smaller, ‘neighborhood’ shops and retail centers, with most such premises being dominated by a supermarket as the key

lessee and smaller shops added. The sector has held up well during the pandemic and investors are actively seeking opportunities to invest in high-quality premises.

6.2. Regulation of leases

The regulation of leases of real estate are somewhat different depending on whether the lease includes the right to the fruits received from the property (such as grain, livestock, timber) or not. Fruits received from the property belong to the lessee under the commercial lease contract (*rendileping*) and this is mostly relevant for agricultural and forest land. Commercial property such as premises for offices, shops, industrial installations are covered by the regulation concerning lease contracts (*uurileping*). Rules of the ‘simple’ lease contract also apply to commercial lease contracts, with a few exceptions, such as a longer-term notice of cancellation of the commercial lease contract.

There are also some exceptional clauses that apply to the lease of dwellings, meant to protect the lessee of a dwelling as a presumably weaker party. Whereas the terms of the lease of commercial property can be mostly freely determined by the parties, any term in the lease contract for a dwelling that differs from the *default* rules found in the *Law of Obligations Act* to the detriment of the lessee is considered null and void (and therefore statutory rules will be applied).

6.3. Registration of leases

Commercial leases do not need to be registered. However, the lessee has the right to demand that a notation regarding the lease contract be made in the land register.

6.4. Termination of leases and renewals

Termination of leases depends on whether the lease was concluded for a fixed term or not. In case the term of the lease was not fixed, the lease may be canceled without any reason by either party. The statutory minimum term for the notice of such ‘regular’ cancellation is three months (parties may agree on a longer-term).

For contracts where the term of the lease is fixed, only extraordinary cancellation is allowed. In the case of leases without a fixed term, extraordinary cancellation may be used to cancel the contract without prior notice.

Extraordinary cancellation is allowed when there is “good reason” for it, *i.e.*, under the circumstances where the party wishing to cancel the contract cannot be presumed to continue performing the contract. The *Law of Obligations Act* contains an open list of grounds that can be invoked for extraordinary cancellation, such as the lessee not being able to use the asset because of reasons attributable to the lessor and the latter

has failed to fix the situation after being given a warning and reasonable term to do so.

Lease contracts for a fixed term may be automatically extended and become lease contracts without a fixed term. This would be the case where after the expiry of the term of a lease contract, the lessee continues to use the asset, and neither party objects to the lease continuing within two weeks. The two-week period is calculated from the end of the term of the contract for the lessee and from the time the lessor learned of continued use for the lessor. Such an extended contract may be canceled as explained above.

6.5. Rent regulations and rent reviews

Estonia has no rent controls, *i.e.*, the rental market functions as a free market. Rent reviews are common and usually explicitly regulated in lease agreements. If the parties have not explicitly agreed on the rent review, the lessor is entitled to increase the rent once a year for lease contracts without a fixed term.

6.6. Services to be provided together with the lease

Any services to be provided together with the lease should be explicitly agreed on by the parties to the agreement.

6.7. Fit-out works and their regulation

Improvements or alterations to the leased property by the lessee require, as a rule, the consent of the lessor in a form that

can be reproduced in writing (*e.g.*, an e-mail). If such improvements or alterations would be necessary for reasonable use or management of the property, the lessor is not allowed to deny their consent.

Upon expiry of the lease contract, the lessor may demand the removal of improvements and alterations only if this has been explicitly agreed on. On the other hand, the lessee can remove the improvements or alterations if this is possible without damaging the property. If the lessor pays a reasonable compensation for the improvements or alterations and the lessee does not have a legitimate interest in removing them, they should remain on the property. In case the lessee is not interested in removing the improvements or alterations made, but the value of the property has considerably increased because of such improvements or alterations, the lessee may demand reasonable compensation for them.

6.8. Transfer of leases and leased assets

The sale of leased assets does not automatically end the lease contract; the rights and duties of the lessor are transferred to the new owner. If the new lessor fails to fulfill their obligations under the lease agreement within three years of the transfer of ownership, the previous owner/lessor is liable as a surety to the new lessor, *i.e.*, they are jointly and severally liable to the lessee.



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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1 Legal Framework

As a typical example of a first-generation human right, the right to property has been consistently protected by all constitutions adopted since the Greek War of Independence. Today, the fundamental right to property, whether in the form of real estate or movable property, is enshrined (while simultaneously confined) in art. 17§1 of the Constitution of 1975/1986/2001/2008/2019: “*Property is under the protection of the State; rights deriving therefrom, however, may not be exercised contrary to the public interest.*”

At a statutory level, the protection of property has mainly taken the form of the different real rights (also known as *rights in rem*) regulated in the third section of the Greek Civil Code (GCC) entitled *Law of Real Rights*. GCC art. 973 establishes a *numerus clausus* of real rights, all of which vest in their holder legal, direct, and *erga omnes* power with respect to property. Amongst these rights, the ones applicable to real estate are:

- Ownership (GCC art. 999 et seq.): the fullest, all-encompassing real right which consists in using the property in any legal manner. Essentially identified with the property itself, ownership is best described as a *jus in re propria* (right in one’s own property), as opposed to the qualified nature of the rest of real rights, which grant a *jus in re aliena* (right in the property of another) and are therefore viewed as encumbrances of ownership.

- Servitudes (GCC art. 1118 et seq.): the rights attached either to another estate (predial servitudes) or a person (personal servitudes) which consist in enjoying one or more benefits from the substance of someone else’s property (e.g., a right of way). Usufruct, the right to fully use and derive profit from someone else’s property without altering its substance, is the most representative case of personal servitude, specially regulated in the GCC (art. 1142 et seq.).

- Mortgage (GCC art. 1257 et seq.), the right of a creditor to collect their claim with priority from the value of someone else’s real estate property. It is the most traditional example of a security interest.

The above provisions of the GCC have remained virtually unchanged since the entry into force of the Code in 1946. However, certain additional real rights have been fashioned from time to time by means of special laws, the most significant of these (from an investor’s point of view) being the so-called “surface right” introduced by Law 3986/2011. This right applies to certain types of public properties and grants powers similar to ownership exclusively over the buildings constructed thereon, derogating from the *superficies solo cedit* principle of land ownership according to which the owner of the land is also the owner of the buildings above it.

Finally, apart from real rights, powers of usage and possession of real estate property may come in the form of contractual rights (*rights in personam*), such as the rights deriving from a lease agreement.

As to the potential subjects of all the aforementioned real rights, these generally include all natural and legal persons, whether it be Greek or foreign. Nonetheless, for reasons of national security, *Law 1892/1990* prohibits the acquisition of real, but also contractual rights in designated border areas (which admittedly cover a significant part of the country) to national and legal persons who are nationals of or seated in a country outside the EU or the EFTA. This prohibition also extends to the purchase of legal entities owning properties in border areas. The persons concerned may apply for permission to acquire real or contractual rights in such areas before a special administrative committee.

The remainder of art. 17 of the *Greek Constitution* (§§2-7) is dedicated to balancing the conflict between the right to real estate property and the public interest through the process of expropriation, which results in the deprivation of private persons of their property. These rules are further specified in *Law*

2882/2001 (*Code of Expropriation of Immovable Property*). The main principles governing expropriation in Greece are the requirement of a public interest which renders expropriation necessary (in line with the constitutional principle of *proportionality*), a full (as opposed to a merely *just*) compensation corresponding to the value of the property, the determination of this compensation by the competent civil courts on a provisional and/or a final basis and its payment at maximum 18 months following the court decision, as well as the consummation of the expropriation process only upon payment of the full compensation.

In closing this introductory section, here is a little snapshot of the Greek real estate market today: after a long decade of stagnation due to the 2009 debt crisis, it is finally showing vibrant signs of recovery. A recovery process assisted by important legislative initiatives such as the immigrant investor program known as “Golden Visa,” the privatization projects of the Hellenic Republic Asset Development Fund, the various incentives offered by laws on so-called “Strategic Investments” and, more recently, horizontal tax cuts and reliefs. It is also heartening to realize that the demand for properties seems to be quite resilient to (although of course affected by) the further socio-economic shock caused by the COVID-19 pandemic and the restrictions it brought about. To illustrate this point, the total number of building permits issued in Greece from August 2020 to July 2021 was higher by 18,2% compared to the previous 12-month period, while house prices across the country saw a year-on-year increase of 7,9% in the third quarter of 2021 according to the Hellenic Statistical Authority’s *Report on Building Activity: July 2021*. Considering Greece’s allure as a holiday destination, a lot of these residential properties are destined to be used for short-term rentals (e.g., through Airbnb); at the same time, a significant portion of both domestic and foreign investment volumes are channeled into developing new hotels, villa complexes, and integrated tourist resorts in different locations. Finally, the *Ellinikon* project, the

breakthrough urban regeneration vision in the Athens Riviera is already coming to life and anticipated to become one of the key drivers of the Greek economy in the near future.

1.2 Registration of ownership

Pursuant to GCC art. 1198, registration of the relevant legal acts in public records is a precondition for the valid establishment and transfer of all real rights on real estate properties. There are currently two systems of publicity operating in parallel: the traditional so-called system of “registrations and mortgages” (GCC, *Regulatory Decree 19/23.07.1941*, *Royal Decree 533/1963*) and the newer system of the National Cadastre (*Laws 2308/1995* and *2664/1998*). It is the intention of the Greek state to fully replace the system of registrations and mortgages with the undeniably superior system of the cadastre. At this point, however, the National Cadastre is estimated to cover approximately one-third of the real estate properties of the country, leaving most areas still under the flawed old system.

The system of registrations and mortgages, represented by the competent Land Registries, is structured around the persons holding real rights in a specific area, and searches therein are conducted by reference to the holders’ identities. The records are kept in a physical form (books). On the contrary, the National Cadastre, represented by the competent Cadastral Offices, is organized by reference to each real estate property (land plot). Cadastral records are kept digitally in a unified database.

Pursuant to *Regulatory Decree 19/23.07.1941*, Land Registries fall under the competence of the Ministry of Justice, while the Prosecutor of the local Court of First Instance supervises and exercises disciplinary powers upon their personnel. Cadastral Offices are run by the legal entity under public law with the name *Hellenic Cadastre*, established by *Law 4512/2018* and supervised by the Ministry of Digital Governance. That said, in areas integrated into the system of the National Cadastre, where

Cadastral Offices belonging to the Hellenic Cadastre have not been set up yet, existing Land Registries operate as transitional Cadastral Offices, until their envisaged gradual abolition.

Registration is generally not required for the establishment or transfer of contractual rights. However, in the case of a long-term lease agreement of more than nine years, future owners of the real estate property are only bound by the lease if this has been registered in the public records (GCC art. 618). Conditions and exceptions apply.

1.3 Publicity of real estate register

In the case of Land Registries still operating under the old system of registrations and mortgages, there is no absolute clarity as to whether the law offers the right to research their (physical) records to all individuals with properties registered therein, or only to certain categories of professionals (hence the divergent opinions Nos. 7/2020 and 69/2020 of the Prosecutor of the Supreme Civil and Criminal Court and the Legal Council of the State, respectively). The general practice is that the records are made available to lawyers, interested individuals accompanied by their lawyers, and bailiffs.

Pursuant to Ministerial Decision 11206/2021, records of the National Cadastre are available either through in-site research at the computers of the Cadastral Offices of the Hellenic Cadastre or the Land Registries operating as transitional Cadastral Offices, or through remote research in its database. In-site research is permitted to lawyers, bailiffs, notaries, and engineers (under different restrictions), while remote access is also granted to all other persons but only in relation to the registrations that concern them.

1.4 Protection of ownership

The primary legal remedies established for the protection of ownership are the *declaratory action* (art. 70 of the Greek Code of Civil Procedure), *rei vindicatio* (GCC art. 1094), and *actio negatoria* (GCC art. 1108).

A declaratory action is filed against a person who merely questions the ownership of the claimant, with the request that the claimant be officially recognized as an owner vis-a-vis the defendant. *Rei vindicatio* (loosely translated as a “direct claim”) is used to proceed against a person who unlawfully possesses or occupies a property, depriving the owner of such possibility, and results not only in the recognition of the owner’s right but also in the recovery of the property. Finally, *actio negatoria* (loosely translated as a “negative claim”) is filed in cases where the owner, although not absolutely forced out of their property, is unlawfully disturbed in the full enjoyment of their right of ownership by an offender, and the request consists in the cessation of the nuisance and/or the omission of a future nuisance.

In the system of registrations and mortgages, a false or inaccurate entry does not prevent the true owner of a property from successfully protecting their ownership using the above remedies. Registration of the relevant legal act (*e.g.*, a sale and purchase agreement, an act for the acceptance of an inheritance) only constitutes one of the conditions to be fulfilled for the transfer or establishment of a real right on a real estate property, and it does not guarantee itself said transfer or establishment. Also, entries do not facilitate the proof by the registered holder that they are indeed entitled to the real right in question: they would still have to prove in court the rest of the conditions prescribed by law for the acquisition of their right. Finally, persons who accept the entries of the system in good faith and proceed to legal transactions relying thereon are generally not protected. For example, the purchaser of a property from a person who appears to be its current owner by means of a sale and purchase agreement with the previous owner, which is, in fact, null and void, will not acquire ownership on the grounds of them trusting in the public records, save for very limited and rather marginal cases (*e.g.*, if the registered sale and purchase agreement between the previous and the current owner is null and void due to it being fictitious).

Conversely, the initial entry for every property in the National Cadastre becomes final after the lapse of a specific time period during which it can be challenged. Thereafter, entries produce a non-rebuttable presumption of accuracy, which means that the claims *in rem* (a declaratory action or a *rei vindicatio*) of the true owner of the property are erased. The true owner is limited to monetary claims against the inaccurately registered owner, and may only reclaim the property itself if it has not yet been transferred to another person for a consideration. For all subsequent entries, a rebuttable presumption of accuracy is established: future registered holders of real rights on the same property will not bear the burden to prove the rest of the conditions (other than the registration) for the acquisition of their right; the opposing party will have to prove their absence. Finally, good faith in previous entries of the National Cadastre benefits the person who relies thereon to acquire a real right, even if these entries are proven to have been inaccurate.

Apart from filing a remedy for the direct protection of their ownership, owners may, alternatively or jointly, seek the protection of possession of their property against potential offenders, pursuant to GCC arts. 987 and 989. The actions related to possession not only manifest the advantage that possession is easier to prove than ownership (especially under the system of registrations and mortgages), but can also be accompanied by a request for interim measures (art. 733 of the Greek Code of Civil Procedure).

2. Real estate acquisition

2.1 Share deal or asset deal?

Acquisition of real estate may come in the form of either a direct acquisition of real rights on the desired property(-ies) by an investor (asset deal) or an indirect structure, where the investor gains control over a legal entity holding such right through the purchase of its shares (share deal).

Share deals tend to be preferred in the business

world for a number of reasons. Their popularity is mainly attributed to the following features that distinguish them from asset deals:

- They are freed from the formalities of an asset deal, as sale and purchase agreements for the acquisition of shares are not required to be drafted by means of a notarial deed or registered with a Land Registry or a Cadastral Office. They are therefore more straightforward, and investors may not only acquire but also dispose of real estate in a quicker and simpler manner.
- They do not entail notarial or registration fees or incur much lower taxes related to the transfer of shares.
- The insertion of a legal entity between the investor and the real estate asset, usually in the form of a capital company, comes with all the benefits of a separate legal personality, subject to rare cases of lifting of the corporate veil. That is, not only implications related to the specific business venture that is the acquisition and development of one or more real estate assets for a specific purpose will not affect the investor directly (at least not from a legal point of view), but also the business venture is further transferable as a whole. This is one of the reasons why Real Estate Investment Companies (REICs) tend to set up separate subsidiaries for their different projects.
- The existence of any (not regularized) illegalities of buildings on the purchased property will not threaten the validity of a share deal, whereas an asset deal with such objects would be null and void (see 2.4.).

Although more inexpensive and effortless in terms of the actual deal, it cannot be overlooked that purchasing a company that owns a real estate property involves risks not only related to the property but also the company itself. In addition, the formalities of an asset deal may be troublesome, but could potentially reveal significant findings, especially through the involvement and expertise of legal pro-

professionals (both lawyers and notaries), who would be qualified to notice abnormalities or insufficiencies in the property's documentation. In this sense, multifaceted, meticulous, and sophisticated legal due diligence becomes of vital importance in the context of a share deal. Lastly, maintaining the purchased company naturally means embracing an additional set of corporate and accounting obligations.

2.2 Share deal

A share deal consists in acquiring shares in, and thus gaining control over, a company owning (or holding any other real right on) the desired real estate property. These companies are usually capital companies, primarily in the form of a Societe Anonyme (SA) or a Greek Private Company (PC). They might constitute either special-purpose entities, with the limited function of owning the property in question, or actually engage in business activities. The acquisition of shares is achieved through a sale and purchase agreement between the old and the new shareholder(s).

Before entering into the agreement and in order to assess the risks of the transaction, it is an essential part of the process for due diligence to be conducted on behalf of the prospective purchaser. Depending on the target company's nature, size, history, activity, *etc.*, varying types and degrees of due diligence may be required, including legal, financial, tax, operational, commercial, environmental, and others. Special due diligence of legal and technical character is carried out on the company's real estate assets (see 2.6).

In the context of the company's legal due diligence, it is investigated whether the company has been lawfully incorporated and operates in accordance with the corresponding corporate legislation (*Law 4548/2018* for SAs and *4072/2012* for PCs), whether it complies with any applicable corporate governance or regulatory requirements and whether there are any provisions in the companies' Articles of Association or call options that may prevent, or

encumbrances on the shares that may devalue, the transaction. Also, a review of the company's material contracts (*e.g.*, loans, guarantees, insurances), employment policy, data protection policy, pending trials, *etc.* is performed. It is especially important to verify if the company has taken all measures in order to be exempt from the Special Real Estate Tax (EFA) (see 4.2).

Following the due diligence, should the purchaser wish to proceed with the transaction, the sale and purchase agreement for the acquisition of the shares is drafted and executed. *Law 4548/2018* on SAs does not prescribe a particular form for this agreement, while *Law 4072* on PCs only requires that it be written; therefore, the common practice is that a private document is signed, without the need to involve a notary public. In the case of SAs, the transfer of shares is then registered in a special company record (the shareholders' record) along with the names of the contracting parties, and either a new share certificate is issued in the name of the purchaser or a relevant note is made on the existing certificate. Please note that as per art. 184 of *Law 4548/2018*, starting from January 1, 2020, all bearer shares issued by Greek SAs are mandatorily transformed into registered shares. Different registration procedures apply with regard to listed shares. A very similar procedure is followed for PCs.

If, after the transfer of shares, the purchased shares, the company itself or its real estate properties are revealed to fall short of what the parties had agreed (*e.g.*, the purchaser discovers that the company is in debt or faces regulatory implications or its properties are subject to restrictions that they had not been informed of when entering into the deal), the provisions on the so-called "substantive" and "legal" defects of the object of a sale apply (*mutatis mutandis*), granting a – far from negligible – set of claims against the seller (see 2.6). However, a prudent purchaser is advised to not rest on the protection of the law mainly because, oftentimes, these claims would be activated (or at least realized) after the sale

price has been paid, and also not all deficiencies of the purchased company could be easily categorized as substantive or legal defects. For this reason, additional protection is ensured through the inclusion of specific terms in the sale and purchase agreement, which incorporate the findings of the due diligence and contain representations, conditions precedent (e.g., deferred payments until the seller succeeds in removing an existing third-party right, such as a mortgage, from the company's property), warranties (which guarantee the full spectrum of claims against the seller irrespective of whether they are in fault of not), indemnities, and penalty clauses.

With regard to taxation, share deals are exempt from indirect taxes (VAT, stamp duty) and transfer taxes, save for a 0,2% Sale Tax levied upon the seller of shares listed in the Athens Stock Exchange (art. 9 of *Law 2579/1998*). For the remaining part, the seller of shares who is a natural person is subject to a Capital Gains Tax, which is calculated at a rate of 15% of said capital gains (art. 43-43 of *Law 4172/2013*). If the seller is a legal person, a business income tax is imposed on the capital gains instead, at a rate of 22%; however, an exemption applies in the case that the legal person transferring the shares is a tax resident of Greece and maintains at least 10% equity holding in the company whose shares are being transferred for at least 24 months.

Lastly, a share deal could be concluded through a merger of a company interested in acquiring the real estate property (or one of its subsidiaries) with the owning company, in which case special rules apply (*Law 4601/2019*).

2.3 Asset deal

For the process of an asset deal preceding the execution of the sale and purchase agreement by means of a notarial deed and the risks to be considered by the purchaser, please refer to section 2.6.; for the ways in which such risks are usually addressed in the agreement, please see the relevant paragraph of section 2.2. above, as these are common in share and

asset deals; for details on the notarial deed itself and relevant fees, see section 2.4.; for the subsequent registration process and its fees, refer to section 2.5.; for applicable transfer taxes, please check section 4.1.

2.4 Disposal process

As explained above, the involvement of a notary public is not needed for a share deal, whereas an asset deal would only be valid if performed by means of a notarial deed.

Apart from the sale and purchase agreement for the real estate property, a series of other documents are required by law for the conclusion of the asset deal by means of the notarial deed and are typically annexed thereto. These include, among others:

- Certificates of payment of taxes related to the ownership of the property (ENFIA, TAP – see 4.2.) for the years before the transaction, as well as a proof of payment of the applicable transfer tax (FAM – see 4.1.).
- The seller's solemn declaration and an engineer's certification that **a)** the property is a vacant land plot, **b)** that the building(s) existing thereon are legal, or **c)** that any illegal buildings existing thereon have been duly regularized. The engineer's certification is accompanied by a topographic diagram of the property drafted according to the National Coordinate System, subject to exceptions. Please note that as a general rule set in art. 82 of *Law 4495/2017*, transactions for the transfer or establishment of real rights on properties with illegal (or not regularized) buildings thereon are absolutely null and void. However, this prohibition does not, interestingly, cover deals for the acquisition of shares in companies that are already lawful owners of said properties.
- An energy performance certificate for the building being transferred, if applicable, which is handed over to the purchaser.

The aforementioned solemn declaration, engineer's certification, and energy performance certificate

shall be absorbed and replaced by the so-called “Building’s Digital Identity” envisaged in *Law 4495/2017*. As the legislation currently stands, starting from January 1, 2021, the new document required for the transfer of most buildings shall be the *Certificate of Completeness of the Building’s Identity*, without an option to use the previous set of documents.

Special documents might be required for reasons associated either with the subjects of the transaction (*e.g.*, an insurance clearance certificate when a seller is a natural person performing business activities or any legal person), the natural or legal status of the property (*e.g.*, a certificate of non-burnt land for private forests and forest expanses) or both (*e.g.*, special administrative permission for foreign transferees of properties in designated border areas – see 1.1.).

A breach of duty by the notary public who has agreed to perform the transaction may result in their civil liability, disciplinary consequences, and, in special cases (*e.g.*, the intentional non-attachment of the aforementioned solemn declaration and engineer’s certification to the notarial deed), is treated as a criminal act.

Finally, pursuant to Ministerial Decision 111376/2012, notarial fees are calculated as an aggregate of certain standard fees (EUR 20 for the first page and EUR 5 for each of the other pages of the deed) and a progressive fee at a rate ranging between 0,80% and 0,10% on the higher of the objective price (see 4.2.) or the price of the property agreed between the parties. Notarial fees are also subject to VAT.

2.5 Registration of change of ownership

As previously mentioned, registration of all legal acts resulting in the transfer or establishment of real rights on real estate property, a primary example being a sale and purchase agreement for the transfer of ownership, must be registered with the competent Land Registry or Cadastral Office.

Registration is usually complete shortly after the notarial deed has been brought for registration, subject to delays caused by the process of reviewing the legality of the legal act (see below) and the understaffing of certain Land Registries. In any case, for legal purposes such as the determination of the priority of real rights, it is the time of application for the registration of the (valid) legal act that is of consequence.

Registration fees apply and are calculated based on a rather complex structure of standard and proportional fees and tend to differ slightly for Land Registries and Cadastral Offices. Indicatively, art. 6 of *Law 4512/2018* provides that a fee at a rate of 5 or 6% on the value of the transferred property is payable for the registration of sale and purchase agreements at a Cadastral Office.

Finally, the personnel of the competent registration authority is not commissioned to accept and register all legal acts brought before them in an unquestioning manner; however, their review is limited by law and differs between Land Registries and Cadastral Offices. At Land Registries operating under the old system of registrations and mortgages, the review of the registrants is generally formal, mainly focused on the confirmation that all required documentation has been submitted, and does not extend to the examination of the documents’ validity (art. 13 of *Royal Decree 533/1963*), save for certain cases of blatant nullity. On the other hand, at Cadastral Offices, and in service of the principle of public faith in cadastral registrations, registrants proceed to a deeper review of the legality of the legal acts brought before them, verifying their suitability to produce the desired legal consequences (art. 16 of *Law 2464/1998*). In both cases, a breach of the registrants’ duties (*e.g.*, the registration of a blatantly null and void agreement) may incur their civil liability, disciplinary penalties, but also, in extreme cases and provided that the registrant acts with intent, criminal responsibilities.

2.6 Risks to be considered

The acquisition of ownership (and other real rights) on real estate, be it through a share or an asset deal, might involve considerable risks associated with either the validity of the transaction itself or the possibility to legally, safely, and effectively proceed to the envisioned use and/or development of the property. For this reason, thorough legal and technical due diligences should be conducted on behalf of the prospective acquirer.

Legal due diligence typically includes the review and confirmation of an uninterrupted sequence of titles (*i.e.*, legal acts capable of producing the transfer of a real right, such as sale and purchase agreements, deeds of acceptance of inheritance, court decisions, *etc.*) duly registered in the public records, that is, either in the physical records of the competent Land Registry or in the system of the National Cadastre (see 1.2.). The titles themselves should be reviewed in terms of their validity, for a minimum 20-year lookback period. This period is essential because it is the time required to acquire a property by adverse possession (extraordinary usucaption), and continues to benefit the consecutive successors of the initial possessor of the property. Furthermore, it is investigated if there are any registered encumbrances or other property defects (*e.g.*, mortgages, prenotations of mortgage, servitudes, long-term leases, lawsuits, seizures) or non-registered leases. In any case, it should be reminded that the factuality of the conclusions reached through a title review is inevitably dependent on the system of publicity that applies in the area of the property (see 1.4.).

Technical due diligence, performed by engineers, usually focuses on confirming the property's location and dimensions, as well as inspecting existing buildings and structures in order to confirm their compliance with the corresponding building permit(s) and applicable legislation. This last verification is crucial because, as explained under 2.5., the transfer of real rights on properties with illegal (or not regularized) buildings thereon is generally

impossible.

Finally, legal and technical advisors collaborate in order to review the property's spatial and urban planning status (or planning identity), which delineates the ways in which the property can be built on and exploited. Indicatively, it is determined whether the land plot falls inside or outside a city plan, what are the allowed land uses and applicable building terms and restrictions deriving from such status and whether limitations arise from special legislation on forests and forest expanses, cultural heritage, nature conservation areas, foreshore and beach zones, *etc.*

If the purchaser wishes to bind their prospective seller in advance (*e.g.*, for a certain sale price) before the completion of the due diligence, it is common practice to conclude a preliminary agreement. Such agreements are also useful for the seller to bind prospective purchasers before they (the seller) gather all necessary contractual documentation (see 2.6.). In order to be valid, a preliminary agreement should contain all the essential elements of the final sale and purchase agreement and also be drafted by means of a notarial deed (GCC art. 166). For the remaining part, it might be either unilaterally, or bilaterally binding.

In the event that, after the final transfer is complete, a purchaser finds out that the property is flawed with substantive or legal defects that they were unaware of during the transaction, they hold a set of claims against the seller. This means that if the seller manages to prove that the purchaser had knowledge of these defects, they are exonerated from the purchaser's claims.

More specifically, in the case of substantive defects, which may affect the property's natural qualities or its administrative status (*e.g.*, a deficiency in the surface of the land plot, illegal buildings, planning restrictions), the purchaser has the right to: **a)** demand that the defect be rectified (if applicable), **b)** request that the sale price be reduced, **c)** rescind the sale and purchase agreement, or **d)** seek compensa-

tion, either exclusively or in addition to the previous rights (GCC arts. 540 et seq.). The first three rights are available regardless of the seller's fault (by way of intent or negligence), whereas compensation generally requires demonstrating such fault. In case of legal defects, *i.e.*, third-party rights that hinder the enjoyment of the purchaser's right, the purchaser may, regardless of the seller's fault: **a)** require proper performance of the sale and purchase agreement, and possibly claim compensation for the delay in proper performance, **b)** insist on performance on the contract despite the defect and claim compensation for the existence of the defect, **c)** rescind the sale and purchase agreement, or **d)** exclusively seek compensation (GCC arts. 515-517).

Please refer to section 2.1. on share deals to see the ways in which the purchaser may ensure greater protection through the sale and purchase agreement, which apply to asset deals as well.

3. Real estate financing

3.1 Key sources of financing

Banks represent a primary source of real estate financing in Greece, as debt financing on a commercial scale is reserved for licensed credit institutions. To this end, they provide loans, project finance schemes, or sale and lease-back contracts.

Investment capital can be raised through the stock market, institutional funds, or through the issuance of bond loans. Bond loans, governed by *Law 4548/2018*, are only available to Greek *Societes Anonymes* and have proved a particularly effective instrument, both among companies specialized in real estate investments (REICs) and other corporations. The so-called category of "green bonds", issued for the financing of sustainable real estate projects, appears to be increasingly attractive across all sorts of investors.

Another practice worth mentioning is finance leasing, whereby a regulated financial lessor acquires a property from the original owner and enters into a

long-term lease with the interested investor, combined with an option to acquire ownership of the property at a pre-agreed residual value (typically nominal or even zero).

In addition to the above, funding is available for real estate investments through various national and European development programs. Indicatively, special state funds from the Greek Recovery and Resilience facility are dedicated to incentivizing and supporting certain types of sustainable "Strategic Investments," *i.e.*, large-scale projects that are deemed particularly important for the national economy and for which a unique framework exists.

3.2 Protection of creditors

A creditor's primary security when financing real estate projects are, unsurprisingly, mortgages, and prenotations of a mortgage over the debtor's properties. Other securities include:

- Pledges over the debtor's shares and bank accounts.
- Nominal pledges on debtor's goods in turnover, machinery equipment, *etc.* in accordance with *Law 2844/2000*, or floating charges.
- Personal or corporate guarantees granted by the debtor's shareholders or entities affiliated with the debtor.
- The assignment of insurance claims, rental claims, and generally all receivables generated by the property(-ies), as well as any claims arising from material contracts of the debtor (*e.g.*, a management agreement with a hotel operator).
- The assignment or establishment of pledges over claims arising from loans granted to the debtor by its shareholders.

In addition, financing agreements contain covenants, such obligations of the debtor to maintain a certain legal and financial status and inform the creditor about any changes, to comply with applicable laws

and regulations, to not dispose of or encumber the real estate property(-ies), to not dispose of receivables, to not proceed to corporate transformations and/or distributions, *etc.*

4. Real estate taxes

4.1 Transfer taxes

The transfer of real rights on real estate properties is subject to taxation. These transfer taxes are levied once and burden either the transferor or the transferee (usually, a seller or a purchaser) of said rights. They include:

- The Real Estate Transfer Tax (FMA) - *Law 1587/1950*. This tax is imposed on the purchasers of the real rights at a rate of 3% (subject to minimal increases for the benefit of local authorities) on the higher of the objective price (see 4.2.) or the price of the property agreed between the parties. Exempt from the FMA are, up to certain amounts, the natural persons who purchase properties that shall serve as their main residence. The FMA must be paid by the purchaser before the execution of the notarial deed for the transfer of the real right.

- The Value Added Tax (VAT) - *Law 2859/2000*. In place of the FMA, VAT is imposed on the transfer of real rights on new and unoccupied buildings (or parts thereof in the case of a horizontal property) whose buildings permit has been issued after January 1, 2006, at a rate of 24%. Subject to the tax are all natural and legal persons in the context of their business activities. Any subsequent transfers only incur FMA for the purchaser. It is important to point out that persons subject to VAT may opt for a deferral of their obligation to pay VAT until December 31, 2022, in which case the transferee's obligation to pay FMA applies.

- The Capital Gains Tax on Real Estate (FYA) - art. 41 of *Law 4172/2013*. Capital gains realized by natural persons upon disposal of their real rights are taxable at a rate of 15%. However, the application of this tax has been continuously deferred since its

introduction and is currently deferred until January 21, 2022. If the seller is a natural person acting in the context of their business activities or a legal person, these capital gains are, instead, subject to business income tax (at a rate of 9-44% depending on the tax bracket for the former and 22% for the latter).

4.2 Specific real estate taxes

Not only the transfer but also the mere ownership (or the holding of other real rights apart from mortgages but also, the possession) of real estate in Greece is subject to taxation. The following taxes are levied on an annual basis on the ownership of real estate properties:

- The Uniform Real Estate Property Tax (ENFIA) - *Law 4223/2013*. This tax consists of a principal tax, imposed on each real estate property located in Greece and owned by a natural or legal person and a supplementary tax, imposed on the aggregate value of the taxpayer's rights on real estate. The principal tax on buildings is calculated by multiplying the surface of the building with a so-called "basic tax," which ranges between 2 and 13 depending on the price zone where the building is located, and other coefficients regarding the building's oldness, floor, facade, *etc.* Price zones are determined by means of a decision of the Minister of Finance (the latest available one is dated June 7, 2021, and shall take effect on January 1, 2022) and these prices form the basis of the renowned system of *objective values*, which should – albeit frequently have not – converge with the current market values of the properties. Similar rules apply to vacant plots. The supplementary tax is imposed at a progressive rate for natural persons (the first EUR 250,000 being tax-free) and at a standard rate for legal persons.

- The Municipality Duty (TAP) - art. 24 of *Law 2130/1993*. This tax, also imposed on natural and legal persons alike, is collected through electricity bills in favor of Municipalities. The tax is imposed at a rate ranging between 0.25‰ and 0.35‰ on the

real estate's objective value and (if applicable) further multiplied by a rate derived from the building's oldness.

■ The Special Real Estate Tax (EFA) – art. 15 et seq. of *Law 3091/2002*. Only applicable to legal persons, this tax is calculated at 15% of the property's objective value. This extortionate tax was introduced in order to tackle the tax avoidance problem of offshore companies regarding their real estate in Greece since the ultimate beneficiaries of these properties remained secret from Greek authorities. Therefore, among other exceptions, companies with a registered seat in Greece or in another country within the EU or the EEA or a third country (provided that this country is not included in the Greek list of non-cooperative jurisdictions), which (i) have registered shares (or the equivalent in their jurisdiction), (ii) disclose their ultimate beneficial shareholders (individuals), and (iii) such individuals hold a Greek tax identification number, are exempt from paying the EFA.

5. Condominiums

5.1 Legal Framework for condominiums

A much more conventional example of a divergence from the *superficies solo cedit* principle than the surface right (see 1.1.), condominiums exist in Greece in the form of horizontal and vertical properties, which are collectively referred to as “divided properties.”

Horizontal properties are mainly governed by GCC arts. 1002 and 1117 and *Law 3741/1929*. Horizontal ownership is the special form of ownership which consists of (a) exclusive ownership of a floor or an apartment in a building and (b) a mandatory co-ownership on the land plot and the building's common areas (roof, yard, stairways, etc.). Vertical properties, in turn, were introduced by *Legislative Decree 1024/1971*, pursuant to which the aforementioned provisions on horizontal properties also apply, mutatis mutandis, to vertical properties, forming a shared legal framework for both concepts. Vertical ownership is the special form of ownership which

consists of (a) exclusive ownership of a building constructed on a land plot with two or more separate buildings and (b) mandatory co-ownership of the land plot and the common facilities thereon. The two types of divided properties may also coexist, if a vertical property is also partitioned into horizontal properties, creating a so-called “composite vertical property.”

Apart from their conceptual differences, it should be mentioned that, unlike horizontal properties, the establishment of vertical properties is not allowed in non-urban areas (*i.e.*, on land plots beyond city plans and settlement boundaries). However, certain exceptions apply; one to be considered are integrated tourist resorts (*Law 4002/2011*).

Divided properties are typically established by means of an agreement between all the co-owners of the whole property, a unilateral act of the sole owner of the property, or an agreement between the owner (or owners) of the whole property and the transferee of the divided property. All these acts must take the form of a notarial deed and be registered in public records.

5.2 Rights and duties of co-owners

The rights and duties of the owners of divided properties derive from *Law 3741/1929*, as well as the provisions of the GCC on co-ownership (arts. 1113-1117). It is also typical – albeit not mandatory – that additional rights and obligations are set by virtue of by-laws established through an agreement of all the co-owners, which must take the form of a notarial deed and be publicly registered.

In relation to the part of the property exclusively owned by them, the owners of divided properties enjoy all the powers emerging from the right of ownership. As regards the common parts of the property, each co-owner holds a right of free use and repair thereof, on condition that the rights of the other co-owners are not harmed and that the ordinary purpose that these parts are destined to serve is not altered.

In terms of duties, each co-owner shall contribute to the common expenses of the whole property depending on the value of their divided property and be obliged to take the necessary measures for the maintenance of the common areas in the event of imminent danger.

5.3 Liability of co-owners

An owner of a divided property may breach their obligations under the law or the by-laws (if in place) and thus become liable vis-a-vis the other co-owners. If the breach consists in offending the exclusive ownership of another co-owner, this co-owner is equipped with the actions *in rem* and the remedies related to possession described under 1.4., as well as claims for the compensation of any damages suffered. Similarly, if a co-owner offends the co-ownership of the rest on the common areas of the property (e.g., by arbitrarily occupying a common space), each of the other co-owners may protect their percentage of co-ownership or co-possession by exercising the same claims, and also request compensation for any personal damage. In any case, each of the other co-owners holds a primary right to request that another co-owner conforms to all their obligations under the law (e.g., that they pay their share in the common charges) or the potential by-laws (e.g., that they cease to exercise an activity which is not allowed in the building), and demand compensation if damages occur.

5.4 Rights and duties of condominium associations

Together, all the owners of divided properties on a land plot form a union of persons which is not endowed with a legal personality (GCC art. 107). The two main bodies serving this union are the General Meeting of the Co-owners and the Administrator, whose role is usually elaborated in the by-laws, as the relevant provisions of *Law 3741/1929* are frugal.

The General Meeting of the Co-owners decides on matters related to the maintenance, improvement, and use of the common parts of the property. The

majorities required for decision-making are fixed in the by-laws. These majorities, however, may not amend the by-laws (which constitute an agreement between all the co-owners) or unanimous decisions of all the co-owners.

The Administrator is typically elected by a majority at the General Meeting in accordance with the by-laws; in the absence thereof, a consensus of all co-owners is required for their appointment. The Administrator is usually responsible for the execution of the maintenance works in the common areas, the allocation of the common expenses, and the legal representation of the union of the co-owners. Finally, the law does not require the Administrator to also be a co-owner, but the by-laws may.

6. Commercial leases

6.1 Form and contents of a lease agreement

Just as for any regular lease, no particular form is required for the validity of a commercial lease; even an oral lease agreement can be binding. The usual practice, however, is for the lease contract to be concluded through signing a private document. In any case, tax legislation requires that the basic information of all real estate property leases (whether be it written or oral) be declared on the Greek electronic system for taxation services (TAXISnet), whereby they receive a registration number and a so-called “certain date.”

Commercial leases must at least define:

- the amount of the rent, which is usually paid on a monthly basis and adjusted annually (see 6.5.); and
- the commercial or professional activity which the lessee may exercise in the leased premises. The parties may also agree on an obligation of the lessee to practice said activity.

Other terms standardly found in commercial leases include:

- the duration of the lease;

- the amount of a security deposit or a bank letter of guarantee provided by the lessee;
- obligations of the lessee to keep the leased premises in good condition and repair any damages thereto, pay any utility charges and common area expenses, maintain a set of insurance policies, *etc.*;
- the exclusive responsibility of the lessee to obtain all applicable permits and approvals to exercise the agreed activity and/or perform any construction or fit-out works; and
- the reasons for which each party may terminate the lease.

As one would expect, the contents of a standard commercial lease in Greece today have been shaped, in large, by the two great socio-economic crises of the recent years: the financial crisis of 2009 and the COVID-19 pandemic. By virtue of a radical reform of the legislation on commercial leases in 2014 (see 6.2.), their minimum mandatory term was significantly lowered from 12 to three years. Surrounded by market insecurity and fluctuations, both parties to commercial leases have eagerly grasped the opportunity to conclude shorter contracts and freely re-evaluate their best interests more often. Moreover, the pandemic has not only instigated legislative interventions in the direction of mandatory reductions of rent and extensions of the leases' duration (for periods equal to the suspension of economic activity due to quarantine) but also inspired the parties to agree on more elaborate *force majeure* clauses.

In spite of the adversities, the demand for commercial leases definitely seems to be on an upward trajectory, also inducing an increase in rental prices according to the eKathimerini news portal. Finally, according to the same news outlet, after an unprecedented surge in e-commerce during the pandemic, there has been fierce competition among 3PL companies to rent logistics real estate.

6.2 Regulation of leases

Commercial leases are regulated by *Presidential Decree 34/1995*, supplemented by the general provisions of the GCC on leases (arts. 574 et seq.). Considerable amendments were introduced to said Presidential Decree by virtue of art. 13 of *Law 4242/2014*, essentially creating two different regimes for commercial leases concluded before (old leases) and after (new leases) its enactment on February 28, 2014. The following information on commercial leases is focused on the current legal framework for new leases.

Pursuant to art. 45 of *Presidential Decree 34/1995*, its protective regulations for the rights and interests of both parties are *semi-mandatory*, in the sense that a waiver of said rights upon the first conclusion of the lease agreement does not produce legal effects (unless stipulated otherwise in the decree), however, a posterior waiver is possible. This means that the parties can only conclude commercial leases that bind them with the total of semi-mandatory rights and obligations of the decree, and each of them can only later decide if they want to be deprived of one or more of these rights (or not). One example of these (drastically decreased by virtue of *Law 4242/2014*) rights is the right of the lessee, three years into the lease, to concede the use of the leased premises to a company established with a minimum participation of 35% by the lessee. However, the most prominent example regarding new leases refers to their duration under *Law 4242/2014*: this is mandatorily set at three years, even if agreed for a shorter or indefinite term, and may, of course, be agreed for longer. Commercial leases can only be dissolved during the mandatory three-year period by means of a subsequent agreement bearing a certain date. In this context, if the lessee is acknowledged to still hold a right of termination for convenience under the new regime (see 6.4.), then a certain date would also be required for a subsequent waiver of this right.

Please bear in mind that there are certain exceptions where the protective provisions of *Presidential Decree*

34/1995 do not apply, leaving the parties under the provisions of the GCC only. These exceptions include the lease of spaces within the premises of ports, airports, and train stations, within public spaces such as archaeological sites and universities, listed buildings, etc.

6.3 Registration of leases

As a general rule, no registration is required for a commercial lease, neither as a condition for their validity nor as a prerequisite for the lease to have binding power over future owners of the leased property (however, see 6.8.). The aforementioned declaration to the tax authorities (see 6.1.) serves purely taxation purposes.

6.4 Termination of leases and renewals

The ill-advised wording of art. 13§2 of *Law 4242/2014* has created a major interpretative challenge as to whether a semi-mandatory right to terminate a commercial lease for convenience (*i.e.*, without cause) is applicable to new leases. For the time being, two divergent decisions of two different courts of appeal have only deepened legal uncertainty around the matter. More specifically, in its *Decision No. 2117/2019*, the Single-Member Court of Appeal of Athens held that the lessee (and the lessee only) may, at any time, even before the completion of the mandatory three-year period of the lease, terminate the lease for convenience, the termination taking effect three months later. Conversely, the Single-Member Court of Appeal of Piraeus, in its *Decision 35/2020*, ruled that new leases are binding for both parties throughout the lease, *i.e.*, for at least three years or more, if the parties have agreed on a longer term, and none of them may terminate the lease for convenience at any time. It is thus evident that until the Supreme Civil and Criminal Court sheds light on the meaning of said provisions, the lessors in all new leases will continue to be insecure about their lessees having or not a right to end the contract at any time.

With regard to termination for cause, the reasons

granting a right to each party to terminate the lease are usually set down in a relevant clause and are mostly associated with a breach of contractual terms. In any case, the law provides that the lessor may terminate the lease if the lessee makes improper use of the property (GCC art. 594) if they fail to pay rent in time (GCC art. 597) or for a “serious cause,” that is, for any occurrence which, combined with all other circumstances, renders the continuation of the lease intolerable. However, unless the parties have explicitly agreed otherwise, it is no longer possible for lessors to invoke reconstruction of the property, owner-occupancy, or the intention to practice their own business in the leased premises as causes for termination. On the other hand, the lessee is mainly equipped with a right to terminate the lease if the leased premises have not been delivered in time, wholly or in part, in a (substantive or legal) condition that renders possible their unobstructed use as agreed (GCC art. 585).

When a commercial lease reaches its natural end upon completion of the minimum mandatory three-year period or any longer term agreed, the parties may of course agree to renew it. In absence of such a new agreement, if the lessee continues to use the leased premises and the lessor does not object thereto, it is deemed *ex lege* that the lease has been renewed under the same terms for a duration which is, now, indefinite (GCC art. 611). An indefinite duration means that any party may, at any time, terminate the lease without cause, subject to observing minimum notice periods.

6.5 Rent regulations and rent reviews

Presidential Decree 34/1995 explicitly states that the amount of the rent is freely determined by the parties, as is the percentage and frequency of its adjustment. For the case where the parties have not agreed on a rent adjustment clause, the law establishes a system for its adjustment after the second year of the lease, based on either the objective or commercial value of the leased premises and, following that, an annual readjustment based on the

shift in Consumer Price Index (CPI) statistics.

However, is it rather extraordinary for a specific rent escalation clause not to be included. It is typically agreed that the rent shall increase annually by a percentage equal to the percentage of change in CPI, often further increased by another percentage (e.g., CPI +2%). Rent review clauses, whereby the rent is brought in line with the current market value of the leased premises through real estate appraisal, are also allowed, yet not as popular (especially for shorter leases) since they result in additional costs for both parties and a mutual agreement on the new rental price is not guaranteed.

Furthermore, through its arts. 288 and 388, the GCC offers useful tools for the adjustment of rent in the case of a material change of circumstances. Especially art. 388, granting a right to request judicial intervention for the adjustment of a contract whose balance has been disrupted by unforeseen events, has been widely used in the past decade of the financial crisis in Greece.

Finally, special mandatory legislation for the payment of rent in commercial leases has been issued for periods when the country (or parts of it) was in lockdown due to the spread of COVID-19. This legislative allocation of risks mostly came under the form of a relief of commercial lessees of 40% of their rent, with simultaneous financial aids granted to lessors.

6.6. Services to be provided together with the lease

There is generally no specific service prescribed by law that the lessor of a commercial lease shall provide to the lessee. Lessors do have a general obligation under GCC arts. 575 and 592 to maintain the leased premises in a condition that is appropriate for the exercise of the agreed commercial activity and repair any damages caused by the regular use of the premises by the lessee; these obligations, however, are usually passed on the lessee through the lease agreement.

Other than the above, the parties may freely agree on any additional service to be provided by the lessor. One such example would be a lessor of a shopping mall undertaking to provide cleaning, security, and marketing services to the lessees running the shops within the mall.

6.7 Fit-out works and their regulation

As a general rule provided by the GCC (art. 591§2) any investments in the form of fit-out works resulting in the increase of the premises' commercial value shall be repaid by the lessor, but only if the lessor truly or presumably desired such fit-out works to be made and remain for the benefit of the property. For fixtures, instead of their right to repayment, the lessee may choose to remove them from the property. In any case, the lessor is entitled to require that the premises be returned to them in their original state (GCC art. 599), in which case the lessee is obliged to proceed to all necessary removals and perform any necessary works to restore such state.

However, these provisions are often derogated through special agreements in the lease contracts. It is often agreed that the lessor may choose to keep all improvements and fixtures for the benefit of the property, without a duty to repay the lessee, or alternatively choose to have the premises returned to them in their original state at the lessee's cost. In the case where improvements and fixtures are agreed to remain with the lessor, it is typical that instead of repayment, a lower rent would be agreed upon, either during the fit-out works or throughout the lease.

It should be mentioned that if the improvements and fixtures made by the lessee do remain with the lessor, the latter shall be taxed for these benefits with an income tax (an income *in kind*). Tax legislation stipulates that if the parties have agreed that the benefits shall stay with the lessor, then the annual income in kind shall be calculated by dividing the value of these benefits by the number of years of the lease. Other than that, if the benefits to be kept exceed basic fit-out works and result in the property

acquiring features that influence its objective real estate value (e.g., the construction of new, or the expansion of existing buildings), then the owner/lessor shall bear a heavier real estate tax (ENFIA, TAP – see 4.2.) burden.

6.8 Transfer of leases and leased assets

In contrast to regular leases, commercial leases seem to be *immune* to the risk of potential transfers of the leased properties to new owners without the need to observe the additional formalities set by GCC arts. 614-618 (proof of the lease through a document bearing a certain date, registration of leases exceeding nine years in duration). This is essentially the case-law of the Supreme Civil and Criminal Court, based on the argument that these provisions have been explicitly excluded from commercial leases by law. Thus, future owners are automatically (*ex lege*) bound by existing commercial leases for the remaining time of the lease. However, please note that this case law of the Supreme Court was formed under the old regime, where a minimum mandatory term of 12 years was fixed by law, and it has not been tested for new leases, whose minimum term has been set at three years.

A noteworthy exception exists for the case where the old owner is succeeded by a new one not by means of a consensual transfer, but as a result of enforcement proceedings initiated on the property of the old owner. The highest bidder in these proceedings becomes the new owner of the property and holds the right to terminate the lease at any time. The lease is subsequently dissolved within two months. Starting from January 1, 2022, the termination takes effect after six months (art. 1009 of the *Greek Code of Civil Procedure*).

As for the lessees, they are entitled to unilaterally transfer their rights and obligations deriving from a commercial lease (*i.e.*, their position as lessees) in the case of severe health issues preventing them from continuing their commercial or professional activities in the leased premises. In the case of the lessee's

death, this right may be exercised by their closest relatives (art. 12 of *Presidential Decree 34/1995*).

Other than the above cases, the transfer of a lease agreement presupposes a mutual agreement of all its old and new subjects.



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NAGY & TRÓCSÁNYI

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

Constitutional protection

The right to property is a fundamental right governed by Article XIII (1) of the *Fundamental Law of Hungary* and it is under the requirement of equality and non-discrimination. Based on the Fundamental Law of Hungary, everyone shall have the right to property. However, the ownership of property shall entail social responsibility.

Requirement of equality and the sub-rights

The rights of real estate owners are equal in Hungary. According to Section 5:13 of *Act V of 2013 on the Civil Code* ownership means the rights of an owner to lawfully exercise the full and exclusive right to control property within the framework of law and without prejudice to the rights of others. The owner shall have the right of possession, right of use, right of beneficial enjoyment, and the right to dispose of property. These are the sub-rights of the right to property. The owner also has the right to avert all forms of unlawful intrusions.

4. Some sub-rights of this full ownership may be limited by various encumbrances (e.g., restraint on alienation and encumbrance, easements, right of use for public purposes), rights of use (usufruct, land use, use rights), and by contractual relationships (usage contracts).

Restrictions allowed by the Fundamental Law

The right to property may be restricted according to the Fundamental Law. The Constitutional Court of Hungary has pointed out that the restriction of a sub-right of the right to property is unconstitutional only if it is unavoidable and if the weight of the restriction is disproportionate to the objective pursued by the restriction. It follows that the constitutional rules allow for a statutory restriction of fundamental rights provided that the restriction does not affect its essential content. However, the essence of a fundamental right may also be restricted in order to fulfill and guarantee another constitutional right.

Statutory restrictions based on the direct authorization of the Fundamental Law

One of the restrictions on property rights regulated by the Fundamental Law is *expropriation*. According to Article XIII (1) of the Fundamental Law, expropriation shall only be permitted in exceptional cases when such action is in the public interest and only in such cases and in the manner stipulated by an act under terms of full, unconditional, and immediate compensation. The detailed rules of expropriation and expropriation purposes are stipulated by *Act CXXIII of 2007 on expropriation*. The expropriation purposes serve the public interest such as national defense, exchange of territories under an interna-

tional agreement, urban development and zoning regulations, placement of educational, health, social, and law enforcement facilities, development of transport infrastructure, energy production, mining, electronic communications services, heritage protection, environmental protection, water management, sustainable forest management, and afforestation, etc.

The Fundamental Law also allows the restriction of the acquisition of property in Article P (2). The *acquisition of agricultural and forestry lands* is subject to such restriction and is regulated by *Act CXXII of 2013 on Transactions in Agricultural and Forestry Land* and *Act CCXII of 2013 on laying down certain provisions and transition rules in connection with Act CXXII of 2013*. According to *Act CXXII of 2013* as a general rule only Hungarian or EU citizens qualifying as a farmer may acquire the ownership of agricultural and forestry lands and the ownership may not be acquired by third-country (non-EU) natural persons, foreign states, and legal persons, except as provided for in that Act.

Other statutory restrictions

In addition to the above several restrictions are provided by law such as the following:

According to Section 1/A of the *Act LXXVIII of 1993 on residential and non-residential leases* the acquisition of real property (which is not agricultural or forestry land) by foreign natural and legal persons is subject to the approval of the competent government agency. The detailed rules of the governmental agency's procedure are stipulated by the *Government Decree 251/2014 (X. 2.) on the acquisition of foreign nationals of real estate other than land used for agricultural or forestry purposes*. Citizens and legal persons of the EU, the members of the Agreement on the European Economic Area and Switzerland are not deemed to be foreign persons and therefore authorization is not required.

The *Act V of 2013 on the Civil Code* provides for several property restrictions by law such as easements and right of use for public purposes. Easement may be granted to and held by the possessor of a real estate property on another person's real estate property to use such property to a specific extent for right-of-way, or for the installation of water lines or water conduits, basement, poles for aerial lines, building abutment, or for other similar purposes to the benefit of the dominant tenement or to demand the holder of the servient tenement to refrain from otherwise rightful conduct proceeding from his entitlement. Besides, if a piece of land is not connected to a suitable public road, neighbors shall tolerate the holder of a dominant tenement to pass through their land. Public easement may be imposed upon a real estate property by decision of the relevant authority in the public interest, to the benefit of agencies authorized under specific legislation.

Based on the *Act LXXVIII of 1997 on the Formation and Protection of the Built Environment* landed areas may be subject to a prohibition of modification for the length of the period required for drawing up the local building code or building prohibitions with a view to the implementation of activities related to urban development and to the prevention of any harm to nature and to the environment or with a view to the enforcement of legislation on nature preservation and environmental protection. A prohibition shall be limited to the extent and duration absolutely necessary and shall be withdrawn immediately when the reasons based on which it was issued no longer exist.

The most recent trends on the real estate market

According to publicly available real estate market assessments, the nearly four-five-year volume growth has stopped in 2020 due to the pandemic. After last year's weakening, the real estate investment market has gained strength again this year, and the outlook is also good. Although until October 2021 the recorded real estate investment turnover is 5% lower than in the same period of 2020, it is expected that it will be 20% higher than last year, experts say.

The real estate price growth slowed in 2020 due to the pandemic. The price of real estate has not decreased due to the increase of the costs and has even increased sharply in some regions (e.g., Lake Balaton, county seats, agglomeration of Budapest).

A special feature of the year 2021 is the high proportion of office market transactions within the total volume which reached 85% by October 2021, compared to 40% before the pandemic.

1.2. Registration of ownership

In Hungary, the real estate rights are registered in the Land Register. The Land Register is an authentic public register containing separately for each municipality data and information for each and every real estate property in the country, rights in real estate properties, significant facts, and the personal identification data and address of each person registered therein. The sequence of rights registered in the real estate register for real estate properties shall be determined based on the effective dates of such entries.

The keeping of the real estate register and the administration of real estate registration matters shall fall within the jurisdiction of the real estate supervisory authority.

The creation, amendment, and termination of rights (e.g., right to property, mortgage) and entitlements (e.g., pre-emption right granted by an agreement) defined by law shall be considered effective when recorded on the title deed in the Land Register. However, the *Act V of 2013 on the Civil Code* regulates the legal status of persons acquiring non-registered rights. A person

who acquiring some right that is not entered in the Land Register or the beneficiary of a fact that can be recorded in the real estate register may not enforce such right or fact against a party acting in good faith who is registered in the real estate register or who enjoys priority with respect to the application for registration before such person.

1.3. Publicity of real estate register

The Land Register is open to the public. Everyone has unlimited access to title deeds and maps in the Land Register – with the exception of personal data under special protection – they may be inspected, notes may be made, and certified copies and certificates may be requested. The title deed and map of the property can be requested at the land office or online with a separate subscription through the *Takarnet* website. Note that the online downloadable title deed does not contain the archaic data of the property which can only be accessed with personal insight. Issuance of title deeds and maps is subject to a fee.

9. The documents on file in proof of entries and records made in the Land Register as well as applications pending registration may be accessed if the requesting person is able to verify the consent of the parties in respect of whom the document contains any rights or obligations or that it is necessary for the purpose of enforcing his legitimate right or for discharging an obligation conferred by law or administrative decision.

1.4. Protection of ownership

If a right or a fact has been registered or recorded in the Land Register, lack of knowledge of such shall not constitute an excuse under any circumstances. This provision shall also apply in respect of the fact and subject of such pending procedures.

On the basis of rights registered and facts recorded in the real estate register, it is to be presumed that such registered rights and recorded facts pertain, until proven otherwise, to the rightsholder thereof. Unless proven to the contrary, rights or facts deleted from the real estate register shall be presumed not to exist.

An entry or record in the real estate register shall be deleted if the transaction on which the entry or record is based has been abolished or if the entry or record subsequently becomes inappropriate. The rightsholder's entitlement to request cancellation and correction shall not lapse in respect of any person acquiring ownership of the real estate property or a right related to the real estate property.

2. Real estate acquisition

2.1. Share deal or asset deal?

The two most common types of real estate acquisitions are asset deals and share deals. The main difference between the

two transactions is that while in the first case the properties themselves will be sold and the ownership of the properties will be acquired in the latter case the share of the company owning the property will be sold so the ownership of the property will not change.

The pros and cons of the two transactions should be carefully considered based on the type of property, the aimed goal with the property, and considerations of the tax environment. The main advantage of an asset deal is cherry-picking as the buyer can choose the assets that are favorable to him. It is worth mentioning that operational permits, certificates, similar rights, and contracts that may be linked to the real estate property are not automatically transferred as part of an asset deal. In contrast, in the case of a share deal, one of the most important advantages is the legal continuity of the business which could also be a disadvantage due to hidden liabilities. Finally, the time factor may also be relevant. While a share deal can last from six months to years depending on the complexity of the transaction the asset deal could usually be performed in a relatively short period of time.

Due to the publicly available assessments, in 2020 the proportion of asset deals rose to 74%. The high ratio of asset deals can be explained by the favorable tax environment.

In addition, the above real estate acquisitions may take place in other ways, such as in-kind contribution, business transfer, beneficiary transformation, beneficiary share exchange.

2.2. Share deal

The share deal usually starts with planning and research for the targeted company. The private limited liability company and the private limited company are the main corporate types commonly targeted with share deals in Hungary. Private limited-liability companies (*korlatolt felelossagu tarsasag* or *keft.*) are business associations founded with an initial capital consisting of capital contributions of a predetermined amount, in the case of which the liability of members to the company extends only to the provision of their initial contributions, and to other contributions set out in the memorandum of association. Limited companies (*reszvenytarsasag*) are business associations founded with a share capital consisting of shares of a predetermined number and nominal value, where the obligation of shareholders to the limited company extends to the provision of funds covering the nominal value or the accounting par value of shares. Private limited company's shares are not listed on any stock exchange.

Most of the hidden liabilities and risks arising from legal continuity (see 2.1.) can handle by due diligence procedures and proper insurance. With that in mind, the second part of the share deal is usually the legal, tax, or other specific due diligence. The management of the risks identified by the due

diligence may be defined by the parties as conditions of their agreement.

A share deal is a twofold transaction – on the one hand, it is contractual and, on the other hand, it is a corporate relationship. That is why the two main pieces of documentation required the sale and purchase agreement and corporate documentation.

Share deal agreements usually provide for an extensive list of warranties on *e.g.*, the assets of the company, the liabilities of the company, the status of the employees, contracts, IP rights, permits, and tax matters.

The signing of the sale and purchase agreement and the closing is often separated from each other. The closing of a transaction is the point at which the buyer pays the purchase price and therefore becomes the owner of the company in return. There are several possible reasons for this, *e.g.* the share deal could be subject to the authorization of the Hungarian Competition Authority, Magyar Nemzeti Bank, or the Ministry of Innovation and Technology, *etc.* In other cases, the separation is required for the acquirer's bank to secure financing for the transaction.

The registration of the corporate changes follows the signing of the sale and purchase agreement and the closing.

The main acts regarding share deals are currently the *Hungarian Civil Code* and *Act V of 2006 on public company information, company registration and winding-up proceedings*.

The transaction may incur a corporate tax liability. Share deals are generally exempt from VAT. Transfer duty may arise only if the legal entity in question qualifies as a company with domestic real estate.

Costs are incurred in the process, such as the fees of the contributors (*e.g.* attorney's fees, tax advisory fees), bank charges, and procedural and administrative costs.

2.3. Asset deal

As hidden encumbrances and unregistered rights may also arise in the case of asset deal due diligence is also recommended before the transaction.

Compared to a share deal (see 2.2.) an asset deal has one important documentation which is the asset sale-purchase agreement and related documents. If the continuity of the business is also a goal, it is recommended that the parties agree on the separate transfer of the requested relationships. Exceptions are certain legal relationships for which the law provides the legal succession (such as a lease).

The main acts regarding asset deals are currently the Hungarian Civil Code, Act CXLI of 1997 on Real Estate Registration, and the *Decree 109/1990 of the Ministry of Agriculture and Rural Development* implementing *Act CXLI of 1997*.

The transaction may incur corporate tax and VAT liability.

Transfer duty obligation arises in all cases except in the case of exemption from duty.

Costs are incurred in the process, such as the fees of the contributors (e.g. attorney's fees, tax advisory fees), bank charges, and procedural and administrative costs.

2.4. Disposal process

According to the *Hungarian Civil Code*, if the subject of the sales contract is a real estate property, it shall be executed in writing. Besides, contracts for the transfer of ownership of agricultural or forestry land shall be executed in a paper-based document bearing safety features. A contract in Hungary shall only be accepted for real estate registration purposes if the date and location of the issue are clearly indicated.

Any transaction for the creation, modification, or termination of ownership may be registered on the basis of notarial instruments or private documents countersigned by an attorney or bar association legal counsel. The countersigned document shall be equipped with continuous page numbers in the case of documents consisting of several pages. The initials of the parties shall be affixed to each of the pages of the contract and it shall be signed by the parties, and also shall be signed by the countersigning attorney beside indication of his name, bar association identification number, the fact of countersigning, as well as the place and date of countersigning. Real estate registration procedures in Hungary are still paper-based, so electronic signatures cannot be used. It is expected to change as of 2023 due to the digitization of the procedure.

In some cases (e.g., the case of signing abroad or signing with a power of attorney) additional formalities are required by law.

The attorney's fee is the subject of a free agreement in Hungary, usually proportional to the market value of the property. The notarial fees are regulated by law.

Lawyers and notaries are obliged to compensate for the damage caused by them in accordance with the rules of the *Hungarian Civil Code* and specific regulations. Compensation for damage caused by legal/notarial practice and the cover for payment of the damages for pain and suffering payable due to privacy violation shall be provided by liability insurance.

The transfer of real estate may be subject to several consents and approvals. The acquisition of real property (which is not agricultural or forestry land) by foreign natural and legal persons is subject to the approval of the competent government agency (see 1.1.). The acquisition of agricultural and forestry lands is highly regulated, and the acquisition of such land is subject to approval in most cases. In such cases, the contracts shall be approved by the agricultural administration body.

Please note that the proceeding of agricultural and forestry land sales regulation contains a number of additional formalities, content supplies, approvals, and pre-emptive rights.

In other cases, approvals may be required from the guardian

authority, Hungarian Competition Authority, and other authorities.

The real estate transfer contract shall include the number of the energy certificate. In addition, the *Act CXLI of 1997 on Real Estate Registration* and the *Decree 109/1990 of the Ministry of Agriculture and Rural Development* implementing *Act CXLI of 1997* lists a number of mandatory attachments. An exhaustive list of these would go beyond the scope of this guide.

2.5. Registration of change of ownership

Proceedings for the registration and/or recording of legally significant facts concerning a real estate property shall commence upon the request of the client. Registration shall be requested by the party who will become the right-holder in consequence and may also be requested by a party whose registered right is affected thereby.

The application shall be submitted on a standard form decreed by the competent minister. Applications shall be submitted on paper to the competent real estate supervisory authority according to the location of the real estate property in question. The general administrative service fee is currently HUF 6,600/property. There are separate fees for mortgages and the establishment of condominiums.

In proceedings related to the acquisition of ownership legal representation is mandatory.

Applications shall be submitted to the real estate supervisory authority within 30 days of the date of the contract (legal statement) serving as a basis for registration. If third-party consent or regulatory approval, not including land title office permits, is required for the aforementioned contract (legal statement) to take effect, such application shall be submitted to the real estate supervisory authority within 30 days of the effective date of such consent or approval.

The *Act of CXLI of 1997 on Real Estate Registration* and *Decree 109/1990 of the Ministry of Agriculture and Rural Development* implementing *Act CXLI of 1997* sets out the mandatory annexes to the application.

The administrative time is 60 days. Where an application involves more than 30 independent properties or more than 30 parties, a decision on the merits of the application shall be adopted within 90 days.

The client may request to process his application with priority. The fee for this procedure is currently HUF 10,000. In the case of priority processing, the administrative time limit shall be half of the administrative time limit set according to the general rules.

On June 15, 2021, the Hungarian Parliament adopted the new real estate registration act (under no. C of 2021) which will en-

ter into force on February 1, 2023. Please note that the above summary is based on the current regulation.

2.6. Risks to be considered

There could be statutory pre-emptive rights on the property that are not required to be registered in the Land Register. Such pre-emption right may exist on the following legal title: in the case of state or municipally owned real estates, agricultural and forestry lands, monumental properties, archaeological, natural, or other protected properties.

If the owner enters into a contract in breach of his obligations stemming from a right of preemption, such contract shall be inoperative in respect of the holder of the right of preemption. The holder of the right of preemption shall be able to enforce his claims arising from such nullity within 30 days after gaining knowledge thereof, on condition that he makes a statement of acceptance at the same time, and verifies his ability to perform. The holder of the right of preemption shall not be able to enforce his claims arising from nullity after three years following the date of conclusion of the contract. If the holder of the right of preemption exercises their right, the buyer may claim the paid purchase price and his damage from the seller.

Unregistered rights and facts may also arise (see 1.2.).

8. Besides the above, it is worth mentioning that the seller could encumber the property or sell it to another buyer between the signing of the contract and its submission to the land office. In such a case it is decisive who is the first that submits the first application for registration. If another buyer (or the holder of the burden) is the first, the buyer may withdraw from the contract and claim damages.

3. Real estate financing

3.1. Key sources of financing

In Hungary, for-profit lending can only be performed with a financial permit. Credit institutions grant credits and loans in HUF, EUR, or in CHF in general. The determination of a debtor's creditworthiness consists of three components in general: the status of the debtor, the scope of collaterals, and the purpose of the credit. The debtor is ranked on the basis of scoring, which shows the probability that the debtor will repay on time, based in each case on the business's past financial results. If the debtor's operations are found to be reliable and continuous the bank may classify the business as lower risk, making it more likely to obtain credit. Unless the debtor's creditworthiness is limited by an exclusionary factor, collateral may be assessed. If the collateral is also adequate, the purpose of the credit shall be examined.

10. The main act regarding real estate financing is currently *Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises* which stipulates the legal framework of crediting. However, the detailed rules of the credit relationship will be regulated by

the credit agreement, collateral agreements, standard service agreements, and notices.

3.2. Protection of creditors

The most common type of collateral is a non-possessory charge which shall be registered in the Land Registry. According to the publicly available banking practice the encumbered property shall be free of litigation, encumbrances, and claims and is located in Hungary. In addition to a non-possessory charge, a guarantee, movable (inventory) pledge, security or cash collateral, security deposit, and parent company guarantee may also arise. In the event that a debtor is unable to provide real estate or other collateral, it can only obtain a credit based on its financial performance, which typically incurs higher interest rates, as the credit institution assumes greater risk in the absence of adequate collateral.

4. Real estate taxes

4.1. Transfer taxes

Transfer duty

Acquisition of real estate property is normally subject to real estate transfer duty (in Hungarian: *vagyonszerzési illeték*). The obligation to pay the duty also applies to certain transactions involving rights such as the acquisition of shares in a company with holdings in real estate properties located in Hungary. The duty shall be paid by the buyer based on the order for payment issued by the competent tax authority.

The general rate of duty is 4% of the market value of each real estate property acquired up to HUF 1 billion, plus 2% of the portion of the market value above HUF 1 billion, not to exceed HUF 200 million per property.

There are exceptions under the general rate. Please find some examples in the following.

In case of an acquisition by a licensed real estate fund the rate of duty is 2% of the market value of the real estate property without any deduction of encumbrances.

If a business entity acquiring a real estate property and provides a statement undertaking to resell the property to a person other than its affiliated company the rate of duty is 3% of the market value without any deduction of encumbrances, or 2% if the business entity agrees that the contract concluded for the onward sale of the real estate property will be considered executed upon the acquisition of ownership by the buyer (or in case of leasing agreement: the lessee). (A "business entity" means an economic operator that is licensed to engage in the selling of real estate properties and whose net sales revenue for the previous tax year originate from such activities up to at least 50% or more, as well as any authorized provider

of financial leasing services. Resale means the sale of the real estate property within two years or to transfer the real estate property by way of transfer of title under lease contract at the end of the term.)

In the case of a regulated real estate investment company, the rate of duty is 2% if the buyer provides a statement to declare his commitment to comply with the requirement of registration in the register of regulated real estate investment companies by the last day of the tax year when the duty is payable.

The rate of duty can be extremely high as 90% in case of the transfer of real estate property that has been rezoned as incorporated land after January 31, 2020, and the transfer of a share of a company with holdings in real estate that has been rezoned as incorporated land. In this case, the duty shall be paid by the seller.

A number of tax reductions and exemptions are provided by law. Such exemption is the acquisition of ownership of a landed property suitable for the construction of a residential building if the party acquiring the property builds a residential building on such real estate property within four years and the net floor space of the residential suites contained in the building is at least 10% of the permissible building space fixed in the general zoning plan.

VAT

In the case of the sale and purchase of real estate, the examination of the VAT liability is inevitable. In some cases, the transaction is subject to VAT with direct taxation. In other cases, the acquisition is exempted from property tax. However, in the case of a VAT-free transaction, the seller may turn the transaction taxable with reverse taxation.

Other taxes

Real estate investing requires conscious tax planning. In addition to the above, other tax liabilities, such as corporate tax, or personal income tax could be incurred.

4.2. Specific real estate taxes

The representative body of a local government may introduce local taxes within the local government's area of jurisdiction. Such local taxes are building tax and property tax.

The subjects of the building tax are the structures located in the area of jurisdiction of a local government, dwelling places, buildings, and building sections not used for housing purposes. The basis for tax depending upon the decision of the local government could be the net floor space of the building expressed in square meters or the adjusted market value of the building. The maximum rate of the building tax per annum is currently 1,100 HUF/square meter if the tax base is the net floor space of the building and 3.6% of the adjusted market price if the tax base is the adjusted market value of the build-

ing.

Lands situated in the jurisdiction of a municipal government may be subject to property tax. The basis for property tax depending upon the decision of the local government could be the actual area of the land parcel expressed in square meters or the adjusted market value of the parcel. The maximum rate of tax per annum is currently HUF 200/square meter if the tax base is the actual area of the land parcel or 3% of the adjusted market value, if the tax base is the adjusted market value.

5. Condominiums

5.1. Legal framework for condominiums

According to the *Hungarian Civil Code*, a condominium may be established when in a building at least two independent units for residential or non-residential purposes or at least one independent unit for residential and one for non-residential purposes defined in the by-laws and technically separated pass into the private ownership of condominium owners, whereas the building sections, building equipment, areas, and dwelling units, which are not owned individually, shall pass into the joint ownership of condominium owners.

The main advantage of establishing a condominium is that the co-owners have private ownership (*e.g.*, flats) in addition to the joint ownership, and the use of the jointly owned parts and the related costs are regulated in the by-laws, the Organizational-Operational Regulations, and the House Rules of the condominium. The supreme decision-making body of the association of condominium owners is the general meeting by which the co-owners could issue the material decisions regarding the operation. The condominium owners association may acquire rights and undertake commitments under the common name it bears in respect of the maintenance and renovation of the building and attending to matters related to common property. The association may sue and be sued and shall exercise ownership rights related to common property and bear the burdens associated with such. The managing agent shall be vested with powers to appear before court. Based on the above condominiums could operate as a more organized form of simple joint ownership.

The rules for establishing a condominium, the basic rules for its operation, and the rights and obligations of the co-owner are regulated by the *Act CXXXIII of 2003 on Condominiums*.

The registration procedure is regulated by the *Act of CXLI of 1997 on Real Estate Registration* and *Decree 109/1990 of the Ministry of Agriculture and Rural Development* implementing *Act CXLI of 1997*.

A condominium may be established for a building to be constructed in such a manner that the owner or owners of the land proclaim their intention to establish a condominium

executed in by-laws, and such establishment is noted on the title deed of the land in the Land Register. Once the building is constructed, an application may be submitted for having the condominium entered into the Land Register. Areas of common ownership of a condominium building shall be recorded on the primary title page, while the units of private ownership shall be recorded on the auxiliary title page(s) of the condominium building.

5.2. Rights and duties of co-owners

Owners of individual units have the right of possession, right of use, right to yields, and the right to dispose over their individual unit and they are entitled to possess and use the common property on condition that it does not injure the related rights and lawful interests of the other owners.

All owners may participate and vote in the general meetings.

Owners of an individual unit have the right to carry out construction work in their unit without the consent of the general meeting, if the work does not entail any amendment of the by-laws and if the joint property is not affected.

Each of the co-owners may freely dispose of his private ownership. The ownership share in the common elements and the related private may not be transferred separately. In case of sale and purchase of private ownership the other co-owners have the right of preemption or the right of first refusal for lease or tenancy before third persons.

5.3. Liability of co-owners

Owners of individual units may not exercise their rights in such a manner as to injure the rights and lawful interests of the other co-owners.

The owners of individual units shall (i) properly maintain their unit under their individual ownership, (ii) admit and allow for representatives of the association to enter his individual unit for the purposes of inspecting, maintaining, and renovating building sections or equipment under common ownership, and to carry out emergency repairs, (iii) take the necessary measures so that any person authorized to use the unit observe the obligations stipulated by law, and (iv) inform the managing agent or the head of the governing body of any construction work planned in his unit.

The costs associated with the maintenance and renovation of building sections which are common property, as well as the expenses which exceed the scope of normal operations usually shall be borne by the owners of individual units in accordance with their ownership share.

5.4. Rights and duties of condominium associations

Condominium associations are not known under Hungarian law.

6. Commercial leases

6.1. Form and contents of a lease agreement

The legal framework of lease agreements in Hungary currently consists of the *Hungarian Civil Code* and *Act LXXVIII of 1993 on residential and non-residential leases*.

According to *Act LXXVIII of 1993*, lease agreements shall be concluded in writing, however, it is not obligatory for the contract to be countersigned or notarized.

In case of the lease of a non-newly built building, an energy certificate shall be prepared by the seller. When a building or stand-alone unit is offered for rent the advertisement shall indicate the energy quality rating of the building if a certificate is available. The lease agreement shall include the code of the certificate and a statement from the lessee that he has received that certificate.

The key clauses of a standard lease agreement usually are the following: (i) the subject of the lease, especially if not the entire property is leased, (ii) the handover of the leased property, (iii) the amount of the rental fee, the terms of payment, (iv) the rights and obligations of the parties, especially the use, renovation and sub-lease of the leased property, and (v) the cases and conditions for terminating the relationship.

According to publicly available real estate market assessments in 2020, the tenant demand of the Budapest office market decreased by 45% on an annual basis. The growth of the rental fees slowed in 2020 but did not stop due to the further rise of the construction costs. Assessments show encouraging signs for the second quarter of 2021.

6.2. Regulation of leases

Hungarian regulation differs according to the type of the properties as there are residential lease agreements and non-residential (commercial) lease agreements. There are special rules for lease agreements if the lessor is a local government or the Hungarian State.

Regarding lease agreements, parties enjoy contractual freedom as the parties may deviate from the statutory rules and may supplement them. Note that if certain conditions are not regulated by the parties the general rules of the *Hungarian Civil Code* and *Act LXXVIII of 1993* shall be applicable.

6.3. Registration of leases

Commercial leases are not registered by any public register.

6.4. Termination of leases and renewals

In the following, we summarize the statutory legal reasons for termination and their main conditions stipulated by the *Hun-*

garian Civil Code and Act LXXVIII of 1993. Please note that as we mentioned above (see 6.2.) the parties may deviate from the statutory rules of the lease and may supplement them. This is also applicable for the reasons and conditions of termination.

Without cause

Leases can be concluded for a definite or an indefinite period of time.

In the case of a non-residential lease, either party is entitled to terminate an indefinite agreement without cause in the case of a monthly lease, at the latest by the 15th day of the month to take effect at the end of that month and in the case of longer lease terms, at the latest by the thirtieth day preceding the end of the lease term. In the case of a residential lease, either party is entitled to terminate an indefinite agreement at the latest by the 15th day of the month, to take effect at the end of the next month.

A definite-term lease may be terminated by either party by giving notice at the latest by the 15th day of the month, to take effect at the end of the month if termination can be exercised within the statutory period of notice.

With cause

In the event of failure to make lease payments charged to the lessee, the lessor is entitled to terminate the lease, provided that the lessor has issued a written demand for remittance of overdue payments within a reasonable period of time and notified the lessee of the consequences, and the lessee fails to remit payment within this period. In the case of a residential lease, there are specific rules of that notice.

If the lessee fails to terminate inappropriate or non-contractual use of the leased property despite being asked to do so by the lessor, the lessor is entitled to terminate the agreement.

In the case of residential leases, the lessor has the right to terminate the lease agreement, upon prior warning sent to the lessee, if the lessee or any other occupant of the premises is engaged in any flagrant misconduct against the neighbors or if he uses the leased property contrary to its purpose. Prior warning is not required if the impugned conduct is grave enough.

In the scope of the contractual freedom, the parties may agree that their definite-term contract will be extended or become indefinite in the absence of a notice of termination by the parties. The parties may also specify a termination clause, upon the occurrence of which the contract is terminated.

6.5. Rent regulations and rent reviews

The lessee shall be entitled to use the thing for its intended purpose and in accordance with the contract and shall be entitled to sub-lease or assign the use of the leased thing to a third party subject to the lessor's permission.

6.6. Services to be provided together with the lease

The law does not require mandatory services, however, in many cases the lessor operates the leased property and the lessee pays an operating fee in addition to the rental fee. As part of the operation, the parties often agree on regular maintenance, safe-keeping and cleaning tasks, *etc.*

6.7. Fit-out works and their regulation

As we mentioned above (see 6.2.) the parties may deviate from the statutory rules of the lease and may supplement them. *Act LXXVIII of 1993* expressly entrusts the regulation of the renovation of the leased property to the agreement of the parties.

Unless otherwise agreed by the parties minor expenses required for the maintenance of the thing shall be borne by the lessee. other expenses, as well as public duties in connection with the thing, shall be borne by the lessor.

The lessee is entitled to renovate the leased property with the permission of the lessor. If the lessee renovated the property without permission the lessee shall be obliged to restore the original state at the lessor's request.

6.8. Transfer of leases and leased assets

If the lessor transfers ownership of the leased thing following the conclusion of the lease agreement, the rights and obligations of the owner arising out of or in connection with the lease agreement shall accrue to the new owner. The lessor and the new owner shall be jointly and severally liable toward the lessee for the lessor's obligations arising out of or in connection with the lease agreement. The new owner of the leased thing shall be entitled to terminate the fixed-term lease if he was misled by the lessee regarding the existence of a lease or material lease conditions.

Either party has the right to transfer its rights and obligations to a party entering into the contract according to the general rules of the *Hungarian Civil Code*. Besides based on *Act LXXVIII of 1993* the acquisition of real property the lessee may transfer its rights and obligations, exchange or sub-lease the leased property with the consent of the lessor.



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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

The property rights are fundamental rights of a person (also a legal person), the protection of which is provided for in Article 105 of the *Constitution*. Everyone has the right to own and protect legally obtained property, including real estate. The protection of the real estate title and rights of usage is provided by both Civil Law and Criminal Law. The protection of real estate rights is exercised in civil proceedings in court.

Property rights may be restricted only in accordance with the law. Expropriation of property for public purposes is allowed only in exceptional cases on the basis of a specific law and in return for fair compensation. Latvia is a member of the Council of Europe and ensures the level of protection of property rights set by the European Convention on Human Rights.

The procedure and criteria for obtaining residential or commercial property is the same for Latvian and EU residents. Special restrictions are applicable to the acquisition of land plots and agricultural land, which applies to anyone who decides to purchase this type of property.

Land plots may be acquired by citizens of EU member states, as well as citizens of European Economic Area (EEA) countries and member states of the Organization for Economic Co-operation and Development (OECD) and registered capital companies that are taxpayers in the Republic of Latvia in accordance with regulatory enactments.

Foreign nationals, non-EU EEA OECD citizens have to deal with additional restrictions, a ban on acquiring land in the state border zone, as well as in certain areas, and requirements for obtaining a residence permit.

In recent years, especially in 2021, Latvia has been experiencing demand and growth in the real estate market. Increasing activity is being experienced in all sectors of the real estate market, including residential property, land property, commercial property such as office, warehouse facilities, and shopping centers.

1.2. Registration of ownership

Real estate rights and also the securities and restrictions of rights are registered in Land Register. Registration in the Land Register is provided by the district (city) court of which the immovable property to which the registration of rights applies has been entered. The Land Register contains information about registered ownership, encumbrances mortgages, servitudes, pre-emptive rights, and other rights and obligations pertaining to real estate. If the rights acquired on the basis of the transaction, for example, the right of pledge, are not registered

in the Land Register, this endangers the stability of such rights.

In general, buildings and the land on which they are located are considered to be uniform property. Buildings and the land on which they are located may belong to different persons only in exceptional cases. Both buildings and the land are registered in the Land Register in the same folio except if the buildings constitute an independent property. Also, in practice, there may be situations where the building is not registered in the Land Register.

Before carrying out a real estate transaction, it is recommended to look into the status of the real estate as well as encumbrances, the allowed use of the land plot stated by the municipality, territorial planning, other agreements relating to the real estate, *etc.*

1.3. Publicity of real estate register

Land Register entries are available to everyone and the entries thereof are publicly reliable. Information on the Land Register entries and the rights attached to real estate can be obtained using public databases for a fee. However, it is possible to get acquainted with or receive the documents available in the Land Register only by proving that there is a legally justified interest in receiving such information.

1.4. Protection of ownership

Only a person who has been registered in the Land Register is recognized to be the owner of real estate. A real estate owner may bring an ownership action against any person who is illegally retaining his or her property; the objective thereof is a declaration of ownership rights and in connection therewith, granting of possession. The real estate owner may also claim damages if proven damage has occurred as a result of an unlawful violation of property rights.

Until registration in the Land Register, acquirers of real estate do not have any rights against third persons, they may not use any of the priority rights associated with ownership, and they must recognize as valid any acts pertaining to such immovable property by the person who is indicated, pursuant to the Land Register, as the owner of such real estate. However, the acquirer of real estate has the right not only to request compensation for all acts done in bad faith by the earlier owner pertaining to the real estate, but also to request that the latter take all the appropriate steps to register the passing of the real estate in the Land Register.

2. Real estate acquisition

2.1. Share deal or asset deal?

Share deals and asset deals – both are possible. Real estate

owned by a legal entity can be acquired by acquiring a specific real estate or by acquiring shares of a private limited liability company or stocks of a public limited liability company. Acquisitions of real estate are registered in the Land Register, but acquisitions of shares are registered in the register of legal entity participants and documents must be submitted to the Register of Enterprises.

Real estate can be divided between investors into imaginary parts, thus each of them becomes the owner only of the respective part. However, the ownership of real estate acquired for entrepreneurship purposes is usually registered as a company's asset whose share capital is distributed among investors. Such a solution is also more appropriate from the point of view of legal liability, accounting, and tax planning.

2.2. Share deal

A share deal generally means that an investor or a group of investors acquire by purchasing shares of a share capital of the target company. Transactions of share capital are concluded in writing between shareholders and investors. A shareholder of a limited liability company may freely alienate its shares in the company, determining the price of shares. However, the other shareholders of the company have the pre-emptive rights to acquire the transferred shares unless this right is excluded by the company's articles of association. Ownership of capital shares is registered in the company's shareholders register's compartment which is submitted to the Register of Enterprises together with an application for registering changes of the true beneficiary.

Before carrying the acquisition of capital shares it is recommended to carry out a due diligence of the target company, it involves matters about all the assets, liabilities, and rights of the entity, including creditors and debtors, as well as employees and the board.

The fees for registration of changes in the Register of Enterprises are not significant and usually from EUR 20 to EUR 120, depending on the number of the changes and the term for the changes to be registered. A capital share transfer transaction may constitute a capital gain to the seller, which is usually subject to capital gains tax in the amount of 20%, however, for the seller company the amount of tax payable is usually lower than if the seller is an individual person because operating expenses can be taken into account. The amount of the fee for investing real estate in the share capital of the capital company is 1% of the amount of the real estate investment to be invested in the share capital of the capital company.

2.3. Asset deal

In the case of purchasing the assets, the buyer usually acquires a defined part of the selling company, which can be described

as a business, or the buyer usually acquires a defined real estate. Asset transfer agreements are not required to be in any specific form. However, for transactions of real estate as an asset or when real estate is transferred as part of an acquisition of assets, the transfer agreement must be in writing and an application to the Land Register on the transfer of the real estate must be signed before a notary public.

The amount of the state fee for the registration of real estate property rights in the Land Register for each real estate is from 1.5% to 2% of the value of the real estate – the amount of the purchase price of real estate or the cadastral value, whichever is higher. An insignificant registry fee is payable. Selling real estate may constitute capital gain for the seller, which is usually subject to capital gains tax in the amount of 20%.

2.4. Disposal process

See point 2.3.

2.5. Registration of change of ownership

Agreements of ownership transaction of real estate must be in writing and an application to the Land Register on the transfer of the real estate must be signed before a notary public. The amount of the state fee for the registration of real estate property rights in the Land Register for each real estate is from 1.5% to 2% of the value of the real estate – the amount of the purchase price of real estate or the cadastral value, whichever is higher. An insignificant registry fee is payable. Requests for corroboration are examined not longer than within 10 days.

2.6. Risks to be considered

The local municipality has a pre-emptive right if real estate is disposed of in the administrative territory of the municipality. Pre-emption rights do not apply to real estate such as production facilities, real estate from which the presumed part is alienated and which remains in the joint ownership of the seller and the buyer, real estate sold at a voluntary or forced auction, apartment property. The pre-emptive right may be used if specific real estate is necessary for the municipality to perform its functions specified in the law. Therefore in a real estate purchase transaction, it is necessary to receive a municipal refusal. The municipality must notify the seller of its decision to exercise or not to exercise its right within 20 days of receiving the request.

A claim for cancellation of a contract or an action in court may be based on defects in the will to conclude the contract, such as excusable substantial mistake in facts, false, illegal enforcement, as well as significant damage, a delay which has resulted in a reasonable loss of interest to the buyer, and other situations. It should be noted that these cases are relatively rare

in practice.

3. Real estate financing

3.1. Key sources of financing

The purchase of real estate is usually financed from investors' own funds, investment funds, or in the form of loans received from institutional lenders as credit institutions or private loans.

3.2. Protection of creditors

For the protection of the real estate acquirer's creditors, the right of pledge and a prohibition note in favor of the creditor are entered in the Land Register, thus becoming a secured creditor. The entire property and real estate of the company may also be pledged in favor of the creditor. The secured creditor has the right to pursue the recovery in an undisputed manner by selling the real estate at auction.

4. Real estate taxes

4.1. Transfer taxes

The amount of the state fee for the registration of real estate property rights in the Land Register for each real estate is from 1.5% to 2% of the value of the real estate – the amount of the purchase price of real estate or the cadastral value, whichever is higher. An insignificant registry fee is payable. Selling real estate may constitute capital gain for the seller, which is usually subject to capital gains tax in the amount of 20%.

4.2. Specific real estate taxes

The amount of annual real estate tax depends on the type of real estate and its use. The exact amount is determined in the regulations of the real estate local municipality and is from 0.2 to 3% per annum of the cadastral value of the respective real estate.

Generally, the real estate tax rate for land and buildings owned by a company is 1.5% for land plots and 1.5% for a building per annum of the cadastral value of the respective real estate. The real estate tax shall be paid quarterly – no later than March 31, May 15, August 15, and November 15 – in the amount of one quarter of the amount of the tax year.

5. Condominiums

5.1. Legal framework for condominiums

Ownership rights which belong to several persons in respect of one and the same undivided real estate, that is not divided in actuality but as imaginary parts – so that only the substance of the rights is divided – are joint ownership rights. Divided real estate property rights can be created by acquiring the

imaginary part or by dividing the property into imaginary parts between two or more co-owners. The co-owners can conclude an agreement of shared use of the real estate, thus each can use a separate part of common real estate.

A similar regulation as for the understanding of joint ownership is in relation to apartment properties. In the case of apartment ownership, if the apartment building is divided into separate apartment properties, the investor becomes the owner of the apartment property, as well as acquires the ownership parts of the building, and land if it belongs to the building co-owners (the condition of the shared building and land ownership is possible).

5.2. Rights and duties of co-owners

The consent of all the co-owners is required in order to act with the object of the joint ownership. All the co-owners, proportionately to the share of each of them, are entitled to receive all the benefits provided by the real estate and in the same proportion also bear the losses arising from it. The fruits of the real estate devolve to the individual co-owners, in proportion to each of their shares in it.

In the case of apartment property, the owner enjoys the full real estate ownership rights over the separate apartment property but is bound by liabilities set in the *Apartment Property Law* and the Joint Property Management Agreement.

5.3. Liability of co-owners

All the co-owners, proportionately to the share of each of them bear the losses arising from real estate. If real estate is divided between two or more owners into imaginary parts, each of them has a pre-emptive right.

5.4. Rights and duties of condominium associations

6. Commercial leases

6.1. Form and contents of a lease agreement

Latvian law distinguishes between two situations: commercial lease and rental of residential premises (apartments). There are significant differences between these regulations, as the terms of a commercial lease are largely a matter for the parties themselves, whereas in the case of a rental, the most of relevant terms are determined by the *Residential Premises Rental Law*.

As the lease market for new Class A office space is relatively thin, pre-leases are becoming common as this allows for the lessee in the construction stage to set the specific requirements for lease object and fix potential lease payments, allowing the developer to more effectively plan the construction costs and potential income.

6.2. Regulation of leases

The law does not require the written form for a commercial lease contract, however, leases are usually concluded in writing, as the lease contract is the most important document for determining the rights and obligations of the lessor and the lessee.

The commercial lease agreement is regulated by Civil Law and allows the parties to broadly agree on the lease arrangements, including termination of the lease agreement, vacating the premises, compensations, handling of the lessee's investment in the improvement of the premises.

On the other hand, the rental of residential premises to individuals is regulated by a *Law on Apartment Rent* that provides for the protection of tenant rights. In 2021, a new regulation came into force, providing effective remedies for the renter in cases of breach of the rental agreement and non-payment of rent.

6.3. Registration of leases

Registration of the commercial lease in the Land Register is not mandatory, however, when the lessor disposes of the leased object, the acquirer of real estate must comply with the lease only if it is recorded in the Land Register.

6.4. Termination of leases and renewals

In accordance with the understanding of the autonomy of private parties, the parties must agree in the lease agreement on situations in which the lease is automatically extended and in which the parties have the right to unilaterally withdraw from the lease.

The law provides for a number of cases in which the parties have the right to unilaterally withdraw from the lease agreement, and these are mainly related to situations where there are significant breaches of the lease obligations, such as the object of the lease being lost or payment is delayed. In the case of a real estate title transfer, lease agreements if they are not registered in the Land Register may be terminated.

6.5. Rent regulations and rent reviews

The rental of residential premises to individuals is regulated by a *Law on Apartment Rent* that provides for the protection of tenant rights. In 2021, a new regulation came into force, providing effective remedies for the renter in cases of breach of the rental agreement and non-payment of rent.

6.6. Services to be provided together with the lease

The lessor of real estate shall transfer the real estate (for instance commercial premises) to the lessee and the lessor shall

ensure that the real estate can be used and fruits (benefits) can be gathered from it by the lessee. The condition of the leased object and additional services provided by the lessor, as well as payment for these services, are stipulated in the contract.

6.7. Fit-out works and their regulation

The lessee's expenses for the improvement of the premises may be considered as the lessee's operating expenses. In the case of a sellout of real estate, the seller pays capital gains tax. Improvements to the premises may increase the capital gain from which the amount of tax is calculated.

6.8. Transfer of leases and leased assets

Registration of the commercial lease in the Land Register is not mandatory, however, when the lessor disposes of the leased object, the acquirer of real estate must comply with the lease only if it is recorded in the Land Register.



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1. Real estate ownership

1.1. Legal framework

Key sources of law

Real estate ownership (and ownership in general) is a constitutional value - Article 23 (1) of the *Constitution of the Republic of Lithuania* explicitly states that property is inviolable. However, ownership rights are not absolute – they can be limited in certain exceptional cases of public interest or if it is necessary for a democratic society.

When it comes to the management, use, and disposal of real estate, the *Civil Code of the Republic of Lithuania* sets forth the main principles and regulates almost every common transaction – sale-purchase agreements, lease, mortgage, *etc.* The *Civil Code* has been amended many times since it entered into force, although most amendments are related to tort and law on obligations. Laws regarding ownership and property rights are rarely changed (the biggest change was the reform of the mortgage institute back in 2012).

The *Law on Land of the Republic of Lithuania* also sets forth some specific rules regarding the acquisition of certain land, its disposal, and other special rules. Some other legal acts might be also applicable depending on the situation. These special legal acts, in comparison, are amended quite often.

Equality of real estate owners

If a person has ownership rights to a real estate object, they have more rights than a person that has the right of *usus fructus* or servitude. Most secondary *in rem* rights (mortgage, servitude, *usus fructus*, *emphyteusis*, and so on) contain restrictions for the rights of owners. For example, a person with *usus fructus* rights cannot sell the property, although they have the right to receive income the property generates; if a person has a right to use the property of another person under the grounds of servitude, they cannot receive income from that property, sell it, *etc.*

Restrictions of real estate acquisition for foreigners

The Constitution of Lithuania and its implementing acts set some limits for the acquisition of land for foreigners. The purchase of land in Lithuania is only allowed to a person or a legal entity coming from a country that is a member of at least one of the following alliances or organizations: the European Union, the North Atlantic Treaty Organization, the Agreement on the European Economic Area, the Organization for Economic Co-operation and Development.

Expropriation of ownership. Trends in the market.

Expropriation, in cases when a property is taken away without any compensation, or the compensation does not meet market values, is not legal in Lithuania. The law sets exceptional cases

allowing to take the property for public needs, but the owners must be duly compensated. Proper compensation is evaluated individually in every case, although the state can take the property before paying the compensation and the owner can only claim the compensation amount. The procedure is strictly regulated and procedural infringements from the state can result in the reversal of the acquisition or the ability for the owners to claim extra damages.

Most of the time land is taken for public needs when projects of state importance face private property as an obstacle (*e.g.* certain under or on-ground electricity grid lines need to be constructed, although part of the gridline falls into private property). Despite that, there are situations when land is taken for public use in the context of lower-priority projects, although in such cases public institutions are forced to provide clear and justified motives for such acquisition.

This year Lithuanian residential real estate market experienced a high rise – the prices of residential and logistic real estate have increased significantly since 2020. Some residential property in Lithuania is bought for investment purposes to lease it out lately. Investors claim that they lack available land plots for development, as owners are not willing to sell their land expecting the prices to get even higher.

1.2. Registration of ownership

All real estate objects located in Lithuania must be registered in the Real Property Register and Cadastre of Lithuania. The Register is owned by the Government and the state enterprise “*Registru centras*” manages it. This register contains information such as cadastral data and maps, ownership and its history, property restrictions, *etc.* A separate public register is established for seizure acts and mortgages.

All real estate ownership rights, encumbrances must be registered in the public register for it to have legal effect against other third persons. For example, the law provides that the servitude shall take legal effect only from the moment of its registration, except the cases when the servitude is established by law.

1.3. Publicity of real estate register

Data in public registers is public but subject to some fees.

1.4. Protection of ownership

If certain legal facts are registered, they are presumed true and legally binding to all third persons. If, for example, a person disposes of a real estate object without having the right to do so (unauthorized disposal), such contract is null and void in general. In such cases the owner may claim the court to declare such a contract void and apply restitution – the parties are returned to the status prior to the conclusion of such an illegal contract (the sold property is returned to its rightful

owner. If the property is gone, a monetary equivalent is paid). In the case of illegal use of private property, its owner can file a *vindicatio* or *negatoria* claim. In both cases, the owner can claim the damages that they suffered.

2. Real estate acquisition

2.1. Share deal or asset deal?

Both share deals and asset deals are common in practice when it comes to real estate transactions. Asset deals are more common when a legal entity sells its property purely as real assets. Share deals are more common when a project related to the real estate in question is the target of the transaction. For example, in the case a land plot with a project under development is “on the table” (with signed design, construction agreements, *etc.*), in such a case a share deal is much more common in practice. Share deals allow the parties of the transaction to transfer the property without the need to change the design, construction agreements, agreements on infrastructure matters with a municipality, *etc.* When choosing between the share deal and asset deal tax aspects should be also taken into account.

2.2. Share deal

.In the case of an acquisition of shares, it is always advised to conduct a *due diligence* procedure to minimize the risks of the buyer.

Most of the times risks are related to unknown debts of the company in which shares are purchased, certain claims to the seller, possible seizure of such shares or other property of the company due to debts, *etc.* Some risks might be addressed by certain warranties of the seller (for example a certain amount of liquidated damages in the case the creditors of the seller file an *actio Pauliana* claim, *etc.*), however, for example, the responsibility to check public registers data lies on the buyer.

In the case shares are sold by a natural person, it is always suggested to double-check whether he/she is married, and, if that is the case, include the other spouse as a party of the contract, as if the shares were acquired during the marriage, as a rule, they are an object of joint ownership of spouses (if no wedding contract is in place).

Fees:

- Legal or other consultations fees (lawyers, audit and tax consultants, *etc.*);
- Notary fees for the transaction (0,33 % - 0,41 % from the transaction sum, but no more than EUR 5,000) (in some cases the share transaction can be concluded without the involvement of the notary).

Taxes:

- Personal income tax (if the shares are sold by a natural person).

- Profit tax (if the shares are sold by a legal entity).

2.3. Asset deal

Real estate deals in Lithuania are subject to notarial approval. In many cases, the parties enter into a preliminary agreement and the buyer pays an advance payment before going to the notary. If a complex real estate deal is in question the buyer is advised to conduct legal *due diligence*. In some cases, technical or even environmental *due diligence* might be required.

Fees:

- Legal fees (if any)
- Notary fees for the transaction (0,33 % - 0,41 % from the transaction sum, but no more than EUR 5,000).
- Registration of ownership in the state registers (in most cases not significant).

Taxes:

- Personal income tax of 15% (in the case real estate is sold by a natural person) with some exceptions, for example, personal income tax is not applicable if the property is kept in the ownership of the private person for not less than 10 years;
- Profit tax (if the real estate is sold by a legal entity).

2.4. Disposal process

Real estate sale-purchase or exchange agreements in Lithuania must be approved by a notary. A mandatory element of a real estate transaction is to specify the ability for the new owner to be able to reach (and use) his new acquired object (*i.e.* house or other structures), for example – lease of land, servitudes. If this is not discussed in a real estate ownership transfer agreement, such a transaction is also null.

The notary’s responsibility is to check the seller’s ownership rights and parties’ or their authorized representatives’ identities. Notary fees for the transaction range from 0,33 % to 0,41 % from the transaction sum, but no more than EUR 5,000.

If the sold property is an object of joint ownership, the co-owners have a preemptive right to acquire the part of the property under sale. The law sets some preemptive rights in the case agricultural or forest land is under sale, for example, the owners of the neighboring land plots have the preemptive right.

2.5. Registration of change of ownership

All changes of ownership must be registered in the Real Property Register. Once a notary approves a real estate transaction, the notary provides all the necessary information to the register himself. Registration fees as a rule are not significant.

2.6. Risks to be considered

All co-owners have pre-emptive rights to purchase the part of

the object that is being sold. If encumbrances to a real estate object are not registered in the register, they have no legal effect on the new owner (the buyer).

In the case of defects of the acquired real estate, the buyer can claim the seller or, if the seller was not the entity/person that built the real estate object, claim the builder as well (the obligation for the builder to ensure the quality of the real estate object during its warranty period is an *erga omnes* type of obligation, disregarding who the owner of the object is). If no progress is made (the defects are not fixed or remedies are not paid out), claiming the courts for damages is the only option.

3. Real estate financing

3.1. Key sources of financing

Most of the time the acquisition of real estate is financed by banks.

The development of real estate is financed not only by banks but various private and investment funds, private and cooperate creditors. Emissions of securities, such as bonds, for real estate projects financing become more and more popular in Lithuania as well.

3.2. Protection of creditors

Most of the time investors use mortgages of the land and build property to secure their credits. Group companies' and other persons' guarantees might be also used, and as a result, liquidated damages can be claimed not only to the real estate developer but also to its guarantors.

4. Real estate taxes

4.1. Transfer taxes

As mentioned before, for real estate disposal a personal income tax (in most cases – 15%) is applied. Keep in mind that certain exceptions when one does not get taxed apply.

Company income tax might be also applicable depending on individual situations.

4.2. Specific real estate taxes

Real Estate tax applies, and it is paid every year depending on rules set by local municipalities. It ranges from 0,5% to 3% from the value of the real estate object.

5. Condominiums

5.1. Legal framework for condominiums

Condominiums do exist in the Lithuanian jurisdiction. Most of the related questions are regulated by the *Civil Code of the Republic of Lithuania* and a special legal act – *Law on Associations of Owners of Multi-Apartment Residential Houses and Other Purpose Buildings of the Republic of Lithuania*.

5.2. Rights and duties of co-owners

The law provides that a specific legal entity – a residential home association, can be established to manage condominiums. The entity as a subject of legal relations is not liable for its obligations – all liabilities lie with its members and, in some cases, the owners of the flats even if they are not members of the association.

The co-owners and members of the association have the right to participate in the meetings and vote regarding the use, management, and disposal of the commonly used areas of the building.

Their duty is to pay for certain services that either the association decided on their own discretion (this duty applies only to the members of the association) or if it's mandatory for the upkeep of the building (such duty applies to all co-owners of the building despite the fact if they are not members of the association).

Co-owners also have the right to decline membership in the association, although that does not relieve them from obligations, which are related to the mandatory maintenance of the commonly used areas of the building.

5.3. Liability of co-owners

All liabilities (for payment of certain services, maintenance of the building, and so on) lie with its members. The owners of the flats that are not part of the association are only obliged to pay for mandatory upkeep services of the building (mandatory restoration of commonly used areas, the building itself, and so on). If the restoration or improvement was not mandatory, such a co-owner that is not a member of the association and does not take part in the meetings of the association does not have an obligation to pay.

5.4. Rights and duties of condominium associations

The associations are specific legal entities that only represent the co-owners, although contractual relations and other legal relations are bound with the co-owners.

6. Commercial leases

6.1. Form and contents of a lease agreement

Most real estate lease agreements are concluded in writing. The key clauses of leases relate to rent and other payments, lease term, obligations of the parties, insurance, unilateral termination (exit opportunities), remedy for the improvements made to the leased object, *etc.*

6.2. Regulation of leases

General rules applicable for all lease agreements are stated in the *Civil Code of Lithuania*. The main rule is that the leased real estate object must be identified in the contract (its location,

unique number, cadastral number, specific premises or area of the object that is leased, *etc.*).

However, the lease of land has specific rules. A land lease contract shall not provide for:

- 1) authorization issued to the lessee to represent the owner of the land and dispose of the land and any other immovable property situated on the land;
- 2) the right of a lessee of land to change the main purpose of land.

Land lease also has exceptions regarding unilateral termination of the contract (if that question is not specified in the land lease agreement) – if the lessee does not pay for three months in a row, the lessor can terminate the contract unilaterally. Otherwise, unilateral termination of the contract is allowed only when the other contracting party breaches its clauses materially.

6.3. Registration of leases

It is not mandatory to register a commercial lease, however, if a written lease agreement is registered in the Real Property Register, new owners of the property must comply with the obligations set in the lease agreement.

6.4. Termination of leases and renewals

A commercial lease agreement can be terminated in the order specified in the lease agreement itself. In most cases, the parties agree that a commercial lease agreement can be terminated if the other party materially breaches the agreement.

The law regulates specific lease agreements, such as land lease, providing that unilateral termination is valid if the tenant of the land fails to pay the rent for the period of three months. No such requirement is set in, for example, for the lease of commercial premises.

Automatic lease renewals are applicable if it is not specified in a contract otherwise. A contract of lease shall be considered to become concluded for an indefinite period where the lessee continues to use the property for more than ten days after the expiry of the period of the contract without any opposition from the lessor.

The law sets the preemptive right to renew the lease agreement for the tenant who duly performs its obligations.

6.5. Rent regulations and rent reviews

If not specified otherwise in a contract, the tenant pays for utilities and other services (cold and hot water, electric energy, gas, heating, and public utilities (disposal of garbage, lifts, cleaning of premises of communal use and territory, *etc.*)) and such payments are normally excluded from the rent.

The parties are free to agree on the rules for rent reviews. As

a rule, commercial lease agreements specify that rent is subject to annual indexation due to the change of consumer price index.

6.6. Services to be provided together with the lease

The lessee has the right to demand from the lessor to ensure that services needed to use the leased premises according to their purpose are provided. Although the contracting parties can agree otherwise (*e.g.* that the lessee undertakes to ensure the flow of electricity or water at its own risk).

6.7. Fit-out works and their regulation

If a tenant is a natural person who takes on lease the property to carry out his activities, the fit-out costs and the paid rent are deemed as activity costs that can be deducted from the taxed income. Similarly, a company can include the costs of fit-out into its accounting. However, the tax implications of individual situations can vary a lot.

6.8. Transfer of leases and leased assets

Generally, there are no restrictions regarding the transfer of leased assets (despite the obligation to inform the tenant of the upcoming transfer). However, the parties are free to agree on specific rules, for example, that the tenant has the preemptive right to acquire the property. The law sets the preemptive right for the tenant of agricultural land.

As mentioned before, if the lease agreement is registered in the public register, the new owner becomes a party of the lease contract – all rights and obligations arising from the registered lease agreement are assigned along with the ownership transfer to the new owner.



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1. Real estate ownership

1.1. Legal framework

Property rights, being one of the fundamental institutions of democratic societies, gained widespread recognition and protection in Moldova upon its independence in 1991. To this day, ownership of movables and immovables, namely rights over real and personal property, is viewed as a pillar principle of prosperity and economic growth, being safeguarded by constitutional norms, private law, and international treaties. The state undertakes the responsibility to protect and guarantee the lawful exercise of property rights held by national citizens as well as foreign investors.

The legal framework that establishes the scope and features of rights *in rem* is contained mainly in the *Moldovan Civil Code*, as well as other special laws (acts) that address, in more detail, aspects of proprietorship and other rights associated with real estate, as well as matters related thereto.

Despite the fact that Moldova is a relatively young state, its foundational legal norms relating to the protection of private property rights have enjoyed an increased degree of stability and are considered inviolable, except for cases of public interest (*utility*).

The last considerable amendment to domestic laws, which affected not only the legal framework of real rights but also other spheres of private law, was in 2019, which addressed several *non liquet* of Moldovan legislation. The legislative amendment introduced novel concepts such as *sale-purchase agreements of real estate under construction and time-sharing ownership*, operating changes on existing concepts, to bring them closer to international and European standards. The instituted developments advanced the predictability and accuracy of Moldovan law, furthering the rule of law and facilitating foreign investment. Noteworthy herein is the fact that Moldovan law does allow foreign entities to acquire real estate in the Republic of Moldova, apart from lands with agricultural purposes and those from the forest reserve.

As a matter of introduction into the technicalities of real rights as they are regulated in Moldova, it shall be mentioned that two categories of such rights are recognized under domestic legislation, namely the right of ownership and limited real rights. The latter include usufruct, servitude (easement), habitation, superficies (which – as a recent trend, is widely used for construction projects where the developer and the landowner are different persons engaged in a joint venture), securities over real estate, and other rights. An owner of real estate is entitled to possess, use or refrain from using and to dispose of their property.

It is possible for several people to acquire ownership over immovable goods, the law distinguishing two types of joint ownership: joint tenancy (co-ownership), where the property is held in “undivided shares” and the owners do not own separate parts of the real estate. Alternatively, several individuals or legal persons may acquire property within a tenancy in common, where each of the proprietors will have a definite share or part in the real estate. More practical details on the manner of acquisition, registration, and disposal of real estate will be broken down in the subsequent paragraphs.

1.2. Registration of ownership

As a general rule, real rights over real estate are constituted, transmitted, encumbered with other real rights only by registration in the Real Estate Register, based on a deed (legal act/document) or the factual circumstances that substantiate such registration under the law. The register entries will consist of information pertaining to the real estate, ownership, and other real rights pertaining thereto, the deeds that confirm the existence thereof, as well as transactions with the immovable property and other legal bases for the emergence of the various real rights.

Ownership, being the central real right, is also acquired on the basis of a registration procedure in the Real Estate Register, which is a part of the state information system known as the Cadastre. The territorial cadastral body creates and maintains the Cadastre within its territorial range established by the Public Services Agency. The Register is held in electronic format and the entries therein are confirmed by the electronic signature of the Registrar, as well as the handwritten signature on the deed.

Before the registration can be carried out, cadastral works must be executed after the elaboration of the cadastral plan of the land plot and after drawing up the cadastral file of the real estate in question.

Compulsory registration extends to:

- lands;
- buildings and other fixed constructions and parts thereof; and
- isolated rooms, including the units in the condominium, with the corresponding share of the property or the superficies right over the land and over the common parts of the construction.

Additionally, may be subject to registration real rights encumbering real estate, such as servitudes (easements), usufructs, securities (mortgages), as well as rights of administration, of economic management, rights of use over certain public lands.

Leases of residential property, leases of agricultural land,

and rights of use that exceed a certain period are mandatorily subject to a different record-keeping measure known as notation. This procedure does not constitute one's right over the real estate in question but merely enforces against third parties any existing legal relationship pertaining to immovable goods. More details on the registration of leases can be found in section 6.3.

1.3. Publicity of real estate register

The Real Estate Register and entries therein bear a public nature, and any person is entitled, upon written or electronic request to receive information from the Registrar pertaining to all registered rights over any real estate.

The documents based on which the registration was carried out are also for the most part inaccessible, except for state bodies, authorized entities, and the right holders themselves, which ensures the confidentiality of personal data included in the Register.

1.4. Protection of ownership

The protection of private property against intruders and unwelcome dwellers is equally, a crucial component of one's exclusive ownership right, being ensured and preserved in any democratic society. Moldovan law recognized two kinds of legal actions against individuals and entities that violate one's fundamental right to own and possess real estate, namely a vindication or recovery action (*rei vindicatio*) and a negatory action (*actio negatoria*), which comes into play when the ownership right is interfered with in other ways than dispossession and seizure of property.

A vindicatory action is available to the property owner against persons that exercise de facto possession over the real estate unless the possessor is entitled to hold property on the basis of a legitimate limited real right, leasehold, or other legal relationship established between the latter and the owner. However, the vindication of property might render unavailable against someone whose rights to own or possess the goods are based on a constitutive registration – such as one in the Real Estate Register.

The other remedy available to landowners is a negatory action, which aims to protect the owner from any arbitrary interferences or violations of their ownership right in manners that did not entail deprivation of possession.

2. Real estate Acquisition

2.1 Share deal or asset deal?

Considering that in the past years Moldova has become a hub for foreign investment and market entries of abroad corpora-

tions, both share and assets deals are available and widely concluded between local legal entities as well as overseas investors.

The preferred transaction by buyers and sellers depends on the activities which the new owners intend to carry out with the freshly acquired asset. Investors who reckon on taking over a company's ongoing business activities, which requires several assets, including the real estate where operations unfold, tend to opt for share deals. A recent example of a share deal transaction is an acquisition of a Moldovan factory by a foreign group of companies being involved in the same field of business activities. Despite the fact that the purchaser implemented its own branding, production standards, a share deal was a far more convenient acquisition attributable to the existing production facilities and employees involved in the manufacturing operations.

Asset deals, especially involving the purchase of real estate, where the legal entity owning the real estate is not part of the deal, are also common among investing companies, especially when foreign entities enter the Moldovan market aiming to introduce unique business models or new commercial standards that are not met by local enterprises. Asset deals are also more attractive when business continuity is outside the scope of a given transaction. Such deals are still widespread within the Moldovan jurisdiction and continue to be a trend, due to a relative scarcity of competitors and market giants which may be taken over by foreign corporations. Any of the aforementioned acquisition methods will have different legal, administrative, and tax implications, which will be addressed below.

2.2 Share deal

Share deals involve a sale-purchase transaction where the buyer acquires the shares of a private company, consequently purchasing a separate legal entity, along with the latter's concluded agreements, liabilities, and assets.

The legal and regulatory framework of the transfer of company shares will vary depending on the form of organization of the legal entity.

Undertakings are usually organized under two kinds of business structures: legal liability companies and joint-stock companies. The functioning as well the sale of each is governed by two different pieces of legislation: *Law on Joint Stock Companies No. 1134/1997* and *Law on Limited Liability Companies No. 135/2007*.

Furthermore, share sales are subject to regulation in light of the capital market laws and resolutions of the National Financial Market Commission, as well as competition legislation and internal documents of the company.

In terms of fees and taxation, the final cost of acquiring real estate together with an independent legal entity will vary depending on the company's form of organization.

The sale of stock of a joint stock company can be carried out on the Moldovan Stock Exchange or outside of it, the latter being known as over-the-counter transactions. The Moldovan Stock exchange charges a commission of circa 0.35% of the transaction value for direct transactions carried on its platform. If the sale is executed outside the stock exchange, the registration of the operation will be performed by the Single Central Depository of Securities, which will charge a commission equal to MDL plus 0.3% of the transaction value, but no more than MDL 3,000 (approximately EUR 150) from each party to the transaction.

The main risks in concluding a share deal would be, of course, any unexpected costs or liabilities which might arise after the transaction is completed. When purchasing a company as a going concern, certain risks might be overlooked, therefore the due diligence in such transactions must cover a lot more areas of interest for the buyer, becoming a more tedious and costly procedure. The issues detected during a due diligence exercise might be mitigated by means of warranties and indemnities, however undisclosed or omitted matters are a risk the buyer is bound to undertake in both share or assets deals. Nevertheless, share deals might be particularly advantageous for foreign investors as they are able to acquire an operational business, along with its permissive acts, facilities, employment and customer agreements, which minimizes the administrative inconveniences and burdensome regulatory hassle.

2.3 Asset deal

As the name suggests, asset deals entail the purchase of separate assets of a company, which are transferred from one legal entity to another. In this scenario, the title of the goods is passed onto the new owner, while the seller company's ownership structure is not affected by the transaction. The attractiveness of such a deal is the buyer's ability to select individual assets and liabilities which are subject to the sale, which might minimize the unexpected risks popping up after the transaction is concluded. In terms of real estate, the sale and purchase of land, with or without constructions attached thereto, is a widespread practice, especially when large foreign corporations implement longstanding standards on the Moldovan market, which are novel to local competitors unable to meet investors' requirements when being sold as going concerns.

Asset deals pertaining to immovable property generally take the form of sale purchase agreements (SPA), governed by the *Moldovan Civil Code*. An essential condition for the validity of a SPA or an agreement encumbering the real estate with limited real rights is notarial authentication, while the right of owner-

ship is duly transmitted upon the registration of the agreement in the Real Estate Register. Under the *Moldovan Civil Code*, the costs pertaining to the drafting, notarization, and registration of the ownership rights acquired on the basis of a SPA are usually borne by the buyer. The expenses of a due diligence that targets the examining of any risks and liabilities attached to the transfer of land will also fall onto the buyer.

If any constructions are integrated or affixed to the land conveyed following the transaction, the buyer will be required to pay a flat tax levied on the building in question, as constructions under the Moldovan tax regime are considered a product of labor, and thus, subject of value-added tax. Generally, assets deal will result in a higher tax burden for buyers, however, both movable and immovable goods will be subject to amortization and tax deductions. Any details on the taxation of real estate will be discussed in section 4.

Within a sale of land, the main risks relate to the legality of the ownership title, the validity of the deed (legal document) transferring the title, and the latent defects of the acquired real estate. Most exposures of the buyer to possible risks may be mitigated by the SPA negotiated and signed by the parties.

The title of the seller as well as of the previous owners is usually verified and confirmed in the course of the due diligence process, which in asset deals is more meticulous in relation to the chain of titles to the land and targets various facets of real estate transactions. The conveyance of the title is conditioned upon the validity of the agreement and the completion of the registration procedure. In order to ensure the legitimacy of this transaction phase, the involvement of the notary in the sale of real estate is compulsory, who is in charge of the authentication of the SPA and frequently carries out the provisional registration. As a safeguard measure, buyers tend to transfer the first installment of the consideration only after the registration of the new owner's title in the Real Estate Register.

Another risk the buyer undertakes when acquiring immovable goods, whether through an asset or share deal, are the latent defects and undetected encumbrances of the land itself. Environmental legal and regulatory non-conformity, underground structures, or faulty constructions are all issues that might emerge when least expected. The coping mechanism in similar situations lies in the agreement concluded with the seller.

It is common practice for acquirers to transfer liability for risks alike onto the sellers by means of contractual clauses. For instance, any disputes arising from pre-existing environmental non-compliance will be dealt with by the seller, in terms of litigation costs and legal representation.

Another mitigation instrument is the inclusion of a retention clause in the SPA, which allows the buyer to retain a part of

the transaction price for several years in case of irregularities come up in a proximate time after the transaction. Penalty and resolution clauses are likewise normally included in the contract as mitigating measures.

2.4 Disposal process

As previously mentioned, the legality of the disposal process is conditioned upon rigorous prerequisites in connection to the form of the sale-purchase agreement, which demands the involvement of a notary and record-keeper.

Apart from the sale contract, the seller will submit to the notary the ownership deed, the excerpt from the Real Estate Register which lists the surface, destination, burdening rights pertaining to the real estate, the certificate confirming the value of the immovable, and the identification documents.

The notary's role consists in an extensive verification of the compliance of the document transferring the right of ownership with legal provisions, the conformity of contractual clauses, the empowerments of the parties' representatives, the will of the parties, and the existence of any encumbrances burdening the real estate. Moreover, the notary informs the parties about the consequences and legal effects of the conclusion of the transaction.

The fees paid to the notary range from 0.1%-1.3% of the transaction, depending on its value, and the state fee equals 0.5% of the value of the agreements.

The notary is liable for damages caused when performing a deed, carrying out notarial activities, or disclosing a professional secret and must repair the damage of the injured party.

2.5 Registration of change of ownership

The registration of the ownership right in the Real Estate Register is a mandatory condition for the validity of the transferred title. One of the parties to the sale-purchase agreement is required to submit a request for registration to the Public Services Agency, along with all the documents proving the legitimate nature of the transaction. The Registrar is responsible for examining the received documents and issuing a decision for approving or refusing the registration request. The process generally lasts 10 days from the date of submission of the documents, however, the term may be extended up to 80 days if the Registrar encounters issues.

2.6 Risks to be considered

The sale of real estate, within a share or asset deal, might be imperiled by preemptive rights held by third parties in relation to the land or the shares which are the object of the transaction.

Other than contractual preemptive rights contained in agreements between the seller and third parties, Moldovan law provides for situations where the right of preemption or of the first refusal is binding for the parties. Such cases include cases of sale of shares in jointly owned real estate, the other owner having the right to purchase, in the first place, the share put up for sale. A similar situation applies in leases of agricultural land or goods, where the lessor that intends to sell the leased assets is required initially to make a sale offer for the goods to the lessee.

The right of first refusal is also granted to the landowner in relation to buildings constructed under a superficies agreement, under which one party becomes the owner of an erected construction on the land owned by the other party.

Furthermore, in respect to the sale of shares, existing shareholders holding voting rights in a company, benefit from a preemptive right of purchase of shares offered for sale in a public offering.

Although from practice unlikely, purchasers of real estate may discover certain defects of the acquired land and seek remedies in relation to them. There are two kinds of latent defects covered by Moldovan legislation, namely legal and material defects.

The former refers to the existence of any third-party rights burdening the immovable property. However, due to the statutory obligation of any real right holders to register encumbrances into public registers, the risk of the emergence of legal defects in connection with the land is generally remote.

Material defects transpire when the buyer comes to understand that the transferred land does not correspond either to the description provided by the seller or to the special purpose based on which the buyer committed to the transaction.

The availability of any remedies to the buyer that discovered the defects is conditioned upon the actual knowledge of the acquirer about the issues, as well as their duty to be aware of the possibility of the defects before the transaction is concluded. In this assessment, the professional diligence and background of the buyer will be taken into consideration for determining whether they "ought to have known" about any problematic aspects that may crop up.

In order to redress the effects of an unsuccessful transaction, the buyer may resort to several remedies under Moldovan contractual legislation. The most straightforward option is the termination of the contract, in line with the fundamental principle of *restitutio ad integrum*, which would take the form of the repayment of the consideration and the de-registration of the new real estate owner from the Register. If the parties

wish to maintain the contract, the buyer can benefit from other countermeasures, in particular, to decrease the pecuniary obligation in relation to the acquired good, to seek damages for the substandard performance, or to take advantage of any other available legal remedies.

3. Real estate financing

3.1. Key sources of financing

Real estate investments require vast initial capital outlay which can be obtained from various sources. In Moldova, frequently, the investors borrow from banks or other lending companies a substantial portion of the real estate value, and the debt is being secured by a mortgage which creates a lien against the property.

In the first instance, the most common source of real estate financing is mortgage lending. This conventional financing is usually performed through the commercial banks of Moldova which secure purchased property in exchange for the granted amount. The security in the real estate loan can also be another immovable good or the purchased property itself. In the latter case, the real estate loan is also called a mortgage loan. Thus, the financial institution that grants the loan is, actually, the owner of the property until the full repayment of the loaned amount. In terms of validity, the mortgage is registered in the Real Estate Register.

Another potential source of financing in Moldova is real estate leasing. The leasing represents a contractual financing operation, through which the lessee can use the immovable property in exchange for the promise to pay the related rent and, consequently, to purchase the property. Leasing is a form of lending in which the amount required for the acquisition of the property is obtained during its exploitation or use, and its repayment is made in the form of leasing rates and, finally, the residual value.

Nowadays, real estate leasing is not the most widely used financing instrument in Moldova, especially, by legal entities. The difficulties of this system lie in, firstly, the tax implications, the acquisition price of the real estate being subject to amortization in a long period of time. Therefore, most of the leasing rate is borne from the net profit of the legal entity, deductible being the interest, the monthly amortization rate, to which insurance costs and related taxes are added.

3.2. Protection of creditors

Typically, a lender, lending to an investor intending to acquire or develop real estate, will insist on the full package of security instruments available under the Moldovan law, such as a mortgage on immovable property, pledge over movable

property, personal guarantees. The most common and effective types of security for real estate financing are the pledge on the movable property and the pledge over real estate, also known as mortgage.

The latter is created by means of a mortgage agreement, the conclusion of which requires the involvement of a notary in order to be considered validly executed, and the agreements itself must expressly list the mortgage assets, the parties, the nature of the obligation secured by the mortgage and the market value and the replacement value of the mortgaged property. Furthermore, in order to be enforceable against third parties and to rank higher than security interests of other creditors, mortgages shall be registered in the Real Estate Register.

A pledge over movable assets may also be set up in order to gain financing for real estate acquisition, provided the value of the movable is able to cover the real estate value. Unlike a real estate mortgage, a pledge agreement does not need to be notarized in order to be valid. A pledge may be granted over any type of movable asset belonging to the debtor, such as any tangible or intangible property, present or future, determined individually or generically, any ownership right, including the right of claim of the pledge debtor towards the pledge creditor, funds in national currency or foreign currency in bank accounts. Enforceability of the pledge against third parties is secured by registration in the Register of Real Movable Securities.

4. Real estate taxes

4.1. Transfer taxes

A real estate transfer tax, also called a “deed transfer tax,” is a one-time state tax or fee imposed upon the transfer of real property. Usually, this is an *ad valorem* tax, meaning the cost is based on the price of the property transferred to the new owner. Transfer taxes are applied to a change of ownership for any type of property that requires a title.

In Moldova, a special taxation regime is applicable in connection with real estate disposal. So, following the transaction of alienation of real estate property, the seller shall pay an income tax, also known as a tax on capital increase. The amount of capital increase is equal to the difference between the amount received (income obtained) following the alienation of the immovable property and its value base.

Under Moldovan tax law, individuals benefit from exemptions from income tax obtained from the alienation of the property. Therefore, individuals are exempt from paying tax on their main residence, under conditions that the property is held for at least three years and it has been the residence of the seller for three years before the sale.

The value added tax (VAT) is another form of taxation on the territory of Moldova in relation to the transfer of ownership of the property through its sale, exchange, or other means of disposal. Its value constitutes 20% of the taxable value of the real estate transaction by the legal entities or individuals who carry out entrepreneurial activities if, within 12 consecutive months, they executed transactions of ownership transfer in an amount exceeding MDL 1.2 million (approximately EUR 60,000).

It shall be mentioned that the VAT is paid only on the real estate not intended for residential purposes, more precisely, commercial real estates, garages, industrial buildings, *etc.*

In addition to state taxes, there are also fees incurred at the stage of concluding the transfer of ownership, such as notary and state fees. The costs of the authentication are calculated based on the value of the transaction, as follows:

For individuals, the notary's fee is equal to 0,1% of the value of the transaction.

In the case of legal entities, the notary's fees are determined according to expressly provided legal coefficients, the minimum being 0.1% from the value of the transaction (if it exceeds MDL 1,000,001).

The minimum amount of payment for the authentication of evaluable transactions with real estate is MDL 120 (approximately EUR 6).

At the same time, for the transfer of ownership over immovables a state fee of 0,5% of the transaction price is incurred, which cannot be lower than the value indicated in the Real Estate Register.

Another fee to be paid for the transfer of ownership is the fee for operating changes in the Real Estate Register. The cost of the service depends on the number of days in which the document is issued and the location of the real property, ranging between MDL 260 (approximately EUR 13) and MDL1300 (approximately EUR 65).

4.2. Specific real estate taxes

Each individual or legal entity who owns real property is required to pay a tax on real estate. Its amount is annually established by the local public administration and is calculated from the estimated value of the property.

Under Moldovan law, resident and non-resident individuals and legal entities who own any real estate are obliged to pay the real estate tax.

For residential real estate (apartments, houses, lands related

thereto, garages, and the lands thereof), the tax rates range between 0.05% and 0.4% of the taxable base of the real estate. For real estate with a destination other than residential, the tax rate represents 0.3% of the tax base of real estate.

Generally, in the case of real estate owned by legal entities and individuals registered as entrepreneurs, the real estate tax is paid no later than September 25 of the current year. By exemption, if the real estate is acquired after September 25 of the fiscal period, the real estate tax is paid no later than March 25 of the fiscal period following the management period.

In the case of real estate of individuals who do not carry out entrepreneurial activity existing and/or acquired until and including May 31 of the current fiscal year, the real estate tax is paid by the subjects of taxation no later than June 30 of this year.

If the real estate of individuals who do not carry out entrepreneurial activities that exists and/or was acquired after and including May 31 of the current fiscal year, the real estate tax is paid by the taxable subjects no later than March 25 of the year following accounting year.

5. Condominiums

5.1. Legal framework for condominiums

The legal framework of condominiums was introduced into the Moldovan law to ensure an efficient mechanism of co-proprietorship among apartment owners, in the view of ensuring proper maintenance of common spaces, accountability of co-owners for damage caused to shared areas, and protecting potential acquirers of property within a condominium from a double sale of the household.

From a legal perspective, a condominium consists of **1)** the shares of the ownership right over the land and buildings, and **2)** the common units and parts used by all dwellers. The common property in the condominium cannot be alienated separately from the ownership right over the dwellings (spaces) in the condominium.

5.2. Rights and duties of co-owners

Co-owners have the right to possess, use and dispose of the dwellings within a condominium in the manner regulated by law, namely to rent or lease the individual property, improve or modify it in any way, as long as the structural integrity of the building or other dwellings is not affected by the adjustments. In case of spaces not intended for dwelling purposes, the owners are entitled to carry out entrepreneurial activities within the commercial spaces, provided the business is carried out in compliance with all safety, sanitary regulations and is not infringing the rights and liberties of the other owners. Re-

strictions may be imposed on the use of residential spaces for purposes other than dwelling only if such limitations relate to safeguarding the rights and interests of other co-owners.

The duties of co-owners include the obligation to maintain in good condition and to repair in time their dwelling spaces (apartments) at their own expense. Moreover, upon a preliminary notice, the flat owners must grant access to members of the condominium association for inspections, repairs, or replacement of common property, which can be accessed only from the individual dwelling area. The maintenance and reparation costs of shared property are split between the co-owners proportionally to their share in the condominium. If the owner is not using the purchased property or waives the right to use the common spaces, they are not exempted from pecuniary contributions for any executed works.

5.3. Liability of co-owners

Any co-owner or persons dwelling with them that caused damage to the property of other co-owners or to common spaces are liable to compensate the incurred damages in accordance with the principles of tort law. Moreover, the destruction or damage to shared goods is sanctioned in line with the *Contra-vention Code*, with a fine or community works.

5.4. Rights and duties of condominium associations

Condominium associations or associations of co-owners are set up in order to ensure efficient management of the commonly owned property of the dwellers.

The association is set up by at least two owners for the maintenance, operation, and repair of both, individual and shared property of the condominium, to provide the members of the association with communal services and other services, to represent and defend their interests.

In exercising their duties, the associations may perform various activities for the benefit of all property owners, including but not limited to entering into contractual relations with parties for services relating to maintaining the good condition and safety of the condominium, establishing for each owner the amount of mandatory payments according to the share of ownership, performing works and providing services to the members of the association, drawing up the annual estimate of revenue and expenditure, as well as undertaking other responsibilities, without infringing or limiting the rights of other co-owners.

In the course of their activities, the associations must act to the benefit of the dwellers of the condominium and safeguard their interests and welfare. Consequently, among their duties, the associations have to ensure the execution of the

obligations of all members of the association, to maintain the proper technical-sanitary condition of the common goods in the condominium, to represent the interests of the members of the association in the relations with the individuals and legal persons, to observe the interests of the other co-owners in the distribution of the expenses for the maintenance and repair of the common goods in the condominium.

6. Commercial leases

6.1. Form and contents of a lease agreement

Under Moldovan law, the lease agreement concerning real estate shall be drawn up in writing form.

Considering that the Moldovan legal framework does not distinguish between different types of leases, such as commercial or residential, the content of the lease agreement takes on a standard form. Therefore, a lease agreement shall include certain elements and key information to be valid and enforceable. The key clauses of any lease agreement are:

- the object of the contract, in particular, the description of the real estate property, its destination, and location;
- the term of the lease, either fixed or indefinite, up to 99 years;
- the rent and other fees, namely, the term of payment and the specific conditions for rent adjusting;
- the rights and obligations of the parties;
- the termination of the lease agreement, including the circumstances that may trigger the termination of the agreement.

6.2. Regulation of leases

The legal framework of lease agreements applies identically to any agreements relating to leaseholds and is set out in the *Civil Code of Moldova*.

However, the Moldovan law provides certain interdictions and limitations.

For example, neither the landlord nor the tenant is permitted to change the form and destination of the property during the lease.

In case of termination of the lease for unjustified non-performance of the obligations by the tenant, the landlord may not claim the rent missed due to the premature termination of the lease but may request compensation for the damage caused.

6.3. Registration of leases

As previously mentioned, the lease agreement of real estate for a term exceeding three years is subject to mandatory notation

in the Real Estate Register. The non-compliance with this provision does not affect the validity of the contract, but the enforceability against third parties.

The tax law provides another mandatory form of registration. So, the lease agreement shall be registered within three days from the date of concluding the agreement, with the State Tax Service. This represents a fiscal obligation, considering that the landlord shall pay a monthly tax in the amount of 7% of the value of the contract.

6.4. Termination of leases and renewals

Generally, the landlord may terminate a lease without reason at the expiration of the lease term.

In case of an indefinite lease, either party has the right to terminate the lease with a three-month notice.

Additionally, the Moldovan law provides other situations which may lead to the termination of the lease agreement that do not depend on the parties, such as the destruction of the leased property, its expropriation, or in other cases established by law or the agreement.

The landlord may terminate the lease agreement if the tenant:

- does not use the rented property according to its destination or to the contractual provisions;
- intentionally or involuntarily, allows the deterioration of the property;
- fails to pay the rent price during three months after the expiration of the payment term (unless otherwise provided in the agreement);
- concluded a sublease contract without the consent of the landlord.

The tenant may also terminate the lease agreement, for multiple reasons established by law and the lease agreement itself, among which are:

- loss of earning capacity and inability to use the rented property; and
- deprivation of liberty and inability to perform the contractual obligations.

The lease agreement is considered to be renewed and, consequently, extended for an indefinite period, if the contractual relationship continues tacitly after the expiration of the lease term.

Considering that the tenant is a vulnerable party in relation to the landlord, upon the expiration of the lease term, the tenant has a priority right for concluding the agreement for a new

term, if possible, provided the latter has previously fulfilled the contractual obligations and agrees with the new contractual conditions established by the landlord.

6.5. Rent regulations and rent reviews

The payment of the rent may be fully performed at the end of the lease term. However, if the rent is set for certain periods, it shall be paid upon their expiration. Generally, the amount of the rent may be modified by the agreement of the parties. However, there are certain situations when the rent amount can be amended at the initiative of both, the landlord and the tenant.

The landlord may ask the court to change the rent by court decision only once a year and only if the economic conditions make the non-adjustment unfair unless the landlord has undertaken the risk of changing economic conditions.

The tenant has the right to request the reduction of the rent if the conditions, stipulated in the contract, for the use of the property or the condition of the property itself have worsened.

6.6. Services to be provided together with the lease

Moldovan law does not regulate the types of services provided by either, the tenant or the landlord during the lease. However, such services may be addressed in the lease agreement, as long as they are duly described.

The services provided together with the lease may refer to:

- utilities - the services necessary for normal operation of the building throughout the lease term, specifically: electricity supply, heating, hot and cold water supply, sewerage, air conditioning and ventilation, *etc.*;
- operating expenses - costs associated with operating and maintaining the property, including, but not limited to security services, cleaning, removal of garbage and cleaning the territory from snow, technical maintenance of engineering systems (including elevator equipment).

Apart from the current costs of normal use and maintenance of the property paid by the lessor, the payment of additional costs is mandatory only if there is an agreement between the parties.

6.7. Fit-out works and their regulation

The tenant may interfere with the leased property in terms of current repairs which involve the necessary interventions resulting from the normal use of the property, according to its purpose, and that can be attributed to the tenant, taking into account the nature of the property, the destination for which it

is used and the term of the lease.

The tax considerations for leasehold improvements primarily are borne by the party paying for them and by the party retaining the ownership of the renovations. If the tenant, upon the end of the lease owns the improvements, made with the permission of the landlord, without damaging the property, the landlord will not have taxable income. If the improvements are left behind when the lease terminates, the tenant is entitled to demand their reimbursement from the landlord.

In this case, the tenant is entitled to deduce all the expenses related to investments made in the fixed assets within the limit of 15% of the rent amount.

If the improvements were made without the permission of the landlord and the latter refused to compensate their value, the tenant must separate the enhancements from the real estate, provided no damages are caused to the property. If these improvements cannot be separated without damaging the property, the landlord becomes their owner.

6.8. Transfer of leases and leased assets

The Moldovan law regulates under specific conditions the transfer of leases from the original tenant to the future tenant. Such a transaction involves major changes, especially, in rela-

tion to the rights and duties of the parties.

Basically, a lease transfer is a legal operation by which the current tenant, with the consent of the landlord, may transfer to another person (potential tenant) all the rights and obligations arising from the lease.

For performing this transaction, the tenant must inform the landlord of their intention and disclose the name and address of the person taking over the lease.

Generally, the landlord may not oppose the lease transfer, if after concluding the lease agreement, the legitimate interest of the tenant to transfer the real property to another person arises. However, if the landlord has identified an impediment to consent to the lease transfer, they must communicate, within 15 days, to the tenant, the reasons for this decision. Otherwise, they are considered to have consented.

In terms of the rights of the parties, the landlord has the right to compensation for reasonable expenses (*e.g.* costs for preparing the new lease).

The previous tenant, following the lease transfer, is released from any obligations. So, the new tenant would take the place of the original tenant, paying rent directly to the landlord, and having all the rights and responsibilities of the original tenant.



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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

The right of ownership over real estate (RE) is guaranteed in the *Constitution of the Republic of North Macedonia*. Additionally, the rights regarding RE are regulated in the following laws: *Law on Ownership and Other Real Estate Rights* (Official Gazette of the Republic of Macedonia, No.18/2001 and its subsequent amendments); *Law on Construction Land* (Official Gazette of the Republic of Macedonia, No.17/2001 and its subsequent amendments); *Law on International Private Law* (Official Gazette of the Republic of Macedonia, No.87/2007 and its subsequent amendments); *Law on Cadastre of Immovable Assets* (Official Gazette of the Republic of Macedonia, No.55/2013); *Law on Obligations* (Official Gazette of the Republic of Macedonia, No.18/2001 and its subsequent amendments).

In accordance with the *Law on ownership and other real rights*, the Foreign natural persons and legal entities, residents of the member states of the European Union and OECD may acquire the right of ownership of an apartment and business premises in the territory of the Republic of North Macedonia in the same manner as the citizens of the Republic of North Macedonia.

Foreign natural persons and legal entities, residents of the non-member states of the European Union and OECD may acquire the right of ownership of an apartment and business premises in the territory of the Republic of North Macedonia in the same manner as the citizens of the Republic of North Macedonia, under the same conditions of reciprocity.

When it comes to land ownership, the law stipulates that Foreign natural persons and legal entities, residents of the member states of the European Union and OECD may acquire the right of ownership and the right to a long-term lease of construction land in the territory of the Republic of North Macedonia in the same manner as domestic legal entities and natural persons, citizens of the Republic of North Macedonia.

Foreign natural persons and legal entities, residents of non-member states of the European Union and OECD may acquire the right of ownership and the right to a long-term lease of construction land in the territory of the Republic of North Macedonia under the conditions of reciprocity.

More specifically, when it comes to the acquisition of real rights over agricultural land the law states that foreign natural persons and legal entities cannot acquire the right of ownership of agricultural land in the territory of the Republic of North Macedonia.

Foreign natural persons and legal entities may, under the

conditions of reciprocity, acquire the right to a long-term lease of agricultural land in the territory of the Republic of North Macedonia, on the basis of a consent of the minister of justice, upon previously acquired opinion of the minister of agriculture, forestry and water resource management, and the minister of finance.

The existence of reciprocity foreseen shall be determined by the minister of justice, under the conditions and in the procedure determined by law.

The RE market trends in North Macedonia have been fairly dynamic. Investments in RE are taking place across all RE sector segments: residential, office, industrial, retail, casinos, mixed-use developments, and special-use properties.

1.2. Registration of ownership

The ownership of the RE assets is registered in the public books kept by the Real Estate Cadaster of the Republic of North Macedonia. In the public book is registered the right of ownership and other real rights of the real estate, of the real estate data, as well as of other relevant rights and facts whose registration is determined by law.

1.3. Publicity of real estate register

The entries in the registry are publicly available on the website of the Real Estate Cadaster Agency. On the website is presented partial data related to the owner of the RE property and the property itself. For more detailed information regarding the RE (whether there are registered encumbrances, *etc.*) it is necessary to get a property list as a title deed, which can be issued by a cadaster or a notary, and this service is chargeable and such list can be obtained by any third party.

Additionally, the registry of RE, as part of the Central Registry of North Macedonia issues information of informative character on ownership rights, data on land parcels and objects on such parcels, as well as information on liens. However, in accordance with the *Law on Personal Data Protection*, property lists will not contain the owner's unique personal identification number (UPIN) when issued to a third person. This is due to the fact that a citizen's UPIN is protected and may only be processed and issued with prior explicit consent by the relevant person/owner listed in the property list.

1.4. Protection of ownership

Property entries are binding. No person may be deprived or restricted of ownership and the rights deriving from it, except in the cases of public interest determined by law, and the owner has the right of judicial protection. The normative regulation of property lawsuits in the legal system of the Republic of North Macedonia is contained in several laws. Lawsuits

for protection of property according to the *Law on Ownership and Other Real Rights* are the following: ownership lawsuit for return the possession of the RE (*rei vindication*), a lawsuit by a presumed owner (*actio publiciana*), a lawsuit against disturbance of ownership (*actio negatoria*), a lawsuit for protection of co-ownership, *i.e.* joint ownership, a declaratory lawsuit, and an extraction lawsuit. Lawsuits for protection of the RE right are lawsuits for change, *i.e.* for deletion of the entries in the Cadaster.

2. Real estate acquisition

2.1. Share deal or asset deal?

The RE can be acquired either directly as an asset deal between the seller and buyer or by acquiring the shares of the legal entity who is the owner of e RE.

2.2. Share deal

The manner of acquire of the RE depends on evaluation of the risks by the acquirer of the RE having in mind that the acquisition of the shares means the acquisition of the owner company with all its liabilities toward any third party. The costs for the acquisition of the RE with an asset deal are slightly higher compared to a share deal. Also, the acquisition of the RE as an asset deal will be subject to property transfer tax (from 2% to 4% percent of the value of the RE) and such tax is not applicable at share deal. Usually, the procedure of acquisition of RE is subject to a prior due diligence process which should address all relevant risks and will determine the appropriate way for acquisition of the RE.

2.3. Asset deal

An asset deal is the purchase of a target's underlying assets. The transaction involves transferring the ownership of assets from the seller to the purchaser. The purchaser only acquires the assets along with any liens. The ability to choose specific assets provides the purchaser with flexibility. The purchaser does not spend money on unwanted assets and there is less risk of the purchaser assuming unknown or undisclosed liabilities. However, this also makes asset acquisitions more complex because the purchaser has to spend time identifying the assets and liabilities it wishes to acquire and assume.

2.4. Disposal process

The contract for sale and purchase obliges the seller to hand over the item it sells to the purchaser so that the purchaser acquires ownership, and the purchaser undertakes to pay the seller the agreed price. The contract for the sale and purchase of real estate must be concluded in writing form. The signatures of the contracting parties in the contract for sale and purchase of real estate are notarized or the contract is solemnized by the

notary public. The costs for notarization and solemnization depend on the value of the RE and the notary determines them in accordance with the appropriate notary tariff. There are no special approvals for the transfer of ownership, except in the case the RE is a land that the seller acquired from the state in which case the seller needs to obtain prior approval from the State Attorney and to transfer all its obligation from the agreement with the state to the purchaser.

2.5. Registration of change of ownership

After concluding a contract for sale and purchase, the contract is submitted to the municipality for clearance of the property transfer tax. Once the property transfer tax will be paid, the contract for sale and purchase is notarized by a notary public and the notary submits the application for registration of the change in the real estate cadaster after which the purchased will be registered as the owner of the RE and the transaction will be considered as closed.

2.6. Risks to be considered

In the case of the sale of a co-ownership part, the other co-owners shall have the pre-emptive right to purchase. The co-owner who intends to sell his co-ownership part shall be obliged, by means of a written proposal through a notary, to offer for sale its part to the other co-owners and to announce the price and the terms of sale. If the co-owners of the RE who are offered the co-ownership part do not declare that they accept the offer within 30 days as of the announcement in the written proposal, the co-owner may sell its co-ownership part to another person. If several co-owners want to buy the ideal part of the thing under the same conditions, then it shall be given to the owner determined by the seller. In the case the co-owner who sells its co-ownership part does not submit an offer to all the co-owners, the co-owners who have not been given the offer may request the sale to be annulled in a court procedure. In the case the RE is agricultural land, the neighbors of the land also have the pre-emptive right to purchase the land. Also, any sale and purchase agreement of RE which the seller acquired in marriage should be subject to consent from the seller's spouse.

3. Real estate financing

3.1. Key sources of financing

Usually, the method of financing RE is by taking a loan from a bank and mortgaging the subject RE (mortgage). For that purpose, a pledge agreement (mortgage) is concluded with the bank that finances the purchase of the RE. This is regulated by the *Law on Banks*, the *Law on Contractual Pledge*, and the *Law on Obligations*.

3.2. Protection of creditors

The most common forms of security granted are a mortgage and/or a pledge. However, there are other forms of security such as a pledge over bank accounts; a pledge over shares; in some cases, a pledge over movable assets; or personal or corporate guarantees.

4. Real estate taxes

4.1. Transfer taxes

Any asset deal would be subject to property transfer tax in an amount between 2% and 4% of the value of the RE depending on the municipality on which territory the RE is located. The basis for calculation of such tax is not the agreed purchase price of the RE but the market value of the RE determined by an evaluator employed in the municipalities.

4.2. Specific real estate taxes

Property tax shall be paid on the ownership of RE, *i.e.* land and buildings. The property taxpayer is the owner of the property. In the case when the owner is not known or cannot be reached, the property taxpayer is the user of the property. Property taxpayer can also be the taxpayer who usufructs the property, and if the property is owned by several persons, each of them is a property taxpayer proportionately to the part-owned. Property taxpayer is also the user of the RE owned by the state and the municipality. The property tax base is the market value of the real estate which can be determined by an evaluator employed in the municipalities. Additionally, upon a request by the municipality, the determination of the market value may be done by an official evaluator. Market value is determined according to the methodology for determining the market value of RE. Property tax rates are proportional and range from 0.10% to 0.20%. They can be determined on the basis of the type of property. Thus, tax rates for property tax on agricultural land not used for agricultural production can be increased from three to five times in relation to the basic rates. The rates are determined by a decision of the municipal council.

5. Condominiums

5.1. Legal framework for condominiums

The Macedonian jurisdiction recognizes facilities that can be residential, residential-business, and commercial-residential.

Residential buildings, depending on the number of apartments in them, can be simple buildings or multi-apartment buildings.

Multi-apartment buildings are apartment buildings with two or more apartments that can be apartment blocks, multi-store

buildings, and solitaires.

All owners of units in such residential buildings should enter into an agreement for regulating the mutual relations regarding the common parts of the building and covering the common costs.

This matter is regulated by the *Law on Housing*, the *Law on Ownership and Other Real Rights*, and the *Law on Obligations*.

5.2. Rights and duties of co-owners

The co-owner shall have the right to keep and use the RE together with the other co-owners proportionately to his part, without violating the rights of the other co-owners.

All co-owners are entitled to possess the whole RE, but they can decide among themselves to share the possession of the RE and the exercise of all or some of the co-ownership powers thereto.

The co-owner shall have the right, at any time, to request division of the RE, except at a time when that division would be to the detriment of the other co-owners unless otherwise determined by law.

The co-owner may manage their part without the consent of the other co-owners. Each co-owner, together with the other co-owners, shall have the right to participate in the decision-making about everything that concerns the RE being the subject of ownership (right of management). Where a co-owner takes activities without the consent required from the other co-owners, the rules on acting without an order shall apply. It shall be necessary to obtain consent from the co-owners whose parts constitute more than half of the value of the RE in order to take activities for regular management of the thing. Consent by all of the co-owners shall be required for taking activities that surpass the limits of regular management of the RE (transfer of ownership of the whole thing, change of the purpose of the thing, leasing the thing, the establishment of a pledge, establishment of real servitudes, major repairs and alterations, and alike).

The costs of using, managing, and maintaining the RE and the burdens related to the whole thing shall be covered by the co-owners proportionately to the size of their parts.

5.3. Liability of co-owners

The co-owner who intends to sell his co-ownership part shall be obliged, by means of a written proposal through a notary, to offer for sale his part to the other co-owners and to announce the price and the terms of sale.

5.4. Rights and duties of condominium associations

The condominium associations have the following rights and duties:

Executes the decisions of the owners of the units; takes care of regular maintenance and functioning of the common parts; represents the owners of the units in the management matters and on behalf of certain owners submits a lawsuit for release from the obligation to pay, *i.e.* a lawsuit for borrowing for payment of the costs and expenses of the owner of the special unit; represents the owners of the special units in front of the administrative bodies in the matters of issuing permits and consents and in the procedures for registration of real estate and other administrative procedures, in relation to the residential building and the land, as well as for other matters related to the management; prepares a plan for maintenance of the residential building, a plan with dynamics for implementation of this plan and takes care of the implementation of the plan; prepares a calculation of the management costs of the residential building and distributes the costs among the owners of the separate parts; receives the payments of the owners of special units on the basis of a monthly calculation and pays the obligations from the agreements concluded with third parties; informs the owners of the special units about their work and submits monthly and annual calculations; prepares an annual report for the management of the facility; manages the reserve fund in accordance with the provisions of this law; enumerates and numbers the apartments and reports the entry of the data in the body that keeps the public books of the real estates and should know the standards and norms for accessibility of persons with disabilities in the residential building.

6. Commercial leases

6.1. Form and contents of a lease agreement

The *Law on Obligations* does not require the form of a lease agreement, while the *Law on Housing* provides that any lease agreement over a residential apartment should be written. However, while the *Law on Obligations* does not stipulate that the lease agreement should be written and notarized, the notarization is both required and advisable because it creates the basis for registration of the lease agreement in the cadaster thus making the lease visible for any third party. Usually, the lease agreements regulate the RE that is subject to a lease, the amount of the rent, covering the costs for maintenance of the RE, enforcement clause (which enables the lessor to collect the claims from the lessee and to evict the lessee from the RE without seeking court protection), *etc.* It is important to be noted that such an enforcement clause may produce legal effect only if the lease agreement is duly solemnized by a competent notary.

6.2. Regulation of leases

The legal rules for leases do not depend on the type of the property, apart from the form of the lease agreement as mentioned above.

6.3. Registration of leases

It is not necessary to be registered the commercial lease, however, is it advisable for any lessee to register the lease agreement in the cadaster in order to make the lease agreement visible for any third party that intends to establish any real estate right over the RE.

6.4. Termination of leases and renewals

The *Law on Obligations* provides termination of the lease agreement in the following cases:

The lessee has the right to terminate the lease agreement: **(a)** if the necessary repairs to the leased property prevent its use to a considerable extent and for a long time; **(b)** if at the time of handing over the leased property there is a defect that cannot be removed, the lessee may, at his own discretion, terminate the contract or request a reduction of the rent; **(c)** if the lessor does not eliminate the deficiency within the additional period set by the lessee, the lessee may terminate the contract or request a reduction of the lease; **(d)** in the case of legal defects of the leased property which completely excludes the right of the lessee to use the object; or **(e)** in the case when the right of a third party only restricts the right of the lessee, the lessee may, at his own choice, terminate the contract or request a reduction of the rent and in any case compensation of the damage.

The lessor has the right to terminate the lease agreement: **(a)** if the lessee, even after the warning from the lessor, uses the leased assets contrary to the agreement or its purpose or neglects its maintenance, and there is a risk of significant damage to the lessor; **(b)** if the lessee does not pay the rent even within 15 days after the lessor called him to pay it; **(c)** or if the leased assets are sub-leased without lessor's permission.

The lease terminates if the leased assets are destroyed by a case of *force majeure*.

The lease agreement concluded for a certain period of time terminates with the expiration of the time for which it was concluded.

When, after the expiration of the period for which the lease agreement was concluded, the lessee continues to use the object, and the lessor does not object to it, it is considered that a new lease agreement has been concluded for an indefinite period, under the same conditions as the previous one.

6.5. Rent regulations and rent reviews

There are no rent regulations in North Macedonia. Also, the rent may be reviewed by the parties in course of the leased period only if such possibility is regulated in the lease agreement.

6.6. Services to be provided together with the lease

The applicable laws do not regulate particular services to be provided together with the lease, but the parties are free to regulate this issue in the lease agreement.

6.7. Fit-out works and their regulation

The parties are free to regulate any fit-out works to be done in the leased property and the parties' rights related to such fit-out works in the case of termination of the lease agreement *i.e.* if the lessee shall be entitled to claim compensation from the lessor for any investment done in the leased premises and under which conditions.

6.8. Transfer of leases and leased assets

Any party may transfer its rights and obligation under the lease agreement to any third party subject to prior consent from the other party. Also, in the case of transfer of leased assets that were previously handed over to the lessee, the acquirer of the leased assets takes the place of the lessor and assumes the rights and obligations from the lease agreement undertaken by the lessor.



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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

Ownership right, including the ownership right to property, has its source in Article 21 and Article 64 of the *Constitution of the Republic of Poland*. The first provision guarantees the protection of the ownership right to property and the right of inheritance. Expropriation is permitted only when it is undertaken for public purposes and for fair compensation. The second provision of the *Constitution* provides that all people can equally enjoy property ownership rights and other property rights, as well as the rights of inheritance. The ownership right to property is subject to equal legal protection for all, and its restrictions may be imposed only by statute and only to the extent not infringing the essence of the ownership right to property. The most important laws regulating ownership right in Poland are the *Property Law* section in the *Civil Code*, as well as the *Act on Ownership of Premises*, the *Act on Land and Mortgage Registers*, and others. These Acts are stable, rarely subject to changes as far as systemic solutions are concerned, and have been functioning in the Polish legal system for years.

Apart from the traditional definition of the ownership right to property, in Poland, there are also quasi-property rights, such as the right of perpetual usufruct and the cooperative ownership right to premises. As a rule, the right of perpetual usufruct is usually established for a period of 99 years (sometimes less but not less than 40 years) on land owned by the State Treasury or local government units. Another characteristic feature of the right of perpetual usufruct that distinguishes it from the ownership right to property is the obligation of the perpetual usufructuary to pay an annual fee. As of January 1, 2019, the right of perpetual usufruct of real estate on which residential premises and single-family residential buildings are located was transformed into ownership. However, this transformation did not extend to non-residential premises. The cooperative ownership right to premises, which is a limited property right, is now of marginal importance and is a relic from the time of cooperative premises. No new cooperative ownership right to premises may be established after 2007.

Citizens of all countries from the European Economic Area and Switzerland may acquire property in Poland on the same basis (with minor exceptions) as Polish citizens. Other foreigners, in order to acquire property in Poland, need the consent of the Minister of Internal Affairs.

In regard to expropriation, in addition to the aforementioned constitutional protective principles, it should be noted that property can only be expropriated for the benefit of the State Treasury or local government units. The expropriation procedure must be preceded by negotiations between the expropriated person and the expropriator, in a legally required attempt

to reach an agreement. If the negotiations fail, the proper expropriation procedure begins. The amount of compensation for expropriation is determined based on the market value of the property. In addition to Chapter 4 of the *Property Management Act*, the relevant rules for expropriation are set out in *Protocol No. 1* to the *Convention for the Protection of Human Rights and Fundamental Freedoms* of November 4, 1950, ratified by Poland. The principles of expropriation are clear and, as a rule, the business solution to expropriation must be first sought while the typical administrative procedure begins only if a business solution is not reached.

The most recent legislative trends observed in Poland include the increased protection of purchasers of residential premises as well as an extension of the protection to purchasers of non-residential premises by the *New Development Act*, which will come into force in July 2022. In terms of market trends, the biggest winners of the COVID-19 pandemic in Poland are logistics parks, which are opening with the greatest frequency seen in recent years. Offices are slowly returning to the pre-pandemic situation. In the shopping center sector, there has been a noticeable shift in investor attention from large-scale shopping centers to convenience centers.

1.2. Registration of ownership

The public Land and Mortgage Register (LMR) is maintained by the Land and Mortgage Register Departments of the District Courts. The functioning of the LMR is regulated by the *Act on Land and Mortgage Registers*. The register obligatorily contains such information as the designation of the property, designation of the owner, and legal title to the property. The LMR may disclose property rights of third parties restricting the use of property, mortgages on property, the right of pre-emption, the right of the lease, and the right of life-annuity.

1.3. Publicity of real estate register

Entries in the LMR are publicly accessible electronically. The current and full content of the LMR is available for all.

1.4. Protection of ownership

Entries in the LMR are effective through a broad range of legal protection which includes: **1)** the principle of transparency, **2)** the principle of presumption of conformity of the contents of the LMR with actual legal status, **3)** the principle of the public credibility guarantee of the LMR, and **4)** the priority of rights entered in the LMR.

The principle of transparency consists of access to current entries in the LMR for everyone. This principle does not apply to supportive documents gathered in the files of the LMR. These files may be seen only by someone who has a legal interest

therein or a notary public since it may include commercially sensitive data such as purchase prices. Due to the fact that the LMR are public, generally, a plea of no ignorance of the contents of the LMR would not be admissible in courts. The principle of presumption of conformity of the content of the LMR with actual legal status follows the legally prevailing assumption that what is registered in the LMR legally exists, and what is deleted from it does not. The principle of public credibility of the LMR consists in resolving that in the case of discrepancies between the legal status of a property disclosed in the LMR and actual legal status, the contents of the LMR prevail. The principle of priority of entered rights provides that a limited property right on property disclosed in the LMR has priority over such a right not disclosed in the LMR. To sum up, only facts established based on data included in the LMR are binding in economic relations. Therefore, entries in the LMR extensively and effectively protect property owners and third parties.

In the case of unauthorized use of real property, an owner has a claim for delivery of the property, and in case of a violation of the property in a manner other than depriving the owner of the actual possession of the property, the owner has a claim for restitution of the legal status and cessation of the violation. Both these claims have their basis in the *Civil Code*.

2. Real estate acquisition

2.1. Share deal or asset deal?

In current market practice, investors are increasingly often choosing to acquire property-owning companies through a *share deal*, less often choosing to acquire the asset itself through an *asset deal*.

Share deals are particularly interesting for investors who are buying a portfolio of property, by being able to purchase several properties held by a company selling the shares, with a single document. Moreover, the public fees associated with a share deal are lower, the acquisition of shares is taxed with a PCC of 2% rather than VAT at a rate of 23%. VAT in the case of an asset deal is generally refundable, but this can take several months, during which time the buyer has to finance the tax amount. Share deals are also beneficial for cross-border purchases, avoiding Polish transaction fees.

In the case of the acquisition of property in the form of a *share deal*, in which companies are merged, divided, or transformed, the acquisition of property is not protected by the guarantee of public credibility of the Land and Mortgage Register (LMR). The great advantage of *share deals*, however, is that the acquisition of property is not restricted by statutory pre-emption rights, which apply in the case of asset deal transactions.

On the other hand, the purchase of legal title to a property in the form of an *asset deal* provides the purchaser with protection under the guarantee of public credibility of the LMR which protects the purchaser who has entered into a legal transaction with a person entitled according to the contents of the LMR. The purchase of property is covered by the guarantee if conducted as a transaction for consideration and if the purchaser of the property acts in good faith. Due to the guarantee of public credibility of LMR registers, the extent of due diligence on the property is narrower than in the case of a *share deal* and thus typically faster and involves smaller fees.

When choosing the type of transaction, particular benefits and limitations are described in 2.2. and 2.3. should also be taken into account.

2.2. Share deal

In *share deal* transactions, the subject of the sale is the company's shares. Thus, the buyer becomes the owner of the shares and indirectly acquires rights to all assets of the acquired company.

The acquisition of the company's shares takes place by concluding a share purchase agreement, which should be concluded in writing with notarized signatures. In this type of transaction, the assets of the company do not change and the company still remains the subject of its rights and obligations. This type of transaction is particularly beneficial for entities deciding to acquire shares in a company conducting a regulated activity and consequently holding appropriate concessions, licenses, and permits. The form of the share deal is also chosen by investors who have funds located in different sectors of the economy.

After concluding a share deal transaction, the Register of Entrepreneurs of the National Court Register should be notified of a change in a company's shareholder; the cost is PLN 350 (approximately EUR 80). As far as the taxation of the transaction is concerned, the income is taxed at the level of the disposing shareholder who receives a price for shares. For the company in which the shares are sold the *share deal* transaction is generally tax neutral, however, in the case of a cross-border sale, the company remains liable for withholding tax payable by the foreign seller unless the tax is excluded under a double tax treaty concluded with the country of residence of the seller.

In the case of a decision to purchase property as part of a *share deal* transaction, a due diligence process is broader since it must not only cover the validity of the title to the property held by the company in which the shares are purchased but also generally the legal status of the company and the status of its affairs.

2.3. Asset deal

An *asset deal* should be understood as a transaction to acquire the title of a property.

With an *asset deal* transaction, the purchaser does not enter into the corporate structure of the company, the selling company is a party to the sale agreement of a property. The acquisition of a property in the form of an *asset deal* should be made before a notary public who prepares the conveyance notarial deed and countersigns it together with both parties to the transaction.

If the disposing party is a corporation, typical consent of shareholders for disposal is required. The lack of such a resolution renders the sale of the real property null and void.

For *asset deal* transactions, the taxpayer is the company selling the property. The taxable income is the difference between the sale price of the property and the tax value of the assets, which corresponds to the expenses for the acquisition of the assets comprising the business after depreciation.

Due to the fact that, as a rule, the transfer of real property automatically transfers all leases affecting the property, the sale of commercial property let to tenants is not easily distinguishable from the sale of a business including a property. As mentioned above, the sale of a property (asset) is subject to VAT at 23% which is returnable while the sale of a business is subject to 2% PCC which is a non-refundable fee. To avoid controversies regarding the tax treatment of a given transaction, it is advisable that the parties to the transaction obtain a tax ruling concerning VAT/PCC treatment.

A significant limitation in *asset deal* transactions that should be taken into account in transaction documentation is the statutory right of the pre-emption of property, which consists in providing certain governmental or local authorities with a priority right to purchase certain property that is undeveloped or located in protected zones.

2.4. Disposal process

In the case of an *asset deal*, the acquisition of property must be concluded before a notary public who prepares the conveyance notarial deed and countersigns it together with both parties to the transaction. The sale of property requires the consent of a shareholders' meeting or the general meeting of shareholders as described in 2.3.

With respect to *share deals*, the transfer of shares in a limited liability company should be made in writing with notarized signatures. Other types of companies may require a different form of share transfer contract, but they are not often used in property transactions. The most popular form in share deals remains the limited liability company.

Moreover, in share deals the stipulations of the articles of association (statutes) of the company are relevant. If the articles of association contain a provision making the sale of a share, a part thereof or a pledge of a share dependent on the company's consent, a necessary element preceding the conclusion of a share deal is to obtain the company's consent to the sale of its shares.

2.5. Registration of change of ownership

If the property is acquired in the form of an asset deal, and thus a notarial deed is prepared before a notary public, a notice of acquisition of property to the relevant Land and Mortgage Register Department of the District Court will be filed by the notary public. The entry of the ownership right of the property in the LMR has a retroactive effect from the moment of filing the application for entry by the notary public. The court fee for recording the ownership right in the LMR is PLN 200 (approximately EUR 45).

In the case of a share deal, the acquisition of property is not subject to notification. However, as mentioned in 2.2., after concluding a share deal transaction the Register of Entrepreneurs of the National Court Register should be notified of the change of the company's shareholder.

2.6. Risks to be considered

As indicated in 2.3., limitation, which should be taken into account while proceeding with *asset deal* transactions, is the statutory right of pre-emption of property; it gives certain public entities the priority right to purchase a property. The statutory right of pre-emption is not disclosed in the LMR, so before the transaction, the buyer should verify whether the property is subject to a statutory right of pre-emption. The statutory right of pre-emption applies primarily to certain types of undeveloped property or property located in protected zones, pursuant to Article 109 of the *Property Management Act* of August 21, 1997.

The right of pre-emption may also be granted to private persons, in which case it is subject to mandatory disclosure in the LMR kept for the property.

If the right of pre-emption in favor of a private person has been disclosed in the LMR, but the sale agreement was concluded in violation of the pre-emption right, the entitled person may bring an action before a common court seeking the declaration of the sale as ineffective towards that person. In the case of a statutory right of pre-emption, a sale agreement concluded in violation of the right of pre-emption is automatically null and void.

In the case of a statutory right of pre-emption of property,

the parties first conclude a conditional sale agreement, subject to a pre-emption right being waived within a period of 30 days.

3. Real estate financing

3.1. Key sources of financing

The most frequently encountered solution is to obtain financing from a financing bank. Before signing a loan agreement, the financing bank evaluates the revenue generated by the project itself, which is both a source of loan repayment and security for the borrowed amount. The most common form of collateral when obtaining bank financing is the establishment of a first priority mortgage in favor of the bank.

3.2. Protection of creditors

As mentioned in 3.1., in the case of property financing, mortgages constitute key security being a charge over a property. A mortgage can be established only on real property, while a pledge can be established over movable assets and certain rights, including shares. Mortgages are established in the form of a notarial deed. A mortgage becomes effective upon its entry into the LMR maintained by the court for the relevant property.

A mortgage is established either in value or up to a certain value. Within a specified value, the mortgage allows for the enforcement of claims from the property with priority over other creditors of the property owner also in the event of the debtor's bankruptcy.

Often financing banks require that the borrower voluntarily accepts submission to future enforcement proceedings which in result would give the financing bank access to an accelerated enforcement process in respect of debts covered by the submission. The submission requires that the borrower executes an instrument pursuant to Article 777 of the *Polish Code of Civil Procedure* which should be made in the form of a notarial deed and which should include a declaration by the debtor (borrower/guarantor) that it voluntarily submits itself to enforcement in favor of the creditor (e.g., the purchaser or the financing bank) directly on the basis of a notarial deed. As a result, the beneficiary of the submission is authorized, in the event of default on repayment of a loan, to commence an enforcement procedure without the need for lengthy court proceedings.

The creditor's position can also be secured by a pledge, in particular a pledge over shares. A pledge is created on the basis of an agreement between the debtor (pledgor) and the creditor (pledgee), and in the case of a registered pledge also on the basis of entry into a public register maintained by the court.

4. Real estate taxes

4.1. Transfer taxes

Generally, taxation depends on the type of transaction (please see 2.1., 2.2., and 2.3.). 2% of PCC (stamp duty) applies to a purchase of shares in a company, purchase of a business (or its specific part), or purchase of an apartment on the secondary market, whereas other property acquisitions are subject to VAT. Personal Income Tax and Corporate Income Tax apply on the basis of general rules.

4.2. Specific real estate taxes

Polish law and practice identify two types of titles to property: ownership (freehold) and perpetual usufruct right. Both an owner and a holder of perpetual usufruct are obliged to pay real estate taxes. Local governments set the yearly amount of property tax for each property based on maximum rates announced by the Minister of Finance.

A holder of perpetual usufruct in addition to property tax is obliged to pay a perpetual usufruct fee. The fee depends on the value of the property and the purpose for which the property is used and may range from 0.3% to 3% of the value of the property per annum. Valuation of land for the purpose of calculating the annual perpetual usufruct fee may be updated no more frequently than every three years.

There is also a possibility to transform perpetual usufruct right into ownership. For such a transformation, a perpetual user should pay a fee equivalent to twenty annual fees for perpetual usufruct.

Specific to Polish law is a planning fee. If in connection with the adoption of a local zoning plan or amendment thereto, the value of the property has increased and the owner or holder of perpetual usufruct disposes of property within five years after a local zoning plan was adopted, the local municipality is authorized to collect a one-off planning fee that is relative to the increase of the property value in result of a local zoning plan. The percentage applicable to the increase in value and used to calculate the planning fee is stipulated in the local zoning plan. In addition, in the event of division, consolidation and redivision, or construction of technical infrastructure facilities financed (co-financed) by the State Treasury or local government units, and the value of a property increases, the owner or holder of perpetual usufruct must pay a fee. The fee is relative to the increased value of the property and may not exceed 30% of the increase resulting from its division, 50% of the increase resulting from its consolidation, and division or 50% of the increase resulting from the construction of technical infrastructure facilities.

5. Condominiums

5.1. Legal framework for condominiums

Condominiums are known in Poland as housing associations. The legal framework for the functioning of housing associations in Poland is set by the *Act on Ownership of Premises* and the *Civil Code* to the extent that it is not regulated by the *Act on Ownership of Premises*. The act specifies the manner of establishing separate ownership of residential premises and premises for other purposes, the rights and obligations of the owners of such premises, and the management of the common property.

Housing associations are formed by law at the moment of the separation of the first premises from the building. As a result, separate Land and Mortgage Registers are maintained for each of the premises and for the building. The share in the co-ownership of the property and the possibility of using the common parts of the property derives from the separate ownership of the premises. A housing association is a legal entity with limited legal capacity. A housing association is a kind of company, which is compulsorily joined by the purchaser of the apartment.

5.2. Rights and duties of co-owners

Each premises owner has the right to use common parts of the property in accordance with their purpose. The common parts of the building include accesses and driveways and parking spaces, staircases and lifts, central heating, premises such as the attic, drying rooms, cellar, roof, and walls. Every member of the housing association has the right to comment on the functioning of the common property. The owners of premises may also convene a housing association meeting, all that has to be done is submit an appropriate application provided these owners hold at least 1/10 of shares in the entire property. The members of a housing association also participate in the life of the housing association by voting on resolutions concerning important matters for the housing association.

The main duty of the members of the housing association is to contribute to the costs of the operation, maintenance, and refurbishment of the common property. This amount varies depending on the size of the residential or non-residential premises. The costs include expenses for repairs and maintenance of the building, all fees related to the supply of energy, also to the common parts, lift, insurance of the property, taxes, maintenance of the common parts, remuneration for the management or manager. Other obligations of the owner include adherence to the rules of the building, making the premises available for maintenance, repair, or removal of a fault, which also concerns the common area or other premises.

5.3. Liability of co-owners

Pursuant to the provisions of the *Civil Code*, which applies when the *Act on Ownership of Premises* does not regulate a given issue, co-owners of a common property bear the expenses and burdens related to that property in proportion to their share in the co-ownership of that property. Therefore, the responsibility of the co-owners of premises for debts related to the costs of premises is not joint.

The co-owner bears the costs connected with the management of the common property in proportion to their share in the common property calculated as the product of a share in the common property and a share in the common ownership of the common property on this premises. Therefore the co-owners of the premises are not jointly liable for debts resulting from the costs of the management of the common property.

As far as the joint liability of the members of the housing association is concerned, the *Act on Ownership of Premises* does not contain a provision that would impose on the co-owners in fractional parts of one premise joint and several liability towards the housing association for expenses connected with maintenance of said premises. On the other hand, according to the *Civil Code*, joint and several liability may arise only by law or legal act.

5.4. Rights and duties of condominium associations

A housing association may acquire rights and incur obligations, sue and be sued, enter into an employment relationship as an employer. A housing association is not a property tax-payer; however, its members are, according to the area and use of the premises, and with regard to the common parts of the property, in proportion to their shares in it.

A housing association acts through its management board. The management board is responsible for managing the affairs of the housing association and representing it vis-a-vis third parties and in relations between the housing association and individual owners of premises. Everyday decisions (such as the collection of receivables, maintenance of the common property, administration, and similar) can be taken by the management board of a housing association itself, whereas activities exceeding everyday affairs (such as entering into loan arrangements, disposal of part of common property to a third party, determining the remuneration of members of the management board or manager of the common property, adopting an annual business plan, determining the level of fees payable by members of the housing association, changing the purpose of part of the common property, or extension or reconstruction of the common property), require the consent of the housing association.

The consent of members of the housing association is expressed in resolutions that require a simple majority of votes of the owners of premises, calculated according to the number of shares unless the agreement or resolution adopted in this manner stipulates that in a given matter each owner has one vote. The housing association may entrust the management of a housing association to a professional company.

6. Commercial leases

6.1. Form and contents of a lease agreement

Lease agreements lasting for a period longer than one year should be concluded in writing otherwise the agreement is considered terminable by notice. If a lease agreement has been concluded not only in a written form but also with an authenticated date (by a notary public or otherwise as regulated in the *Civil Code*) then in case the owner of a leased property has sold it, the purchasing owner must honor the lease, provided the subject of the lease has already been delivered to the tenant.

Standard commercial agreements specify the parties, leased item, lease period, and rental amount. In commercial leases, rent typically consists of two items: proportionate contribution to the costs of the operation of the entire property and net rent constituting income for the landlord. Other provisions typically include a description of the required collaterals. Leases relating to future objects (premises located in buildings under development) include complex regulations regarding the terms and conditions of the handover of the leased item.

The most recent trends on the leasing market have been caused by the COVID-19 pandemic. Tenants are renegotiating agreements and in case of retail activity demanding turnover-linked rent or a proportional reduction in rent in the event of a governmental lockdown. Tenants are also negotiating the right to freely reduce or to extend leased space.

6.2. Regulation of leases

The limitation periods for exercising parties' rights may not be contractually excluded or changed. The limitation period of one year relates to claims by the landlord against the tenant for compensation for damage due to loss of value or deterioration of the property, as well as the limitation period for claims by the tenant against the landlord for reimbursement of expenditure on the property or for repayment of overpaid rent. Similarly, a period of delay in the payment of rent giving a landlord the right to terminate a lease prematurely must not be shorter than two payment periods (months).

During the COVID-19 pandemic, new privileges were granted to tenants. Firstly, in shopping malls with a sale area over 2,000 square meters, the amount of payment obligations of a tenant

towards a lessor is reduced to 20% of dues (of the amount payable prior to March 14, 2020, *i.e.* before 2021 indexation) for the period during which the governmental lockdown was applicable to such a tenant and 50% of dues (of the amount payable prior to March 14, 2020, *i.e.* before 2021 indexation) for a period of three months after the governmental lockdown is lifted. Secondly, eviction of tenants from their apartments is suspended for the duration of the pandemic.

6.3. Registration of leases

There is no general registry containing an index of commercial leases.

6.4. Termination of leases and renewals

Fixed-term lease agreements can be terminated on grounds specified in the lease agreement and in the *Civil Code*. Statutory grounds to terminate a lease for cause apply in case: **(i)** the leased item has defects that make it impossible to use the item in the way it has been envisaged for use in the lease agreement and in spite of being informed, the landlord does not remove the defects or the defects cannot be removed, and **(ii)** the tenant uses the leased item in a manner inconsistent with the lease agreement or with the designation of the leased item and despite a warning does not cease to use it in such a manner, or if they neglect it to the extent that it is exposed to loss or damage, and **(iii)** the tenant does not pay for two full payment periods.

The lease agreement can be terminated without cause if the lease was concluded for an undefined period. The statutory time limits for the termination of a lease by notice are as follows: if the rent is payable in periods longer than one month, the lease may be terminated by giving notice at the latest three months in advance at the end of a calendar quarter; if the rent is payable monthly, one month in advance at the end of a calendar month.

When it comes to automatic lease renewals, under Polish law, a lease agreement concluded for a period longer than ten years (or if between entrepreneurs for a period longer than thirty years) is deemed, after the lapse of that period, to have been concluded for an indefinite period, provided the lease object has not been vacated by a tenant and the tenant continues to pay rent. Under Polish law, there is also an "automatic renewal mechanism" which means that if, after the lapse of the period specified in the lease agreement or in the notice, the tenant continues to use the leased item with the consent of the landlord, then the lease is deemed to have been extended for an indefinite period. Other forms of renewals require the consent of the landlord and the tenant.

6.5. Rent regulations and rent reviews

The date and method of rent payment are typically specified in the lease agreement. If the date of payment of the rent is not specified in the lease agreement, the rent is due in advance, namely: if the lease is to last no longer than one month, for the whole period of the lease, and if the lease is to last longer than one month then monthly, not later than on the tenth day of each month. Although legally (pursuant to the *Civil Code*) a landlord is authorized to unilaterally revise the rent in case of indexation of rent by a pre-determined index, commonly (in the tenant-dominated market) such a possibility is contracted out pursuant to the request of tenants and the conditions and dimensions of rent review in fixed-term leases and regulated contractually by the parties.

6.6. Services to be provided together with the lease

The landlord is obliged to ensure that the leased item is suitable for its agreed use. This regulation determines the scope of services to be provided by the landlord. In case of failing to provide for its agreed use, the tenant is entitled to withdraw from the lease agreement. During the governmental lockdown due to the COVID-19 pandemic and, amongst others, the obligation to close shops located in shopping centers over 2,000 square meters, tenants withdrew from lease agreements, claiming that the landlord did not ensure the agreed use of the

leased premises, as the premises could not be opened.

6.7. Fit-out works and their regulation

Tenants cannot undertake any changes to a leased item against the provisions specified in the lease agreement or against the designation of the leased item. Parties may specify in the lease agreement the scope of works undertaken by the tenant. Upon termination of a lease, the tenant is in principle obliged to restore the leased premises to their original condition, *i.e.* to take back/remove investments, but the lease agreement may modify this rule.

When it comes to the tax implications of alterations undertaken by a tenant, during a period of ten years the tenant may make tax depreciations on costs of alterations made.

6.8. Transfer of leases and leased assets

When a leased item is sold, already-concluded lease agreements are transferred, by virtue of law, to the new purchaser. The new landlord cannot terminate a lease agreement, concluded in written form with an authenticated date and the leased item was already released to the tenant.

Otherwise, the leases are not assignable unless pursuant to the consent of the parties. In commercial leases, landlords require the consent of a tenant in advance for the future assignment of leases or rights to collect rent on banks financing landlords.



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1. Real estate ownership

1.1. Legal framework

This introductory section describes the general legislative framework and the principles governing private property in Romania.

Private ownership protection and its main principles are regulated by the *Constitution* (Article 44) and by the *Civil Code* (Article 555 and the following), together with *Law No. 71/2011* on the implementation of the *Civil Code*. Other main sources of regulation on this matter are:

- *Law No. 7/1996 on cadastral works and real estate publicity;*
- *Law No. 10/1991 on construction quality;*
- *Law No. 50/1991 on the permitting of construction works;*
- *Law No. 350/2001 on urban development and land use planning;*
- *Law No 18/1991 on land patrimony;*
- *Law No. 1/2000 on the reinstatement of ownership rights over agricultural and forest lands;*
- *Law No. 10/2001 on the regime of the real estate illegally seized between 6 March 1945 and 22 December 1989;*
- *Law No. 165/2013 on certain measures for finalizing the restitution process for the real estate illegally seized by the state during the communist regime;*
- *Law No. 247/2005 on property and justice reform;*
- *Law No. 312/2005 on the acquisition of private ownership rights over land by foreign citizens, stateless persons, and legal entities;*
- *Law No. 17/2014 on the sale of extra muros agricultural lands;*
- *Law No. 46/2008 regarding the Forestry Code, etc.*

The *Constitution* has the greatest degree of stability in the Romanian law system. Also, the current *Civil Code*, which entered into force on October 1, 2011, was subject to few amendments ever since, thus we may reasonably expect a high level of stability regarding private property regulations. The other above-mentioned laws have been subject to frequent amendments.

Please note that for specific issues or situations which originated before October 2011 (the entering into force of the current *Civil Code*), the former *Civil Code* of 1864, and other laws in force at the given time apply (e.g. in the case of an acquisitive prescription).

Many of the Romanian laws governing real estate properties

have been enacted as a result of the nationalization of private property during the communist regime and their main purpose is either to restore the properties to their rightful owners or to compensate them.

Before acquiring real estate properties in Romania, investors should first research if any claim based on the special restitution laws has been filed in relation thereof.

Types of property

As per Romanian law, there are two forms of property, namely public and private property.

Public property is mostly regulated through separate legislation and is inalienable and imprescriptible, meaning that it cannot be freely bought, donated, or otherwise transmitted to third parties. Also, public property cannot be seized, and it can bear no securities.

Public property belongs to the State or to the territorial-administrative units, while private property may be owned by the State, the territorial-administrative units, as well as by any natural and legal persons.

The main attributes of the private ownership right are possession, usage, and disposal, which can be cumulated or dismembered between several persons (e.g., one having the usufruct, or the right of use and *fructus*, while the other having the bare ownership). If all the above-mentioned attributes belong to the same owner, we are in the presence of a full ownership right.

One of the most used dismemberments in Romania is the superficies right (the right which entitles its owner to build or to own construction on a third party's land), which may be constituted for a period of maximum 99 years.

Restrictions for foreigners in acquiring real estate

According to the *Constitution*, private ownership protection is equal for all. Foreign citizens and stateless persons can acquire ownership rights over lands (i) according to the conditions resulting from Romania's accession to the European Union and to other international treaties to which Romania is party, (ii) on the basis of reciprocity, or (iii) if the land is acquired by legal succession (as opposed to testamentary succession).

The general rule for citizens of the European Union and European Economic Area (Member States), for stateless persons domiciled in Member States, and for legal entities established according to the legislation of a Member State, stipulates that they can acquire ownership rights over real estate (including land) in the same conditions as Romanian citizens and Romanian legal entities, under the conditions provided for in Article 3 of the *Law No. 312/2005*.

As per Article 4 of the *Law No. 312/2005*, starting from January 1, 2012, the above-mentioned persons, which are not residents in Romania, are allowed to directly purchase real estate properties (lands) in Romania for the purpose of establishing a secondary residence in case of natural persons or a secondary registered office for legal entities.

Starting January 1, 2014, such persons are also entitled to directly purchase agricultural lands, forests, and forest lands, as stipulated under Article 5 of *Law No. 312/2005*. Nonetheless, specific restrictions for such foreigners are provided by the Romanian law in case of *extra muros* agricultural lands (*i.e.* agricultural lands located outside the city limits). Such lands can be acquired only by Romanian citizens or by foreign persons who resided for a certain amount of time in Romania.

Citizens of a non-Member State, stateless persons domiciled outside a Member State and legal entities registered in a non-Member State can only acquire land in accordance with applicable international treaties and on the basis of reciprocity. However, the conditions for acquiring ownership rights for these categories cannot be more favorable than those applicable to Member States citizens and/or to legal persons established in a Member State.

Expropriation of ownership

Expropriation of private property is regulated through the Romanian *Constitution* and subsequent legislation. However, expropriations may only be performed for public utility reasons established by the law, with the payment of a preliminary and fair compensation.

The compensation is computed to reflect both the effective value of the expropriated real estate and the damages caused to the owner by the expropriation (*i.e.* in case of a partial expropriation, the diminishing of the value of the remaining of the real estate should also be considered).

Even if the compensation should reflect the market value of the expropriated real estate, in practice, expropriators usually offer only the amount calculated according to the pricing studies performed for and adopted by the Chambers of Public Notaries (Notaries Price Chart), whereas it is to be noted that such studies contain only the minimum indicative values for real estate properties in a specific locality, not always reflecting the market price. Moreover, the initial main purpose of such studies was to combat tax evasion, as irrespective of the price agreed in a sale purchase agreement (if lower than the minimum value provided for in the study adopted by the Chamber of Public Notaries in a city for a specific year), the notarial fees and Land Registry expenses are computed based on these minimum values.

The expropriating authority must first attempt to negotiate a settlement with the owner being expropriated. Should a settlement not be reached, or should there be a disagreement regarding the compensation, the dispute shall be resolved by the competent courts of law, whereas an independent expert may be appointed to evaluate the asset.

The basic legislation on expropriation was amended in August 2018 in respect of the categories of public utility works triggering the expropriation and of the deadline granted to owners for submitting the relevant documents for the fair compensation to be calculated.

Most recently, on November 15, 2021, the Supreme Court stated in a mandatory decision that the courts are bound to consider all the criteria established by the specific legislation when establishing the compensation due for expropriation.

1.2. Registration of ownership

In Romania, real estate properties are registered with the Land Register, which is a publicity system of all legal agreements and deeds regarding real estate and it is administered by the National Agency for Cadaster and Real Estate Publicity. The legal framework is the *Civil Code* and *Law No. 7/1996*, mentioned in section 1.1.

The registrations are performed in separate land books, opened for each individual land plot. Each land book contains the cadastral number of the real estate, its postal address, a description of the real estate (land plot with or without buildings erected thereupon, dimensions of the real estate, its use categories, such as agricultural or constructible land), the name/s of the owner/s and other persons which have rights over the real estate, such as usufructuaries, as well as any encumbrances registered with the respective property (*e.g.* mortgage, rights-of-way, and/or any other third party rights, *etc.*). It also contains the number and date of the agreements or deeds based on which the registered rights were established.

Currently, not all real estate properties are registered in the Land Register or have cadaster documentation in place, this being the reason why the registration with the Land Register still has only an opposability effect. According to the *Civil Code* and its enforcement law, the registration with the Land Register shall have a constitutive effect once the cadastral works for a particular administrative-territorial unit are fully completed (*i.e.* all real estate properties belonging to an administrative-territorial unit are being measured, and their cadastral documentation are officially registered in the electronic integrated information system for cadastre and land register in Romania, *e-terrá*). Whereas such cadastral works were finalized for an insignificant number of smaller localities (communes, but mostly villages), it remains uncertain when those works will be complet-

ed at the city or county level, not to mention nationwide.

Once the right over a real estate property is registered with the Land Register, any modification of its legal or material structure must also be registered with the Land Register, otherwise, such amendment is not opposable to third parties. For example, if a land plot is being partitioned, each new lot resulting from such partition will represent a new real estate, which is to be separately registered in its own (new) land book.

Several registrations with the Land Register are not mandatory but are required for the same opposability purpose in relation to third parties, such as:

- placing an individual under judicial interdiction, and the lifting of such measure;
- requests for declaring the death of an individual, the court decision on the death of an individual, and the annulment/modification thereof;
- lease agreements in respect of the real estate property;
- the so-called *lex commissoria* (unilateral termination clauses) inserted into an agreement, and the respective executed declaration of termination;
- conventional pre-emption rights;
- the court files relating to the registered real estate property.

This requirement is not absolute, meaning that one can prove that third parties had gained knowledge about such agreements and deeds by other means, except when the law states that such external knowledge is not sufficient to replace the registration.

Registration with the Land Register is not required when the real estate property is obtained by way of succession, natural accession (*i.e.* an addition to property by natural forces), seizure, expropriation, and in other cases provided by the law. However, land book registration is still necessary, should the owner wish to transfer the real estate, prior to such transfer.

1.3. Publicity of real estate register

Any person can obtain a land book excerpt about a certain real estate (in Romanian: *extras de carte funciara*) from the National Agency for Cadaster and Real Estate Publicity, including online/electronically. The cost is RON 20 (approximately EUR 4) per excerpt, and it is not necessary to justify an interest for such a request, as one of the main purposes of the land book is to inform third parties about land book registrations.

Also, any person can request information from the integrated information system for cadastre and land register and may

consult the cadastral and legal regime of the documents registered therein.

1.4. Protection of ownership

Currently, as mentioned in section 1.2., the registration in the Land Register has an opposability effect and it only creates a presumption of ownership, not an absolute proof of ownership. Therefore, the registrations provided in the Land Register may be challenged by any interested party in a court of law.

However, the current *Civil Code* strengthens the position of subsequent buyers registered with the Land Register, and who acquired the real estate property in good faith by time barring the claims for rectification of the Land Register filed by any interested party. Thus, the *Civil Code* provides for a three-year term in case of onerous transfers, whereas in the case of real estate acquired by donation or testament the statute of limitation for filing such rectification claims is of five years.

We note that no real estate may be sold without it first being integrated into the cadaster and Land Register. In case of unlawfully used or occupied property, the owner may initiate an eviction claim, following the procedure provided by law.

2. Real estate acquisition

2.1. Share deal or asset deal?

Under Romanian law, a share deal involves the transfer of ownership over shares in a company (*i.e.* the special purpose vehicle (SPV) in which the physical real estate asset is held), which leads to the indirect transfer of ownership over the real estate belonging to such company, whereas an asset deal involves the transfer of ownership over one or more real estate assets owned by a company (or by a natural person).

Whereas a share deal is preferred by sellers, especially when the assets/portfolios are being held by one or several SPV/s, as it will allow the seller to avoid latent capital gains tax and transfer taxes, and thus command higher net proceeds, whilst extinguishing any ongoing involvement with the SPV owning the real estate assets, asset deals are straightforward and preferred by buyers as it will allow them to avoid buying a company with a long tax, financial and possibly also employment history, and to reset the tax base of the property for local tax purposes.

In case of a share deal, the operational permits obtained in view of the company's activity performed in relation to the real estate will maintain their validity (for example, in case of a company operating a hotel, the certifications issued from the Ministry of Tourism remain available), while in case of an asset deal, such operating permits will have to be obtained again.

For the validity of a share deal, a document under private sig-

nature is sufficient, while an asset deal implies the conclusion of a notarized document and the payment of notarial expenses and fees for registration with the Land Register amounting to approximately 1% of the purchase price.

The asset deal structures are more predominant in daily transactions on the Romanian market (single assets transactions involving mostly housing units or residential assets, as well as land plots with no constructions). However, in the case of acquisitions of real estate portfolios and income-producing real estate assets, there is a clear preference of sellers to opt for share deals.

Market trends

Due to the new approach of remote work triggered by the Covid pandemic, the surface and configuration of the sold residential units weighted heavily in most acquisition decisions during the last two years.

The agribusiness sector was affected by the legislative uncertainty caused by *Law No. 175/2020*, which brought fundamental changes to *Law No. 17/2014* on the sale and purchase of agricultural lands in Romania located outside the city limits (*extra muros*).

One of the major amendments brought by the abovementioned law is the obligation of the seller of agricultural land to pay an 80% tax applied to the difference between the sale price and the purchase price (based on the applicable Notaries' Price Chart mentioned in section 1.1. above, valid for that time) if the sale of the *extra muros* agricultural land takes place in the first eight years from the acquisition date by the seller.

This tax also applies in case of a direct or indirect sale of the controlling interest in the companies owning *extra muros* agricultural lands, if such assets represent more than 25% of the company's assets, and again if such a sale of the controlling interest occurs within eight years as of the acquisition of the respective lands by such company. In such a case, the seller will have to pay a tax of 80% computed on the difference between the value of the lands (calculated based on the Notaries' Price Chart) from their acquisition date by the company, and the sale date of the majority of shares/the controlling interest in the company. Also, in order to avoid double taxation, the corporate income tax for the value difference of the sold shares shall be applied to a base proportionally reduced by the percentage of the *extra muros* agricultural lands in the total fixed assets of that company.

Even though more than a year has passed since this tax was implemented, the applicability of such legal provision, namely the nature of this tax, to which state/local budget account the tax is to be paid, what are the notaries' attributions and/

or obligations in respect thereof when authenticating such sale purchase agreements (in case of asset deals), are still unclear.

2.2. Share deal

In Romania, the incorporation, activity, and organization of companies are mainly regulated by *Companies Law No. 31/1990* and the provisions of the Romanian *Civil Code*.

Usually, share deals contain conditions precedent which are to be fulfilled by the sellers and are structured into two phases: signing and closing. After closing, the transfer of the ownership over the shares of the target company is registered with the Romanian Commercial Registry.

In the case of share deals, the following key factors should be considered by a potential investor:

- the purchaser of shares in a company shall acquire all the historical obligations of the transferring business (including tax obligations), as well as the bad or good faith of the seller when he acquired the property;
 - the due diligence process in case of a share deal is a lengthier one, as along with a full scope legal and technical due diligence exercise, also a tax and a financial one are needed to properly assess the potential risks of the entire company, not only of the immovable assets;
 - a share deal does not imply the conclusion of authentic deeds and no notarial fees and land registration expenses are to be paid;
 - in case of a share deal, all permits obtained by the target company remain valid (in some specific cases, a notification to the issuing authority might be needed in respect of the ownership transfer over the shares), as well as all the agreements entered into by the target company (except for the ones containing change of control clauses);
 - any environmental liability, if the case, should be clearly regulated between the parties of the share sale purchase agreement by means of warranties and specific indemnities.
- It is customary for the parties to a share sale purchase contract to agree upon specific representations and warranties to customarily cover: **(i)** valid ownership history of the company, **(ii)** compliance with applicable laws, **(iii)** completeness and accuracy of the disclosed information, **(iv)** protection against third-party claims, **(v)** lack of encumbrances, **(vi)** status of on-going contracts, especially of lease agreements, **(vii)** no tax liabilities, **(viii)** provisions related to the processing of personal data, *etc.*

2.3. Asset deal

In Romania, an asset deal is commonly structured as a one-step transaction and requires the conclusion of an authenticated sale purchase agreement before a public notary. The registration with the relevant Land Register of the change of ownership over the sold real estate property is performed by the public notary following the conclusion/authentication of the sale purchase agreement and payment of the notarial expenses and land book registration fees.

When concluding an asset deal, an in-depth legal due diligence analysis over the full title chain over the property is to be performed in order to determine if the seller is the legal owner of the respective real estate and that no title flaws are to be found in the previous title deeds with respect to that property, *i.e.* that such title deeds comply with all legal provisions in force at the moment when the respective title deed has been issued/concluded. As part of the legal due diligence procedure, drafting and submitting of customary inquiry letters to the public authorities related to the legal status of the real estate (including the existence of any potential restitution claims on the land), reviewing of the answers, and performing of checks in available public registers and of public information sources in relation to the land and the seller are usually performed.

Also, zoning/town planning certificates and various confirmations from the competent authorities are usually requested to acknowledge both the legal status of the real estate and its applicable zoning and construction regulations and parameters, especially when the investor intends to erect constructions on the respective land plot. Moreover, in the case of specific regulated real estate properties (depending on their location in the vicinity of the country border, near military sites or airports, to name just a few), specific endorsements from other public authorities may be required.

In the case of high-profile transactions, technical and environmental due diligence investigations are common.

Most of the risks associated with the real estate properties in Romania arise as a result of the lack of private ownership during the communist regime, which rendered cadastral and land book operations unnecessary. Therefore, no cadastral measurements and land book registrations were performed in an institutionalized manner before 1990. These aspects, in conjunction with the inconsistent organization and implementation of the restitution process after 1990 for the real estate properties that had been abusively confiscated during the communist regime, generated most of the risks currently associated with real estate transactions in Romania.

As such, boundary conflicts are a common issue that mainly appeared due to the implementation mechanism of land

ownership restoration, which implied that the ownership right was recognized through an ownership certificate that was used instead of the ownership title, which was issued afterward. Subsequently, the technical formalities for the identification, establishment of location, and effective land appropriation were not fulfilled. This mechanism resulted in several inconsistencies between the situations provided in the registries and the reality in the field, which led to the overlapping of the properties' boundaries.

Other notable risks usually emerge from hidden defects, third-party claims against the ownership title of the current owner, potential mandatory legal provisions that were not followed in the previous processes of change of ownership, *etc.*

Generally, the parties agree on specific guarantees related to the ownership title, hidden defects, protection against third-party claims, encumbrances, the status of ongoing agreements, tax payments, as well as any defects existing when the sale takes place. It is possible and even customary in the case of high-profile transactions for the purchaser to obtain title insurance with respect to certain title flaws related to the real estate asset acquired which were identified during the legal due diligence exercise.

For information on the fees and taxes associated with an asset deal, please see sections 2.5. and 4.1.

2.4. Disposal process

In Romania, agreements having as an object the transfer of ownership over real estate must be concluded in writing and authenticated by a public notary in order to be valid. When executing the agreement, the parties should be present in person or should be represented by attorneys-in-fact that are empowered by means of authenticated powers of attorney. Should any of the parties be a legal person, the public notary is obliged to verify if its representative is entitled to sign the sale and purchase agreement having as object the real estate.

Moreover, the notarial expenses and the land book registration fees should be paid on the signing date. For more information on the fees and taxes associated with an asset deal, please see sections 2.5 and 4.1.

In case the sold real estate property is comprised of land and buildings with a net area of more than 50 square meters, energy performance certificates must be obtained by the seller and presented to the notary when authenticating the sale purchase agreement, otherwise, the sanction of relative nullity of the sale purchase agreement applies. *Law 372/2005* on the energy performance of buildings regulates some exemptions from this obligation, in case of **(i)** protected buildings and monuments that are either part of protected constructed areas, or have a special architectural or historical value; **(ii)** buildings used as

places of worship or for other religious activities; **(iii)** temporary buildings intended to be used for periods of up to 2 years and located in industrial areas, workshops and non-residential buildings in the agricultural segment that require low energy consumption; **(iv)** residential buildings that are intended to be used for less than 4 months per year, and **(v)** independent buildings, with a net area of less than 50 square meters.

Also, it is customarily for the seller to hand over to the purchaser (in original counterparts or certified copies) the entire title chain documentation related to the sold property and the technical deeds related to the constructions (if applicable, such as building permits, commissioning protocols and land book registration proofs). The tax certificate attesting the full payment of the local property taxes related to the immovable asset is preserved by the public notary in the notarial archive of the notarized deed, whereas the lack hereof or a tax certificate attesting outstanding taxes is sanctioned with the absolute nullity of the sale purchase agreement.

2.5. Registration of change of ownership

The public notary who authenticated a sale purchase agreement with respect to a real estate property shall by default request the registration of the change of ownership to the relevant Land Register office. Registrations in the relevant land books are performed by the competent cadaster and real estate publicity offices subordinated to the National Agency for Cadaster and Real Estate Publicity.

For the purpose of executing the agreement having as object the constitution or the transfer of a real right onto a real estate property, a land book excerpt for notarial purposes is obtained by the respective public notary authenticating the respective deed.

When signing a sale purchase agreement, the following fees are usually paid by the purchaser: **(i)** the land book registration tax, computed usually at the declared value of the transaction (or at the minimum indicative value of the real estate as indicated in the Notaries' Price Chart, if the declared price is lower than such minimum value), which ranges between 0.15% and 0.5% of the immovable asset's price, **(ii)** as well as the public notary's fees amounting from ca. 0.44% (in case of real estate properties sold for a price higher than RON 600,001 – where the notary fee is computed from a fixed amount of RON 5,080 lei plus 0.44% applied to the amount exceeding RON 600,001) up to 2.2% of the immovable asset's price (yet not less than RON 150 in case of real estate properties with a value of up to RON 15,000). VAT will also apply to the public notary fees if the notary is registered for VAT purposes.

The registration with the Land Register of the change of ownership over real property is to be finalized in approximate-

ly seven business days as of the execution of the sale purchase agreement. An expedited procedure that shortens the deadline up to two business days is possible if an emergency fee is paid amounting to four times the normal fee, yet not higher than RON 5,000, which is to be paid in addition to the normal fee.

2.6. Risks to be considered

The general principle under Romanian law is that privately-owned real estate properties are freely transferrable. Some specific restrictions are expressly regulated in the law, such as the legal pre-emptive rights regulated for agricultural lands located outside the city limits (under *Law No. 17/2014* there are no less than 7 classes of pre-emptors), for properties classified as historical monuments (under *Law No. 4421/2001* the Romanian State, respectively the territorial-administrative units benefit from a legal pre-emption right), for forest lands (under the Forestry Code the co-owners and the neighbors enjoy a legal pre-emption right), but also for agricultural lands located within the city limits (the land leaseholder (in Romanian *arendas*) holds such a legal pre-emption right under the Civil Code).

As mentioned, under *Law 17/2014* the following 7 pre-emptors' classes are regulated: **(i)** first rank pre-emptors: co-owners, first degree relatives, spouses, relatives, and in-laws up to the third degree, included; **(ii)** second rank pre-emptors: owners of agricultural investments for the plantations of trees, vines, hops, exclusively private irrigations and/or agricultural tenants. If on the lands subject to sale there are located agricultural investments for plantations of trees, vines, hops, irrigations, the owners of such investments have priority for purchasing such land; **(iii)** third rank pre-emptors: owners and/or tenants of agricultural land adjacent to the land subject to sale, pursuant to paragraphs (2) and (4); **(iv)** fourth rank pre-emptors: young farmers; **(v)** fifth rank pre-emptors: the Academy of Agriculture and Forestry Sciences Gheorghe Ionescu-Sisesti and the research-development units in the agricultural, forestry and food sectors, regulated by *Law No. 45/2009* on the organization and functioning of the Academy of Agriculture and Forestry Sciences Gheorghe Ionescu-Sisesti, and the research and development system in the agricultural, forestry and food sectors, and the education institutions with agricultural profile, for the purpose of purchasing agricultural lands located outside of built-up areas which have the destination strictly required for agricultural research and which are adjacent to the lands owned by them; **(vi)** sixth rank pre-emptors: natural persons domiciled/residing in the territorial and administrative division where the land is located or in the bordering territorial and administrative division; and **(vii)** seventh rank pre-emptors: the Romanian state, through the Agency of State Domains.

Contractual pre-emptive rights are also possible and, if properly constituted and publicized, should be duly considered when

concluding a sale purchase agreement. However, a set of rules should be observed when constituting such contractual pre-emptive rights, as follows:

- contractual pre-emptive right must be registered with the relevant land book in order to be opposable to third parties;
- contractual pre-emptive rights may not be transferred to a third party, and such right may be exercised during an enforcement procedure;
- legal pre-emptive rights shall always prevail in case of conflict with a contractual pre-emptive right;
- contractual pre-emptive rights shall be terminated upon the death of the beneficiary, if no term or such a right was expressly specified in the agreement; however, should the parties agree on a term longer than five years for the duration of a contractual pre-emptive right, such term shall be reduced to five years *ope legis*.

Potential remedies in case of acquiring a real property with defects:

In the case of a regular sale procedure, the seller transfers the ownership right over the immovable asset free of any encumbrances, defects, or legal claims.

Should the real property be affected by visible defects, the purchaser is supposed to indicate such defects when concluding the sale agreement, under the sanction of losing the right to claim any remedies following such moment.

On the contrary, should the real property be affected by hidden defects, the purchaser may request the seller to repair such defects at his/her expense, reduce the purchase price, or, in some cases, even terminate the agreement.

3. Real estate financing

3.1. Key sources of financing

The general legal framework in relation to financing is the *Civil Code* and the regulations issued by the National Bank of Romania, which encloses norms for different types of mortgages, liens, and personal guarantees.

The main type of security used in real estate transactions is the mortgage over the real estate itself. It is not excluded that the buyer provides another security, be it a mortgage over another real estate or a lien over movable assets, such as accounts receivables, bank accounts, stock, intellectual property rights, or insurance policies.

According to the applicable law, a mortgage may also be established over the bare property, over the usufructs or superficies

rights, or over a share of the real estate ownership right, in case of co-ownership. However, in some cases, banks might be reluctant to accept mortgages over such rights, because of the difficulty to enforce them.

Some banks do not accept a mortgage over any kind of real estate. For example, mortgages over industrial facilities such as warehouses, production halls, *etc.* are not always accepted.

Personal guarantees can also be an option, and the most common is called “*fideiussione*”, where a third party guarantees with his/her own personal patrimony to pay the credit in case of buyer’s default. The guarantor must prove that he owns sufficient assets or income to be able to pay and that he lives/resides in Romania. Also, the bank/creditor has the right to choose a specific guarantor, whereas the two above-mentioned conditions are no longer applicable in this particular case. Romanian law also provides some forms of credit enhancements, such as bank letters of guarantee or letters of comfort.

3.2. Protection of creditors

The most utilized type of security is the mortgage over the real estate object of the acquisition or over other real estate owned by the buyer or by a third party/debtor if accepted by the bank. The mortgage agreement is concluded and authenticated before a public notary and is registered in the Land Register. Other kinds of mortgages, the ones over movable assets (*e.g.* on receivables) must be registered in the Electronic Archive of Security Interests. The bank performs an analysis of the security, including an evaluation and due diligence about other securities over the asset and/or other securities provided by the buyer (*e.g.* on assets belonging to third parties).

A facility offered by law to creditors is that the mortgage agreement is an enforceable title (a writ of execution) if all its validity conditions are met, namely the contract must: **(i)** be authenticated by a public notary, **(ii)** mention the loaned amount, the identification information for the person who establishes the mortgage, and the creditor, **(iii)** show the cause of the obligation guaranteed with the mortgage (*e.g.* a loan/credit), and **(iv)** clearly describe the mortgaged property.

The guarantor (mortgagor) is forbidden to destroy, deteriorate the asset, or diminish its value in any way except for normal wear and tear or in case of necessity. The creditor can ask for damages from the guarantor in such a case.

4. Real estate taxes

4.1. Transfer taxes

Under the applicable provisions of the *Tax Code*, an income tax is owed by the individual who obtains yield from the transfer of ownership rights (or of any dismemberments) over real

property (*i.e.* land free of constructions/constructions of any kind and the relevant share quota of the affected land). Such income tax is computed and collected by the Notary Public authenticating the transfer deed, while the registration of the transfer deed with the Land Book is subject to the payment of the income tax.

The value of the taxable income is established by deducting the non-taxable amount of RON 450,000 (approximately EUR 91,000) from the final value of the transaction.

Additionally, for the transfer of any ownership rights (including its dismemberments) over constructions of any kind and their related land plots by means of *inter vivos* deeds, as well as over lands (free of constructions) of any kind, individuals owe a tax of 3%, which shall be computed on the taxable income, calculated as per the above.

The abovementioned tax shall not be due in the following cases:

- when the ownership transfer over the lands and constructions of any kind was acquired through the restoration of the ownership right under the special restitution laws;
- when the ownership transfer was completed by way of donation between relatives and in-laws (up to and including the third degree), as well as between spouses;
- in case of annulment with a retroactive effect of the transfer deeds having as object real estate properties.

4.2. Specific real estate taxes

Landowners are compelled to annually pay a land tax towards the local budget, computed considering the total surface of the land, its location, and use, as per the classification made by the local council.

Building owners have a legal duty to annually pay a building tax towards the local budget, which is computed based on certain percentages applied to a tax basis; both the percentages and the tax basis vary, mainly depending on the owner (individual or legal entity), use and location of the building. Exemptions may apply for both the tax related to the owned land and to the tax related to the owned building.

The issuance of building permits is subject to a tax in the value of:

- 1% of the estimated value of the construction works, including the value of the relevant installations (except for residential construction works);
- 0.5% of the estimated value of residential construction works or annexed buildings construction works;

- 3% of the estimated value of individually authorized site organization works.

4.3. VAT general provisions

As a rule, the income arising from lease agreements is exempted from VAT. However, the landlords have the option to apply the VAT of 19% on rent.

The following VAT rules apply to the sale of real estate:

- The standard VAT rate is 19 %;
- The 5% reduced VAT rate applies for supplies of social housing under the threshold of RON 450,000, exclusive of VAT, a maximum useful surface of 120 square meters;
- VAT exempt with option to tax can be applied in case of old buildings or non-building land (potentially subject to VAT adjustments);
- Reverse charge mechanism, namely no VAT is charged by the seller, while the beneficiary accounts for 19% VAT under reverse charge mechanism, in case of taxable transactions of real estate between taxable persons which are registered for VAT purposes in Romania).

5. Condominiums

5.1. Legal framework for condominiums

Pursuant to the provisions of *Law No. 196/2018* on the incorporation, organization, and operation of owners' associations and the administration of condominiums, it is customary to incorporate an owners' association for the administration of condominiums. A condominium is defined as a real estate property comprised of a land plot with one or more constructions, housing at least three individual properties consisting of both residential units and/or residential units and spaces with another use, and of the share quotas of the common property. The owners' association is comprised of: (i) the general assembly, (ii) the executive committee, (iii) the president; and (iv) the censor or censors' commission. The owners' association is operating similarly to a company.

5.2. Rights and duties of co-owners

The co-owners of real property have the following rights:

- to participate, to vote, and to candidate in the general assembly of the owners' association;
- to be informed of all aspects regarding the activity of the owners' association, and to receive copies of all related documentation;

- to receive input on their contribution to the owners' association's expenditures, and to challenge such contribution within 10 days as of its publication;

- to submit a written complaint to the owners' association, should any co-owner consider himself aggrieved in relation with one of his rights;

- to address to the competent court of justice, should any co-owner consider himself aggrieved by the non-fulfillment or inadequate fulfillment of executive committee's duties.

The co-owners of real property have the following duties:

- to use the common parts and the individual space as per their destination, without causing any hindrance to any other co-owner;

- to fully and duly pay his share to the owner's association fund;

- to notify the president of the condominium association on any change in the structure and number of the family members/lessees/free-lessees/any other lodgers;

- to maintain the individual space in good and habitable condition, at his/her own expense;

- to repair the damage or to bear the repair costs, should the co-owner damage the common parts or the individual property of another co-owner;

- to allow the president/another member of the executive committee/the administrator of the apartment building and a qualified person to enter the individual premises, with a five days prior written notice (or, in case of emergency, 24 hours written notice), should it be necessary to inspect, repair or replace elements of the common property, which can be accessed only from that individual property;

- to modernize and consolidate the condominium, the equipment, facilities, and endowments, if necessary;

- developers of residential real estate are obliged to inform the purchaser/s at the transfer of ownership of the obligation to incorporate an owners' association; they must hand over the technical book of the relevant constructions to the condominium associations, and they should provide the purchaser with the use of utilities' services.

5.3. Liability of co-owners

Should any co-owner be in default with respect to his duties established under the applicable law, he might be subject to civil and/or criminal liability (in exceptional situations) in order to cover all damages caused to the other affected owners.

5.4. Rights and duties of condominium associations

As per the applicable law, the rights and duties of the owners' associations representatives are the following:

- to adopt a statute establishing the organization, general rules of operation, and attributions of the owners' association, together with an internal building regulation;

- to manage all matters relating to the administration, operation, maintenance, repair, rehabilitation, and/or modernization of the common areas belonging to the building;

- to convene the general meeting of the owners' association at least once a year;

- to annually draft a budget of income and expenses;

- to open a sole bank account through which all the amounts (from tenants and not only) will be collected;

- to raise money for the establishment of a working capital and of a repair fund;

- as per the applicable GDPR regulation, the owners' associations should display information on the notice board without disclosing the first and last name of the individuals, and also the individual should be informed about the data processing when surveillance cameras are installed.

6. Commercial leases

6.1. Form and contents of a lease agreement

The general legal framework for the lease agreement is the *Civil Code*, Art. 1.777-1.850. Commercial leases are regulated by Art. 1.777 - 1.824 and 1.828 - 1.831.

The maximum lease term provided by the *Civil Code* is of 49 years. If the parties provisioned a longer period, the lease agreement will be automatically reduced to 49 years. Commercial leases are usually concluded for a period of five up to 10-15 years, depending on the asset type and the leased areas, yet for longer periods than residential leases, which are typically concluded for one or two years.

The law does not require a certain form for the lease agreement, but lease agreements are customary concluded in writing. Nonetheless, lease agreements with respect to real estate assets belonging to either the public or the private domain of the Romanian State or of the territorial-administrative units must observe a special public tender procedure prior to their execution.

The main clauses in a lease agreement are about parties' rights and obligations, rent, renewal, cases of termination, penalties

for default. It is also customary for tenants to pay a security deposit amounting to up to several months' rent (depending on the type of property) or to grant the landlord a bank guarantee letter in the respective amount.

Landlord's main obligations are:

- to hand over the leased premises in a good and proper condition for use;
- to maintain the leased property in a good condition for use according to its destination for the entire lease term, meaning that the landlord is bound to make all repairs necessary for keeping the destination envisaged by the parties when signing the lease (*e.g.*, maintaining functional elevators, ventilation, *etc.* in an office building). On the other side, the tenant must usually carry on the so-called small/minor repairs, which result from the normal usage of the real estate;
- to provide for the undisturbed and effective use of the leased premises for the entire lease term;
- to guarantee the tenant against all defects of the leased premises which might hinder, or diminish its use by the tenant, even if the landlord did not know them when the agreement was concluded and irrespective of their existence prior to the execution of the lease or their occurrence afterward. An exception is regulated for visible defects, which the tenant did not claim when the handover of the leased premises took place. However, the landlord is still liable for damages caused to the tenant's life, health, or corporal integrity, even if such damages rest upon visible defects which were not claimed by the tenant when taking over the leased premises;
- to protect the tenant against any third party claiming a right over the real estate.

Tenant's main obligations are:

- to take over the leased premises;
- to timely pay the rent;
- to use the leased premises prudently and diligently, according to the destination established in the agreement and, if no destination was established, according to its nature and previous destination (*i.e.*, it is presumed that an office building was rented for office activity, even if this was not provided in the contract). If the tenant changes the destination of the leased premises, and thus causes damages to the landlord, the latter can ask for damages or even for the termination of the lease;
- to inform the landlord immediately about the leased premises' need for important/urgent repairs;
- to execute the small/minor repairs;

- to allow the landlord to examine the leased premises at the agreed periods, or at a reasonable timeframe;
- to return the leased premises at the termination of the lease;
- to pay its share of expenses for the common areas.

As latest trends in lease agreements in Romania, we can mention *heavy* negotiation by the parties in respect to the obligations related to the obtaining and amending, if the case, of the fire safety permit (especially when tenants are performing their own fit-out works), as well as the *Force Majeure* clauses, which due to the COVID-19 pandemic gained totally new importance in lease agreements. Lately, so-called "COVID-19 clauses" are a new trend in lease agreements, causing a lot of divergencies, and negotiation efforts between tenants and landlords.

The last year showed that the best solution to re-balance lease agreements affected by the COVID-19 pandemic is direct negotiation between the parties. Solutions varied from a small number of landlords agreeing to reduce the rent (mostly in conjunction with a prolongation of the lease term) especially in a retail lease agreement, to suspending the lease agreements for a limited time, or providing alterations to the leased premises as to adapt to the new health and safety regulations, or – in some cases - diminishing the leased area.

6.2. Regulation of leases

The *Civil Code* regulates the generally applicable set of rules for all leases, irrespective of the type of property: retail, industrial, office, or residential. Nonetheless, specific legal provisions are to be found in the *Civil Code* for lease agreements related to residential units/dwellings, and for agricultural leasehold agreements (in Romanian: *contracte de arendare*) having as object agricultural lands, vineyards, orchards, platforms, and spaces designed for agricultural production or occupied by farms, animals, constructions, machinery, and equipment intended for agricultural use/exploitation.

The general rules for commercial leases were outlined in the previous section. Most of them can be modified and/or excluded by the parties.

Some of the legal rules in commercial leases cannot be contractually excluded, such as the landlord's liability for damages caused to the tenant's life, health, or corporal integrity by unclaimed visible defects of the leased premises, and generally the main obligations of the parties as described in section 6.1. above.

6.3. Registration of leases

According to the *Civil Code*, it is not mandatory for lease agree-

ments to be registered with the Land register. However, it is mandatory for landlords to pay taxes for the income represented by the rent. To this end, the lease agreement should be registered with the fiscal authorities. However, the registration of agricultural leasehold agreements with the local council is mandatory.

The *Civil Code* provides specific advantages for the owners who register their lease agreements with the fiscal authorities, as such registered contracts represent writs of execution allowing the landlords: **(i)** to evacuate the tenant at the expiry of the lease term without a court decision being necessary if the lease has a limited term; **(ii)** to forcefully execute the tenant for the rent. The above-mentioned advantages of an enforceable title are also conferred by law in case of a lease agreement authenticated by a public notary.

6.4. Termination of leases and renewals

The most common causes of termination of lease agreements are the following:

- expiry of the agreed lease term, unless the lease agreement contains express automatic renewal clauses;
- termination as per the mutual agreement of the parties;
- termination for non-performance, in case one of the parties does not fulfill its obligations assumed under the lease agreement;
- unilateral termination (without cause), if such right was expressly granted to any of the parties, applicable in case of lease agreements concluded for a specific period of time. Usually, such unilateral termination right is granted in favor of the tenant and consists of a break option that can be exercised by the tenant only once, after a specific period of the lease agreement has elapsed (several break options upon the anniversary of certain time periods may be expressly agreed by the parties, usually no more than two or three such break options in lease agreements concluded for more than 10 - 15 years);
- unilateral termination (without cause) by either party with prior notice given to the other party, in case of lease agreements concluded for an indefinite period of time;
- *de jure* termination if the leased premises is fully destroyed or may not be used according to its destination. In case of partial destruction, or a partial impediment in the proper use of the leased premises, the tenant may request either the termination of the lease agreement or a reduction of the rent;
- termination following the annulment or cancellation of the lessor's title. As an exception, if the tenant acted in good faith (*i.e.* not knowing about the defect affecting the lessor's title), the lease agreement will continue to produce effects for the

term stipulated by the parties, but not longer than one year after the annulment or cancellation of the landlord's title.

The *Civil Code* provides for a tacit renewal of lease agreements, if, after the expiry of the lease term, the tenant keeps using the leased premises, and continues to fulfill its obligations without any objection from the landlord. In such case, a new lease agreement is deemed to have been concluded in the same conditions as the initial lease agreement, except for its term, which shall be an indefinite one. Landlords are usually keen to expressly exclude the tacit renewal in the lease agreements, and regulate instead that, if the parties will choose to prolong the lease agreement upon its expiry, new terms and conditions will be negotiated for the extended term.

Agricultural lease agreements are automatically renewed for the same period as the initial one if neither party informs the respective other party about its renewal refusal. Such refusal notice must be served within six months or one year (in the case of agricultural lands) prior to the expiry of the lease term. The notice periods are reduced to half in case the initial lease agreements were concluded for a lease term of one year or shorter.

Also, the Romanian law stipulates a right of first refusal for the tenant, in case the lease agreement expired and the landlord wishes to rent again the leased premises, yet only if the tenant fulfilled his obligations under the initial lease agreement. Such right of first refusal can also be contractually excluded, and landlords tend to impose such exclusion in commercial leases.

6.5. Rent regulations and rent reviews

The law does not provide for rent regulations or review clauses, as such clauses may be freely negotiated by the parties.

It is customary for commercial lease agreements to contain a yearly indexation clause, either with a specific percentage or based on objective indexes, such as the Harmonised Index of Consumer Prices.

Also, in case of retail lease agreements, apart from the base rent, the tenant may also owe a turnover rent, which represents a percentage of the tenant's net income generated in, or from the leased premises, and which shall be due by the tenant only if such turnover rent exceeds the monthly base rent.

6.6. Services to be provided together with the lease

In cases of commercial lease agreements having as object leased premises located in buildings with more tenants, where the common areas are being maintained and managed by the landlord, in addition to the rent, the tenant shall also pay a service charge covering the expenses incurred in relation to such common areas (*e.g.* utilities), as well as the cost of the services

provided by the landlord to the benefit of all tenants (*i.e.* cleaning services, security, property taxes, insurance policies, *etc.*).

Usually, the service charge is either estimated in advance, proportionally to the share of the leased premises applied to the entire building and adjusted each year according to the open book system or is established in a fixed amount (X EUR / square meters), which is indexed together with the rent.

The cost of the utilities used by the tenant in the leased premises is not included in the rent and is usually paid separately according to the effective consumption of the tenant. Utilities may be either contracted by the landlord and invoiced to the tenant based on effective consumption or may be directly negotiated and contracted by the tenant.

6.7. Fit-out works and their regulation

The initial fit-out works to be performed on the leased premises are divided between the landlord and the tenant. As a standard practice for commercial long term leases, the landlord performs, on its costs, the initial fit-out works in order to hand over the premises to be used as per the tenant's envisaged destination or it incurs a part of the cost of the fit-out works requested by the tenant.

The tenant's fit-out works are additional arrangements carried out by each tenant / or by the landlord at the request of each tenant and at the tenant's expense, considering the fit-out contribution granted by the landlord (if any).

If the tenant executes works related to the leased premises without the landlord's prior agreement, the landlord can either keep the works without any indemnification towards the tenant or request the tenant to remove such works at its own expense. In both situations, the tenant could be liable for damages for altering the initial form of the leased premises.

From a building tax perspective if, because of the fit-out works, the value of the real estate rises or decreases with more than 25% of the initial value, the owner must fill out a new declaration with the fiscal authority and pay the building tax accordingly.

From a VAT perspective, if during the VAT adjustment period of 20 years the lease agreement ends, the tenant would be liable to perform VAT adjustment for the fit-out works performed at its own cost and handed over free of charge to the landlord together with the space. This would trigger additional VAT costs for the tenant.

6.8. Transfer of leases and leased assets

As per Romanian law, unless otherwise provided by the lease agreement (i) the tenant may sublease or assign the lease agreement to third parties, and (ii) the landlord may assign its

rights under the lease agreement.

In the event of non-payment of the rent due under the lease, the landlord may pursue the subtenant up to the amount of the rent due by the latter to the principal tenant. The anticipated payment of rent by the subtenant to the principal tenant cannot be opposed to the landlord.

If the sublease is forbidden under the lease agreement, this implies that the assignment of the lease agreement is also forbidden. However, the interdiction to assign the lease does not imply the interdiction to sublease.

The transfer of the leased real estate does not lead to the termination of the lease agreement unless the parties expressly agree thereupon.

In case the leased real estate property is being transferred (*i.e.* sold or otherwise disposed of), the lease agreement is opposable to the acquirer as follows:

- in case the leased real estate property is registered in the Land Register, if also the lease agreement was registered with the Land Register;
 - in case the leased real estate property is not registered in the Land Register, only if the lease agreement cumulatively meets two conditions: it bears a certified date (which is granted either by the conclusion of the lease before a public notary or even before a lawyer, or by registration of the lease with the fiscal authorities), and such date is prior to the certified date of the transfer (in case of real estate transfers, the authentication date of the sale purchase agreement by the notary).
- In the abovementioned situations, the acquirer shall subrogate in all the rights and obligations of the landlord arising from the lease agreement, including in relation to the guarantees provided by the tenant, as per the applicable legal provisions.



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1. Real estate ownership

1.1. Legal framework

The *Serbian Constitution* guarantees peaceful enjoyment of ownership and other property rights. The Constitution allows restriction in the sense of the manner of using the property, but such restrictions may be imposed only by law. Further, taking away or restricting of property to collect taxes and other levies or fines may be permitted only in accordance with the law.

Serbia is also party to a number of international treaties in the realm of human rights, including the European Convention on Human Rights, including its Protocol 1, which entitles every natural or legal person to the peaceful enjoyment of his possessions. In terms of hierarchy, ratified international treaties are below the Constitution, but are above all other national laws and regulations.

Key pieces of legislation regulating real estate in Serbia are:

- *Act on Basics of Property-Legal Relations (Zakon o osnovama svojinskoopravnih odnosa, Official Gazette of SFRY nos. 6/80 and 36/90, Official Gazette of FRY no. 29/96 and Official Gazette of RS no. 115/2005)* – this law contains the basic provisions on the ownership rights, easement rights, possession, and other real estate matters;
- *Act on Transfer of Immovable Property (Zakon o prometu nepokretnosti, Official Gazette of RS nos. 93/2014, 121/2014 and 6/2015)* – this law regulates the transfer of ownership title to immovable property;
- *Obligations Act (Zakon o obligacionim odnosima, Official Gazette of SFRY nos. 29/78, 39/85, 45/89 and 57/89, Official Gazette of FRY no. 31/93, Official Gazette of SCG no. 1/2003 and Official Gazette of RS no. 18/2020)* – this law regulates contracts, torts, and other sources of obligations, and as such contains the basic rules for sale and purchase contracts;
- *Mortgage Act (Zakon o hipoteci, Official Gazette of RS nos. 115/2005, 60/2015, 63/2015 and 83/2015)* – this law regulates the establishment, transfer, termination, and out of court foreclosure of mortgages;
- *Enforcement and Security Act (Zakon o izvršenju i obezbeđenju, Official Gazette of RS nos. 106/2015, 106/2016, 113/2017, 54/2019 and 9/2020)* – this law regulates judicial enforcement, including, inter alia, judicial enforcement of mortgage;
- *State Survey and Cadaster Act (Zakon o državnom premeru i katastru, Official Gazette of RS nos. 72/2009, 18/2010, 65/2013, 15/2015, 96/2015, 47/2017, 113/2017, 27/2018, 41/2018 and 9/2020)* and *Act on Procedure of Registration in the Cadaster of Real Estate and Lines (Zakon o postupku upisa u katastar nepokretnosti i*

vodova, Official Gazette of RS nos. 41/2018, 95/2018, 31/2019 and 15/2020) – these two laws regulate the registration of immovable property and infrastructure lines, as well as title and encumbrances on them, in the cadaster of real estate *i.e.* cadaster of lines.

- *Public Property Act (Zakon o javnoj svojini, Official Gazette of RS nos. 72/2011, 88/2013, 105/2014, 104/2016, 108/2016, 113/2017, 95/2018, and 153/2020)* – this law regulates public ownership and other property rights of the state, autonomous province and municipalities;
- *Expropriation Act (Zakon o eksproprijaciji, Official Gazette of RS no. 53/95, Official Gazette of FRY no. 16/2001 and Official Gazette of RS nos. 20/2009, 55/2013 and 106/2016)* – this law sets the general regime for full or partial expropriation of ownership;
- *Planning and Construction Act (Zakon o planiranju i izgradnji, Official Gazette of RS nos. 72/2009, 81/2009, 64/2010, 24/2011, 121/2012, 42/2013, 50/2013, 98/2013, 132/2014, 145/2014, 83/2018, 31/2019, 37/2019, 9/2020 and 52/2021)* – this law regulates, inter alia, the status of construction land, as well as the construction of buildings.

In terms of rights in real estate, Serbian law recognizes ownership as the fullest scope of entitlements to real estate, which in general allows the ownership titleholder to possess a piece of real estate, to use it, and to dispose of it. Other rights in real estate (so-called sectoral rights) afford its titleholder fewer entitlements, the scope of which varies from one sectoral right to the other. These include real and personal easements, mortgages, right of use, *etc.* Right of lease is not considered a property right, but it comes close to it – this is especially the case with a long-term lease of public construction land, which represents sufficient title for the lessee for construction on such land.

Foreigners have generally the same rights in terms of acquiring rights to movable property, however, in the case of immovables, the situation is quite different. Foreign natural and legal persons who do business in Serbia are entitled to acquire ownership of immovable property provided that (i) such property is required for its respective business, and (ii) there is reciprocity. A foreign physical person is entitled to acquire ownership of an apartment or a residential building, provided that there is reciprocity. Authorities tend to interpret these conditions restrictively. Further, in general, foreigners are not entitled to acquire title to agricultural land (except for EU citizens, but even for them, the conditions for acquiring agricultural land are quite harsh). However, all of the aforementioned limitations in acquiring immovable property can easily be overcome if the foreigners incorporate an SPV in Serbia – such SPV is then considered a domestic person, so the limitations for foreigners in the acquisition of immovables would not apply to it.

Expropriation is possible under Serbian law, but only in the public interest, and against payment of compensation which cannot be below the market value (this principle is embedded in the Constitution). It can be either full (resulting in loss of ownership) or partial (where the ownership title remains but is burdened with an easement or a lease). General rules of expropriation require that the beneficiary of expropriation be a public entity, and set the procedure on how the property is expropriated and how the owner is to be compensated. Usually, expropriations are seen as bottlenecks for the development of large infrastructural projects, since private owners tend to resort to courts in order to secure higher compensations, which, in turn, due to the inefficient judicial system, slows down the entire process. There are several special laws, which have, for the sake of speed and simplification, stipulated for streamlined expropriation procedure in case of particular projects (*e.g.* Belgrade Waterfront project, South Stream Gas Pipeline project), or for a particular set of projects (*e.g.* linear infrastructural projects of national significance).

The legislative framework in the area of real estate is relatively dynamic. This comes as a result of the need to introduce the necessary legal certainty in this area, but also as a response to the requirements of modernization and social and economic development. This can be seen in the digitalization of databases, e-cadastral procedures, e-construction permits, integration of various procedures into one-stop shops, *etc.* Nevertheless, the real estate sector is still perceived as not having enough predictability, due to inconsistent laws, legal loopholes, or divergent interpretation of the laws by the authorities.

The real estate market today is seeing a great increase in demand for residential property, especially in Belgrade. In parallel, there are several landmark PPP projects that have a large real estate content, such as Vinca landfill remediation and development, Belgrade airport concession. Also, the state is investing heavily in infrastructural projects, such as highways, railways, and waste-water treatment. This all together creates a vibrant and booming real estate market, despite the challenges in terms of legal certainty.

1.2. Registration of ownership

The general rule is that transfer of ownership to immovable property which is based on a legal transaction (*e.g.* sale and purchase contract) has to be registered in the real estate cadaster – the acquirer is considered as the owner only if it is so registered. There are, however, cases when the registration of title in the real estate cadaster is only declaratory, *i.e.* when the acquirer is considered as owner even before the registration – *e.g.* in case of inheritance or in case of acquisition which is based on the law. In such cases, registration with the real estate cadaster is still mandatory, but, as said before, it only has

declaratory, and not constitutive effect. These rules apply also to ownership and other rights to infrastructural lines, with the exception that they are registered in the cadaster of lines.

Similar rules, in terms of registration requirements, apply to other rights in real estate – *e.g.* mortgage, easements. There are also certain rights that are not real estate rights in the strict sense, such as lease – which can but do not have to be registered in the real estate cadaster (except for the long-term lease to public construction land, which has to be registered as well).

Ownership to movable assets, on the other hand, does not require registration in order to be effective. However, in the case of a pledge, if the parties agree to have a registered pledge, the pledge becomes effective only after being registered in the pledge registry.

The real estate cadaster and the cadaster of lines are public databases maintained and managed by the Republic Geodetic Authority (state body) and its offices for real estate cadaster. Pledge registry is maintained and managed by Agency for Commercial Registries (public agency).

1.3. Publicity of real estate register

The current legal status of the property is publicly available, save for certain personal data. Unofficial checks can be done online (whereas registered users have access to more data than unregistered ones), whereas official excerpts require payment of fees. Access to the documentation on the basis of which the registrations were made, as well as the registration decisions are available only to the concerned parties and to third parties who can demonstrate sufficient legal interest to access those files.

1.4. Protection of ownership

Cadastral legislation is based on the principle of reliance, which means that data that is registered in the cadaster of real estate is deemed true and complete, and a bona fide person cannot sustain harm due to relying on such data. There has been some questionable case law on this principle, and the courts tend to interpret the bona fide requirement rather wide, so due diligence is generally recommended in order to benefit from this reliance principle.

Registration of title in the cadaster of real estate is subject to challenges both before the cadaster and before the administrative court. In other words, registration in the cadaster is not considered final and binding before **(i)** the appeal period lapses without an appeal being lodged, or the lodged appeal is dismissed or denied, and **(ii)** the period for fining administrative suit lapses without the suit being lodged, or the lodged suit is dismissed or denied. As a general note, in order to be deemed registered, it is necessary that the cadastral decision

on registration becomes final in administrative procedure and non-contestable in administrative dispute procedure.

Furthermore, even if the registration is final and binding, there is a possibility of contesting such registration via extra-ordinary remedies, although the grounds for such remedies are limited.

The fact that a registration is final and binding does not prevent the third parties to file ownership (or other kinds of) suit by which it requests that it be regarded as the owner instead of the registered owner, or that the registered owner's title is limited by sectoral rights of the plaintiff (*e.g.* easement) – the success of such suit will, of course, depend on the facts of the case and the evidence supporting the claim, but also on whether the defendant may invoke the reliance principle (see above).

2. Real estate acquisition

2.1. Share deal or asset deal?

Both share deals and asset deals are present on the Serbian market. Share deals are almost always performed via limited liability companies. Share deals are often utilized as means not to pay property transfer tax (2.5%) – there is no transfer tax on shares in Serbia, and the tax authorities are still not that sophisticated so as to recognize share deals as asset deals in disguise. Thus, the tax aspect is an important motivator when deciding which form of acquisition to choose.

There are, however, cases, where asset deals are more attractive for buyers – *e.g.* in the case the asset owner is a company with a long history, where share deal is risky in terms of liabilities which the asset owner has created through its history. Even in such cases, the deal may be structured as a share deal, where the asset owner first invests the asset as an in-kind contribution into a new SPV and then sells shares to the buyer.

2.2. Share deal

Formally speaking, a share deal requires the seller and buyer to conclude a share purchase agreement, whereby the buyer buys the shares in the company owning the assets (theoretically, other kinds of an agreement are also possible – *e.g.* share exchange agreement). Signatures on such agreement need to be notarized, and the share transfer needs to be registered in the Serbian commercial registry. The notarization and registration fees are not material. Share transfer per se does not trigger transfer taxes, but the seller may be exposed, depending on the facts of the case, to capital gains tax.

In reality, however, the transaction is usually much more complex and involves due diligence analysis and a set of conditions precedent to closing. Given that, by the acquisition of shares, the asset owning company continues to be liable for all liabilities,

the buyer should be motivated to properly check the target and negotiate necessary undertakings, indemnities, representations and warranties, and conditions precedent so as to handle the risks associated with share deals. The buyer is especially interested to get as many indemnities, representations, and warranties and conditions precedent in relation to the asset itself, because, unlike with asset deals, in share deals, the buyer cannot benefit from statutory warranties of the seller vis-a-vis the targeted assets.

Share deals also usually involve synchronized management change and various corporate actions. Depending on the facts of the case, a merger clearance may be required for a share deal (though, such clearance may also be required in asset deals).

2.3. Asset deal

Formally, an asset deal requires the seller and buyer to conclude a sale purchase agreement, whereby the buyer buys the assets owned by the seller (theoretically, other kinds of an agreement are also possible – *e.g.* asset exchange agreement). The agreement needs to be signed before a notary who is competent for the area where the assets are located, and the notarization takes a stricter form than in the case of a share deal. The transfer has to be registered in the cadaster in order to be effective, whereby the notary itself initiates the registration process immediately upon signing. The notarization and registration fees are not material. Asset deal in principle triggers property transfer tax (2.5%) and the obligation of the buyer to report the transfer for the purpose of static property tax. Depending on the facts of the case, the seller may be exposed to capital gains tax.

As with the share deal, in reality, for complicated and/or more valuable deals, the transaction is usually much more complex and involves due diligence analysis and a bunch of conditions precedent to closing. Even though there are certain statutory warranties of the seller vis-a-vis the targeted assets, these are not detailed enough, so the buyer would usually want more concrete representations and warranties included in the transaction. Depending on the findings of the due diligence process, the buyer may also want to include further undertakings, indemnities, and conditions precedent so as to handle the identified risks.

2.4. Disposal process

Share deals require notarization of signatures and registration of share transfer with the Serbian commercial registry. Share transfer agreement needs to be (also) in Serbian (parties tend to prepare a short form share transfer agreement which they use solely for the purpose of share transfer registration, so as to keep the confidential aspects of the transaction in the

long-form contract). Depending on the facts of the case, the involvement of court-sworn interpreters and witnesses may be required. Notarization fees for signature attestation are not material – this is because the notary is not liable for the content of the agreement or its enforceability, he/she is only checking the identity of the signatories.

In the case of asset deals, a stricter notarial form is required – the so-called “solemnization.” The contract needs to be (also) in Serbian and has to contain certain elements (including a cadastral description of the property, as well as an unconditional permission of the seller that the asset be transferred to the buyer – such permission may be granted in a separate solemnized document). Depending on the facts of the case, the involvement of court-sworn interpreters and witnesses may be required. The notary needs to check the capacity and authorities of the parties, as well as whether the transaction is permitted. Notaries are liable for damages they cause and are obliged to maintain liability insurance. Thus, in light of its greater potential liability, he/she makes much more checks when solemnizing an asset deal than with the share deal. As soon as the contract is solemnized, the notary sends the contract to the cadaster in order for it to perform the title transfer registration, as a mandatory step in title acquisition. Notarization fees for solemnization depend on the value of the transaction and may amount to several thousand euros.

Depending on the form of sale (share/asset deal) and facts of the case, different approvals, consents, or proceedings may be required. Below are a few typical ones that appear in private deals (transactions involving public property involve additional procedures and a potential need for consents and approvals).

Usually, in a share deal, if the share is being sold by a physical person, and is part of matrimonial property, spousal approval is required. If it is owned by a company, the owner’s approval may be required (unless the need for it is excluded via a foundation act). The foundation act may also prescribe that the company itself needs to approve the transfer of shares. For pre-emption rights of shareholders see below.

In an asset deal, if the asset is owned and being sold by a physical person, and is part of matrimonial property, spousal approval is required. For preemption rights, see below.

Depending on the facts of the case, share deals (and asset deals, in some cases) may require merger control clearance.

2.5. Registration of change of ownership

In the case of share deals, the asset owner does not change, only the share owner, so the process is performed by registration of share transfer (on the basis of a (short form) share purchase agreement) in the Serbian commercial registry. Both

notarization and registration are quite straightforward and do not involve material fees.

In the case of asset deals, as described above, the parties first need to solemnize their sale and purchase agreement, which is then immediately sent by the notary to the competent cadastral registry in order to perform the titleholder change. Notarization does not take time, however, registration with the cadaster can be time-consuming. As a general rule, the cadaster needs to decide on registration within five business days, but in practice, this can be protracted (sometimes heavily protracted). However, if, for the relevant asset, there is already a pending registration request (*e.g.* someone is trying to register a mortgage, or another person is trying to register its ownership title), the registration will be postponed until the pending request is resolved first. As stated above, notarial fees depend on the value of the transaction and may go up to several thousand euros. Cadastral registration fees are not material and they depend on various factors (*e.g.* number of relevant documents that serve as the basis for registration).

2.6. Risks to be considered

In a share deal, if there are other shareholders in the target owning the asset, who are not selling their shares, they have a statutory preemption right, unless such right was excluded via the foundation act.

In an asset deal, in case the asset is co-owned, each of the co-owners has statutory preemption rights. Further, in the case of agricultural land, owners of neighboring agricultural rights have statutory preemption rights. In the case of forests, if the forest is neighboring a state-owned forest, the user of the state-owned forest has statutory preemption rights. The state has statutory preemption right in respect to water land (except for water land on canals owned by the autonomous province – the province has preemption rights to such land). Further, in case of the first disposal of assets acquired via restitution (denationalization), the state/autonomous province/municipality has statutory preemption right.

There might exist also contractual preemption rights. However, if such right is not registered in the cadaster, and the buyer acted in good faith, he may benefit from the reliance principle (see above).

There are also certain statutory rights of neighbors or limitations in favor of the neighbor. Further, depending on the circumstances of the case, additional third-party rights may exist (*e.g.* statutory easements). Also, depending on the specifics of a case, additional restrictions or limitations may apply (*e.g.* in the case of cultural assets, assets located in national parks, assets in the proximity of infrastructural facilities, *etc.*)

In an asset deal, there is a general statutory rule that the seller

is liable if there is an entitlement of a third party to the sold asset that excludes, reduces, or limits the buyer's entitlements, of which the buyer was not informed, nor did he agree to take the asset burdened with such entitlement. The law further regulates the conditions for applying this rule. The general consequence when the third party's right excludes the right of the buyer is that the contract is deemed automatically terminated, and if it only limits the buyer, the buyer may choose whether to terminate the contract or to ask for a price reduction. In either case, the buyer is entitled to damage compensation. Given that the rule is rather general, the parties tend to develop it in more detail in their transaction documents.

In a share deal, given that the buyer is not buying the asset directly, but only the shares, it does not benefit from the statutory warranties regarding the title to the asset. Thus, the buyer will in general have as many rights vis-à-vis defective title to assets as it has secured for itself via transaction documents.

3. Real estate financing

3.1. Key sources of financing

Typically, real estate acquisition is financed from a combination of bank loans, shareholder loans, and own funding. Investment funding is not developed in Serbia, although there are foreign funds that are investing in properties in Serbia.

Although the general rules on loans are rather flexible, the regulations of the National Bank of Serbia play an important role. Things get more complicated in the case of cross-border loans, where registration requirements may apply, and potential foreign exchange restrictions need to be taken into account.

Shareholders' loans are also regulated under the *Companies Act*.

3.2. Protection of creditors

Financing banks usually consider mortgages and share pledges. Other forms of securities (*e.g.* bank account pledge, receivable pledge, pledge on IP rights, bills of exchange, *etc.*) are less common and are usually combined with these two. Financial assistance limitations need to be observed when taking securities, since in general, companies are prohibited to, directly or indirectly, provide financial assistance (including giving of loans, guarantees, securities, *etc.*) for the purpose of acquiring shares in that company.

4. Real estate taxes

4.1. Transfer taxes

In general, asset deals trigger property transfer tax of 2.5%. By law, the tax is to be paid primarily by the seller (with the buyer being jointly liable), but in practice, the sellers tend to contrac-

tually transfer this liability onto the buyer (in which case both buyer and seller remain jointly and severally liable vis-a-vis tax authorities). The tax base is the contract price or the market value (as assessed by tax authorities), whichever is greater.

Property transfer tax is not applicable if VAT applies. Further, the law sets a number of exemptions from this tax (*e.g.* in case of in-kind contribution into the share capital of a company).

In addition, depending on the facts of the case, the sale of real estate may trigger capital gains tax for the seller. The tax rate for natural persons is 15%, whereas for a legal entity the capital gains in relation to a real estate disposal is, in principle, to be included in the taxable corporate income. Laws stipulate the details of when and how this tax applies, as well as when withholding applies to such taxes. In the case the seller is a non-resident, double taxation treaties might be of relevance for capital gains tax application.

4.2. Specific real estate taxes

In general, ownership (or certain other entitlements) to immovable property entails payment of property tax. The tax base for persons who do not have bookkeeping obligations is the value of the property determined by the municipality, in accordance with various factors set by the law.

The tax rate is defined by each of the municipalities, within the following parameters:

- for persons who have the bookkeeping obligation – up to 0.4%;
- for persons who do not have the bookkeeping obligation, in respect to land – up to 0.3%;
- for persons who do not have the bookkeeping obligation, in respect to immovable property other than land:
 - a. if the tax base is up to RSD 10 million (approximately EUR 85,000) – up to 0.4%;
 - b. if the tax base is from RSD 10 million (approximately EUR 85,000) to RSD 25 million (approximately EUR 212,000) – the amount from point a. above plus 0.6% of the amount in excess of RSD 10 million (approximately EUR 85,000);
 - c. if the tax base is from RSD 25 million (approximately EUR 212,000) to RSD 50 million (approximately EUR 424,000) – the amount from point b. above plus 1% of the amount in excess of RSD 25 million (approximately EUR 212,000);
 - d. if the tax base is exceeding RSD 50 million (approximately EUR 424,000) – the amount from point c. above plus 2% of the amount in excess of RSD 50 million (approximately EUR 424,000).

Law prescribes further details as to the tax triggers, tax payor,

tax base, deadlines, tax returns, and other details related to property tax.

5. Condominiums

5.1. Legal framework for condominiums

Condominiums exist in Serbia in the context of residential buildings and their management (on a broad level, joint (and indivisible) ownership regime exists also on any building in respect to common areas and appliances, however, only in respect of residential building there exists detailed legislation regulating the matter). It is also envisaged under planning and construction regulations as a type of organizing within a closed residential block with common content in buildings and on the land (park, playground, *etc.*), jointly owned by all owners of separate parts of buildings within the complex. However, this type of condominium is underregulated. The following text in this point 5 thus refers to condominiums within residential buildings.

The Act on Residence and Maintenance of Buildings (*Zakon o stanovanju i održavanju zgrada, Official Gazette of RS, nos. 104/2016 and 9/2020*) is the key piece of legislation regulating this matter. If a building has more than one separate parts (*e.g.* apartments) owned by different people, the management of such building is entrusted to an association (a legal entity) formed by the owners of separate parts. Each association has an assembly and a manager, who are entrusted with different tasks related to building management. The role of manager can be outsourced to a professional. Maintenance obligations in relation to the building can also be outsourced.

5.2. Rights and duties of co-owners

Owners of separate parts (who, under the law, have joint ownership to common parts of the building and its appliances) are obliged to participate in costs of maintaining common parts of the building and the land for building's regular use, as well as in the costs of building management.

In addition to entitlements available under the general ownership laws, owners of separate parts of residential building are entitled to:

- exclusively enjoy property rights on their separate part (unless the law prescribes otherwise);
- perform repairs or other works on common parts of the building if necessary to eliminate the danger of damages to their separate part (provided the person liable for such repairs does it timely);
- modify or adapt its separate parts in accordance with the law, without affecting separate parts of other people, common

parts of the building, or independent parts of the building (in each case, except if authorized to do so);

- contest decisions of assembly within 45 days from learning of the decision (and in any event within six months from the date the decision was rendered);
- right of first refusal (in accordance with the law), in case the common part of the building is to be transferred for purpose of annexing, transformation, or upgrade.

Owners of separate parts of residential building are obliged to, *inter alia*.

- not disturb the use of other separate parts by its use of its separate part;
- maintain its separate part in the state that does not make it harder, prevent, or cause a nuisance to regular use of other parts of the building;
- maintain common part of the building (which is an integral part of its separate part) to the extent he/she is able to use that common part;
- allow the use of common parts of building in accordance with their purpose and passage of third parties up to a separate part of a building; and
- allow access through its separate part or its use (as appropriate) if necessary to repair or maintain other parts of the building or to fulfill statutory duties.

5.3. Liability of co-owners

Owners of separate parts (*inter alia*) are obliged to maintain the building *i.e.* its common parts so as not to create a danger of damages. They are also obliged to maintain their separate parts in a manner that secures the functionality of that part of the building and eliminates the danger of damages or inability of using other parts of the building. They also need to comply with fire safety regulations and regulations related to flammable gases and liquids and minimum prevention measures related to evacuation of people and regular maintenance of fire detection and alarm systems and fire extinguishers. Regular and capital maintenance is to be performed in accordance with the maintenance program enacted by the owners' association.

If the owner of a separate part fails to comply with the aforementioned rules, it is liable for damages originating from its separate part, regardless of his/her fault.

The owners' association is liable for damages originating from common parts of the building, however, owners of separate parts are liable for such damages as well if the owner's association does not compensate the damages first.

Owners of separate parts are subsidiarily liable to third parties for the performance of obligations of the owners' association in case it fails to perform, as well as for the damages due to such failure.

5.4. Rights and duties of condominium associations

The owners' association is liable for damages due to failure to perform, or improper performance of tasks that are within its competence.

It is also liable for damages originating from a part of the building if it is not possible to determine from which separate part the damages originate (in such case, all owners of separate parts are subsidiarily liable as well).

6. Commercial leases

6.1. Form and contents of a lease agreement

The law does not prescribe any particular formal requirements for lease, so, even though in practice they are concluded in writing, theoretically, they can be concluded even orally. However, there are certain types of leases that require stricter form – e.g. lease of publicly owned land requires notarization, lease of apartments under the *Act on Residence and Maintenance of Buildings, etc.* Generally, any lease that is intended to be registered in the cadaster has to be in writing, notarized, contain the cadastral description of the property, and the permission of lease registration.

General rules of law do not require many elements to be included in a lease agreement – leased asset and rent would suffice. For certain specific types of leases, laws set mandatory elements that need to be added (e.g. for leases of publicly owned land). In practice, commercial leases tend to include more detailed clauses, this is especially so in e.g. large office buildings or shopping centers. These may include rules on fit-out, indexation of rent, security instruments, insurance, modifications of leased premises, details on utility costs and service charges, termination grounds, etc.

Given the relatively high demand for commercial leases, the lease agreements tend to be lessor-friendly. There are no widely accepted standard forms of leases. Large players (e.g. shopping malls, office buildings) tend to impose their detailed forms of agreements on tenants, and generally, small tenants are often left with a take-it-or-leave-it choice.

6.2. Regulation of leases

General rules on leases embedded in the *Obligations Act* apply to all types of property, however, there are specific rules for certain types of property (e.g. publicly owned assets, agricultural land, etc.), where additional rules, formalities, and procedural

steps may apply.

72. Commercial leases, in the case they refer to private property and private landlord, do not have additional legal requirements than leases in general, and there are only a few rules that cannot be contractually excluded, such as landlord's exclusion of liability for material defects if the landlord knew of the defect and intentionally failed to inform the tenant on them, or if the defect makes impossible the use of the leased asset, or if the landlord imposed the exclusion via its monopolistic position. Also, the tenant cannot waive its right to terminate the lease in case the leased assets present a threat to health. However, even though there is vast room for departing from the default statutory rules on a lease, it is a general principle that the parties' autonomy has to remain within mandatory laws and regulations (note that there are mandatory provisions even within the *Obligations Act* that apply in general, not just in relation to leases), public policy, and good customs.

6.3. Registration of leases

A commercial lease does not need to be registered in order to be effective. However, if the tenant wishes to be protected from eviction in case of enforcement over the property, the lease needs to be registered prior to any mortgage or enforcement order registration. In practice, commercial leases are rarely registered.

6.4. Termination of leases and renewals

Fixed-term leases cannot be terminated without cause unless the parties stipulated otherwise.

In case of indefinite term leases, either of the parties may terminate the contract for convenience with a notice. If the notice period is not set by contract or law or local customs, the notice period is eight days. Such termination cannot be ill-timed.

Both fixed-term and indefinite term leases can be terminated for breach. In practice, the parties tend to specify termination grounds. In absence of any other contractual arrangements, the following lease termination provisions apply:

Under the default provisions of law, the landlord can terminate the lease if:

- the tenant, despite the landlord's warning, uses the leased asset contrary to the contract or its purpose or neglects its maintenance, so that there is a risk of damages to the landlord;
- the tenant fails to pay the rent within 15 days from the landlord's request for payment (but the lease will survive if the rent is paid before the termination notice is communicated to the tenant); or

■ the tenant subleases the asset, provided that the sublease requires the landlord's consent provided further that such consent is required under contract or law.

Under the default provisions of law, the tenant may terminate the lease if:

- the necessary repairs of the leased asset interrupt its use to a significant extent and for a longer period;
- at handover, the leased asset has a defect that cannot be eliminated;
- the asset is defective and the defect can be eliminated without significant inconvenience for the tenant, and the handover date is not a material element of the lease, and the landlord fails to eliminate the defect in the remedy period set by the tenant;
- a third party has an entitlement to the leased asset that limits or completely excludes the right of the tenant to use the asset; or
- the landlord's title to the leased asset is transferred.

General termination rules that apply to all contracts (*e.g. rebus sic stantibus*) may also apply to leases if conditions for their application are met.

If the leased asset is destroyed due to force majeure, the lease ceases to exist automatically. If it is only partly destroyed or just damaged, the tenant may opt to terminate the lease.

6.5. Rent regulations and rent reviews

There are no rent control regulations in relation to commercial leases, so parties are free to agree on the rent, bearing in mind the general principles of obligations. In the case of lease of publicly owned assets, various constraints may apply (the general principle for leasing publicly owned assets is that the rent has to be market-based, but there are exceptions to this rule).

In commercial leases, rent review clauses or indexation clauses are not a must, but indexation is regularly agreed upon

between the parties in practice. In the case of lease of publicly owned assets, depending on the type of assets and lease, indexation may be a mandatory element of a lease.

6.6. Services to be provided together with the lease

By default provisions of law, the landlord is obliged to maintain the leased asset in proper condition and undertake necessary repairs to that end (costs of minor repairs caused by regular use of the asset, as well as the costs of the use are borne by the tenant). In commercial leases, however, parties tend to agree on a wider spectrum of services the landlord would be providing against the tenant's payment of a service charge.

6.7. Fit-out works and their regulation

General rules on lease do not regulate fit-out, so it remains on the parties to agree whether and under which conditions fit-out will be done. In commercial leases, fit-out provisions are quite standard, but their content varies, in terms of *e.g.* who will do the fit-out, who will bear the costs, *etc.* Depending on the facts of the case, fit-out may have VAT implications.

6.8. Transfer of leases and leased assets

In general, for the lease to be transferred, consent of the counterparty is required (unless such consent was provided in advance). However, the law foresees a specific situation of lease transfer in case of transfer of the leased asset: if, after the handover of the leased asset to the tenant, the landlord transfers its title to the leased asset to a third party, the lease agreement is automatically transferred to the acquirer, whereas the original landlord jointly and severally guarantees to the tenant for the acquirer's obligations from the lease. In this case, the tenant is entitled to terminate the lease with notice, but in commercial leasing practice, landlords tend to have the tenants waive this entitlement.

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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

Titles to real estate in Slovakia are highly protected, mostly by the Slovak Constitution and the Civil Code. According to the Slovak Constitution, everyone has the right to own property and everyone's ownership right is equally protected. However, certain things, *e.g.* caves or rivers, are exclusively owned by the Slovak Republic. In addition, ownership right is not time-barred as a result of which title claims to real estate may be brought by third parties without time a limit.

Relevant legal norms pertaining to real estate ownership are not amended frequently and are in general deemed stable (with the exception of agricultural lands regulation).

In general, real estate may be acquired by foreign entities without limitation, with the exception of agricultural lands. In the past, acquiring agricultural lands by foreigners was almost entirely prohibited, but such regulations are currently not effective (however, there have been various attempts to adopt new regulations). Nowadays, acquiring agricultural lands in Slovakia by foreigners is only subject to the reciprocity principle – the foreigner's domicile state must simultaneously allow acquiring agricultural lands by Slovak residents.

Expropriation or forced restriction of ownership rights is possible only when certain conditions are met. An asset may be expropriated solely based on applicable legislation, in the public interest, only to the necessary extent, if the purpose of expropriation cannot be achieved by less invasive methods, and, at the same time, subject to adequate compensation.

The real estate market in Slovakia is generally booming, with the lack of residential living mostly in larger cities, a large presence of the automotive industry, and the pandemic era attracting mainly light production, warehouses, and logistics. On the contrary, due to the COVID-19 pandemic, the hospitality and commercial office sectors are affected by lockdowns and home-working. The most crucial impediments to the real estate market booming in Slovakia are lengthy construction permits processes and the difficult and lengthy amendments to zoning plans.

1.2. Registration of ownership

In Slovakia, there is a single public register (cadaster) for registration of certain real estate rights, regulated primarily by *Act No. 162/1995 Coll.*, as amended (Cadastral Act) and its implementing legal norms. There are 72 cadasters in Slovakia, each maintained by the respective District Office (state).

The Cadastral Act enumerates the real estate assets and real estate rights, which are to be registered in the cadaster. All lands,

buildings, apartments, and non-residential premises (including those under construction) are registered in the cadaster. Structures with roofs and perimeter walls, including structures under construction, firmly connected to the ground by a solid foundation, are registered in the Cadaster as well.

Ownership, co-ownership, and matrimonial rights to real estate and encumbrances are obligatorily registered with the Cadaster. Other rights, such as long-term leases (five+ year term) or statutory easements may be registered voluntarily. Therefore, if a particular right, which is not mandatorily registered in the cadaster, is not listed therein, it does not automatically mean that said right does not exist or is not valid.

1.3. Publicity of real estate register

The entries in the cadaster, relating to real estate are registered in the form of so-called Ownership Deeds (in Slovak: *list vlastníctva*), are publicly accessible, and the cadaster is available also online at www.katasterportal.sk/kapor (available also in English). Extracts from Ownership Deeds are available to the public, and they contain the description of respective real estate, its owners, and encumbrances which are registered in relation to said real estate.

Collection of Deeds, on the contrary, is a part of the cadaster that is accessible only to the parties of the real estate transfer and persons authorized by them. Collection of Deeds comprises deeds (*e.g.* agreements, contracts, court decisions, and other documents) which are bases of registered rights pertaining to respective real estate. Each transfer of real estate has a separate Collection of Deeds. Therefore, the fact that the Collection of Deeds is accessible only to the parties of a specific title transfer significantly limits the possibility of title due diligence of the historical chain of title transfers. It is common that the seller provides for a power of attorney to the buyer's counsel to obtain title documents and real property surveyors are engaged to investigate the title chains given their specific authorizations of access to cadastral documents.

1.4. Protection of ownership

Entries in the cadaster are subject to a rebuttable presumption of correctness – they are deemed binding (reliable) unless proven otherwise. If the reliability of the particular entry is challenged (*e.g.* by litigation), the cadaster marks a “note,” to make such a challenge public. This means that the cadaster in Slovakia is the first step in determining the owner of the real estate but title due diligence is highly recommended given that the registration is rebuttable.

Ownership, including real estate ownership, enjoys the highest level of protection. If a person who is not registered as the owner in the cadaster claims its title, it may file an action with a

competent court, initiating the court proceedings on determination of ownership. In said proceedings, the defendant (sued party) is the person currently registered in the cadaster as the owner of particular real estate.

In order to prevent the registered owner from the disposal of a real estate pending court judgment, the claimant may also apply with the court for an interim injunction. By the interim injunction, the court may effectively prohibit the owner from the disposal of real estate, and such an injunction is evidenced in the cadaster.

2. Real estate acquisition

2.1. Share deal or asset deal?

Depending on the circumstances and the purpose of disposal, both share deals and asset deals are used when acquiring real estate in Slovakia. Each of them is used for a different purpose.

For the pros and cons of the respective deals, please see Sections 2.2. and 2.3. below.

2.2. Share deal

By a share deal, a purchaser usually acquires shareholding in a special purpose vehicle company owning the real estate. In the share deal, the purchaser acquires also all rights and obligations pertaining to the real estate such as rights to design, permits, maintenance agreements, utility supplies, and, most importantly, lease relationships in the case of shopping malls, warehouses, or office buildings. Therefore, the share deal is usually used when the purchaser desires to acquire a going concern – assets, services, IP rights, commercial leases, *etc.*, typically in order to continue with the business operations. Due to its complexity, the whole process may take longer than an asset deal due to the wider scope of due diligence which should include corporate and financial matters as well as employment, data protection, and commercial review. The main legal framework regulating share deals in Slovakia consists primarily of *Act No. 513/1991 Coll.*, as amended (Commercial Code) and *Act No. 530/2003 Coll.*, as amended (Act on Commercial Register).

The transfer of business shares in a limited liability company (in Slovak: *spoločnosť s ručením obmedzeným*) (LLC) is generally allowed but may be subject to the approval of the general meeting of shareholders and according to the rules set out in the articles of association. A share-purchase agreement has to be in writing, and all signatures must be verified by a notary public. In case of majority stake transfer (at least 50 %), the transfer becomes effective upon its registration with the Commercial Register (Companies Register). In the case of a minority share, the transfer is effective upon delivery of the

share-purchase agreement to the company.

Regarding a joint-stock company (in Slovak: *akciová spoločnosť*) (JSC), the transferability of bearer shares (in Slovak: *akcie na doručiteľa*) cannot be limited. The transferability of registered shares (in Slovak: *akcie na meno*) may be limited, but not entirely restricted, by the statutes. Bearer shares may be issued in the form of book-entered shares (in Slovak: *zaknihovaná akcia*) solely, while registered shares may be issued in the form of book-entered stock or certificated share (in Slovak: *listinná akcia*).

Effects of a transfer occur depending on the particular form of the shares – while the transfer of certificated stock is effective towards the company upon enlisting the new shareholder into the list of shareholders, the transfer of book-entered stock becomes effective upon registration in the Central Depository of Securities (a state institution). The share-purchase agreement by which registered certificated shares are transferred must be in writing. The share-purchase agreement on the transfer of book-entered shares must be in writing if at least one party demands so.

All corporate changes must be submitted electronically to the competent commercial register (the Commercial Register is available at www.orser.sk/default.asp available also in English) via a prescribed form no later than 30 days after the respective change occurs. The Commercial Register should register the change in two business days upon the delivery of the said application. However, commercial registers usually do not meet this deadline. Registration of the changes is subject to a court fee, normally in the amount of EUR 33 per one form submitted, regardless of the amount of changes registered via such form.

Fees associated with the share deal consist mostly of obligatory notarial costs (*i.e.* verification of signatures) and fees related to the registration of changes with the commercial register.

Potential risks of a share deal are typically flagged during the due diligence process.

In order to protect the purchaser from risks, representations and warranties are commonly included in the transaction documentation. Additionally, representations and warranties are insurable.

2.3. Asset deal

When a purchaser does not desire to acquire the whole business (or its part) from the seller, an asset deal is a more suitable option. By the asset deal, the purchaser acquires only specific assets, such as particular lands or buildings. Therefore, the asset deal is typically a swifter process, with due diligence limited

to the title, and rights and obligations directly associated with the asset.

Legal due diligence provided in relation to the asset deal should be focused mostly on previous owners' acquisition of title, previous transfers of real estate, the existence of third party rights such as encumbrances (pledges, easements, pre-emptive right, *etc.*), and litigation. The potential risks are described in greater detail in Section 2.6.

A real estate purchase contract must be in writing, must include signatures of all sellers and buyers, and the seller's signature must be officially verified. All pages of the purchase contract, including its attachments, must be firmly connected in one document and the contract may not be signed per partes.

The transfer of a title to real estate based on a real estate purchase contract becomes effective as of registration with the cadaster. The application may be filed by either contracting party, in paper form or electronically. The cadaster has a 30-day period to decide on registration (15 days if the application for the accelerated proceedings is submitted, subject to a higher fee).

If all statutory requirements are met, the cadaster will register the ownership right.

In order to ensure that the whole transfer will occur properly, depositing monies into a notarial or bank escrow has become a market standard. The buyer deposits the purchase price into the escrow, and it is released to the seller once the ownership title is registered in favor of the buyer without any encumbrances or with the pre-agreed permitted encumbrances, and if any other documents agreed by the parties are submitted to the bank or the notary public.

Administrative fees in relation to the application for registration of the ownership rights are EUR 66 (EUR 266, in case of accelerated proceedings). In the case of an electronic application, the administrative fees will be halved. Costs are typically incurred with respect to notarial verification, and notarial escrow, if applicable. With regards to taxes pertaining to the transfer of real estate assets, please see Section 4.

The most common risks pertaining to asset deals when conveying real estate are invalid preceding transfers of real estate, claims of third parties, and hidden encumbrances. With regards to protection from the risks, it is common to perform a title due diligence at least 10 years in reverse and if potential defects are identified, these are addressed in the transfer documentation by way of setting financial and/or time limits of the seller's liability and potentially also title insurance may be introduced.

2.4. Disposal process

Despite a relatively broad general contractual autonomy, Slovak law, as a typical continental legal system, demands a prescribed form and requirements to be met in real estate transactions. The disposal process is described in Section 2.2.

In case the real estate is co-owned by multiple co-owners, the non-selling owners have a statutory pre-emptive right. If a transferor of real estate is a married person and real estate belongs to a matrimonial estate (in Slovak: *bezpodielove spoluvlastníctvo manželov*) the consent of the other spouse is required. The pre-emptive right may also be established by contract.

If the pre-emptive right is not respected or a spouse's consent is not granted, the transfer is voidable within three years of such a transfer by filing a claim with the court.

The seller is obliged to hand over to the seller the energy certificate pertaining to buildings.

2.5. Registration of change of ownership

Please see Section 2.3.

2.6. Risks to be considered

Encumbrances

In general, encumbrances over a real property may be created by contract, a decision of a public authority, or by operation of a statute. Registration with the cadaster is required for the effective creation of a contractual encumbrance. Encumbrances created by a decision of a public authority or statute do not require registration and such registration in the cadaster is purely evidential. Such statutory encumbrances should be identified in the course of the legal and technical (mostly utility lines or various protection zones of utility lines, nature reserves, *etc.*) due diligence.

Pre-emptive right

Under Slovak law, parties may agree on the pre-emptive right either as a contractual obligation or as an *in rem* obligation. Some pre-emptive rights may also be created by statute. In general, contractual pre-emptive right is only binding for the contracting parties, and breach thereof causes only contractual liability and does not void the title to real estate. If a pre-emptive right is agreed *in rem*, it is also binding on the successors of the buyer. In order to establish a pre-emptive right *in rem*, a contract has to be in writing and becomes effective upon its registration in the cadaster. If the seller has not purchased the property offered by the buyer, it retains the pre-emptive right. In case of violation of the pre-emptive right, the entitled party may either demand that the acquirer offer the property

for sale, or the seller shall retain the pre-emptive right for the future. Under Slovak law, co-owners of real property have a pre-emptive right by law, as mentioned before. Additionally, there are several statutory pre-emptive rights comprised in various acts such as in the preservation of nature or significant investments acts. Such acts also provide for the consequences of a pre-emptive right breach. Statutory pre-emptive rights are not obligatory registered in the cadaster.

Lease

Leases of lands with more than a five-year term may be registered with the cadaster, but such registration has no impact on the validity or effectiveness of the lease. Therefore the existence of a lease relationship may not be encountered even in the legal due diligence.

Restitution

After 1990, with the aim to remedy wrongdoings of the communist regime, several restitution laws were enacted. They provided for the restitution of land to its former owners. In the time period from 1948 to 1990 owners of land were forced to transfer *their* land to the State or to another legal entity. In accordance with the provisions of the restitution laws, former owners or their heirs could claim that their land is restituted to them. In certain cases, Slovak law also provided for the restitution of land confiscated in the time period from 1945-1948. All periods for raising said claims have already lapsed.

Unfortunately, many restitution proceedings are still pending nowadays, which results in a risk that some land transfers may have been invalid. Such risks may be significantly reduced by inspecting the respective competent authorities.

Article 59a of the Commercial Code

There is also a possibility that a company has not acquired a property in accordance with statutory requirements. Under Article 59a of the Commercial Code, if a company acquires property under an agreement entered into with its founder, member, or shareholder for consideration equal to more than 10% of its registered capital, the value of such property must be determined by an official appraiser. Such an agreement cannot become effective prior to its filing into the Collection of Deeds of the Commercial Register together with the appraisal. The agreement together with the appraisal must be filed into the Collection of Deeds prior to its registration with the Cadaster.

If a company enters into the agreement above within two years from the date of its incorporation, a prior approval thereof by the general meeting is required.

The same also applies to agreements which are entered into

between a company and parties regarded as close parties of the founders, members, or shareholders thereof, or which have control or are controlled by the founders, members, or shareholders, always provided that the company acquires property for a consideration of more than 10% of their registered capital.

Nowadays, Article 59a applies only to JSCs, but until 2015, it applied to LLCs as well, therefore, past transfers which did not comply with Article 59a may be declared invalid as well.

An unsatisfied buyer has a right to claim remedies arising from liability for defects, whether statutory or contractual. The buyer's rights vary depending on a particular defect – from remedying the defect (if applicable) to withdrawal from the contract. The right to claim defects expires upon the lapse of the respective period.

Claiming defects does not prevent the buyer to claim compensation for damages caused by the defects.

3. Real estate financing

3.1. Key sources of financing

Developers borrow by way of real estate project financing loans from commercial banks under the *Commercial Code* and the *Act on Banks*. Loan agreements are often based on LMA standards. Banks usually require a certain percentage of equity and do not finance 100% of the value of a project. Recently, there were the first examples of green finance deals in the Slovak market.

3.2. Protection of creditors

The standard security package for corporate real estate finance (for the purchase of existing real estate) consists of:

- Mortgage
- Notarial deed (execution title)
- Pledge over bank accounts
- Pledge over the receivables for rent
- Pledge over insurance policies
- Pledge over shares in the special purpose vehicle (SPV) that is to own financed real estate and the subordination agreement (if prior shareholder loans exist)

A mortgage is perfected once it is registered in the Cadastral Register. Pledges are perfected once they are registered in the Notarial Register of Pledges. Pledges over shares are perfected either upon registration in the Register of Pledges of the Cen-

tral Securities Depository (for shares) or in the Commercial Register (ownership interest in an LLC).

4. Real estate taxes

4.1. Transfer taxes

No real estate transfer tax applies in Slovakia.

Regarding value-added tax (VAT), the supply of a structure together with the lands underneath is exempt from VAT after the lapse of five years from the issuance of the occupancy permit allowing the use of the respective structure. However, if a VAT payer supplies a non-residential structure exempt from VAT, it may opt to apply VAT. The supply of a land plot other than a construction/development land plot is also exempt from VAT. The applicable VAT rate for supplies of real estate is 20%.

Regarding income tax, if real estate is transferred prior to the lapse of five years following its acquisition, the transferor is required to pay an income tax. If the transferor is a natural person, the income from the transaction is also subject to health and social insurance payments. The applicable income tax rate varies from 15% to 25% depending on the income and on whether the payer is a natural person or a legal entity.

4.2. Specific real estate taxes

The only tax applicable with respect to real estate ownership is the real estate tax (in Slovak: *dan z nehnuteľnosti*). The real estate tax comprises several tax categories and includes a tax on lands, tax on the structures, and flats and non-residential premises tax. *Act No. 582/2004 Coll. On Local Taxes and Local Fees for Municipal Waste and Small Construction Waste*, as amended sets out the default tax rate for each real estate tax category. At the same time, the act authorizes the respective municipality to change the applicable tax rate according to the municipality's prevailing local conditions. Municipalities are required to adopt such changes via generally binding regulations, which are usually published either on the municipality's website or on the municipality's official board. In general, compared to Western Europe, the real estate tax is rather low, and political discussions arise from time to time to increase the real estate tax rates to align them with European trends.

5. Condominiums

5.1. Legal framework for condominiums

Condominiums (in Slovak: *bytové domy*) are governed by *Act No. 182/1993 Coll. On the Ownership of Apartments and Non-Residential Premises*, as amended (Condominiums Act). A condominium is defined as a building with no less than three apartments and more than half of the floor area intended for residential

purposes. From a legal point of view, a condominium building is split into individual residential and non-residential units which are evidenced separately and individually transferable. The owners of the units in the condominium co-own the common parts and facilities in the building as well as the plot underneath and adjacent to the building (save for a few exceptions).

5.2. Rights and duties of co-owners

The apartment's co-owners' rights and duties in condominiums are regulated in detail in the Condominiums Act. We outline below the most important ones. Apart from the right to enjoy ownership and the right to lease the apartment or non-residential premises, the rights and duties of the owners are as follows:

The duty to take care of the residential or non-residential units: The unit owner is obliged, at its own expense, to keep its unit in a condition suitable for proper use, especially to carry out maintenance and repairs in a timely manner.

The duty to enjoy ownership right in proper fashion: The unit owner is required to act in such a way that when using, maintaining, changing, renting, or otherwise disposing of its unit, the owner does not disturb or endanger others in exercising their ownership, co-ownership, and common use rights.

The right to file a motion ordering the sale of a unit: If the owner restricts or prevents the other owner's exercise of ownership rights by materially damaging the condominium, constantly disturbing the peaceful residence, endangering safety or morals in the condominium, or failing to fulfill the obligations imposed by a court decision, upon a motion, the court may order such owner to sell its unit.

The duty to allow for an entry of an authorized person: The unit owner is obliged to allow an authorized person's entry into its unit due to various reasons envisaged by the law. These reasons include the installation and maintenance of equipment for measuring heat and water consumption, reading of measured values, or inspecting that construction works do not threaten or adversely affect the condominium.

The duty and right to participate and vote: Each owner in a condominium has the duty and the right to participate and vote in all matters concerning the management of the condominium.

The duty to contribute financially to the condominium's administration: The unit owners in a condominium are obliged to pay financial contributions to the operation, maintenance, and repairs fund of the condominium.

5.3. Liability of co-owners

Apart from the generally applicable duty to prevent damage, co-owners also have an extended duty to prevent and remedy damages. A co-owner is obliged to remedy defects and damage caused to the condominium by the co-owner itself or persons who use its unit.

Co-owners are obliged to enable the elimination of deficiencies identified by safety inspection of the technical equipment. If the condominium co-owners do not allow for such elimination, they are liable for the ensuing damage.

Moreover, in order to secure obligations arising in connection with the condominium's management, a lien may be established over its unit in favor of the other co-owners.

5.4. Rights and duties of condominium associations

When it comes to the management of a condominium, the co-owners have two options. They may opt to establish a condominium association or entrust the condominium's management to a professional condominium facility manager (In Slovak: *spravca bytoveho domu*).

A condominium association (in Slovak: *spolocenstvo vlastníkov*) is a legal entity established to manage, maintain, and renovate the common parts and facilities of the condominium including its adjacent lands. A condominium association is established upon registration with the Register of Condominium Associations kept by the respective district office in the seat of the region (In Slovak: *okresny urad v sidle kraja*).

A condominium association may only act in ways envisaged by the Condominium Act. A condominium association manages co-owners' payments and contributions in order to manage the condominium. To this extent, a condominium association may conclude contracts on behalf of the co-owners, for example, insurance, repair, reconstruction, lease, or credit agreements. Further, a condominium association is entitled to enforce payments and contributions to the condominium's joint fund from the co-owners on its own behalf.

Apart from the duty to duly manage and administer the condominium, the condominium association's general duties comprise an obligation to submit to the co-owners an annual report on its activities and funds' management each year by May 31 and to distribute to individual co-owners the billing of the funds for services used. Condominium funds are strictly to be kept in a bank account owned by the condominium co-owners. Condominium associations are forbidden from engaging in third-party business activities.

The co-owners may also decide to employ a professional condominium facility manager. Compared to the condomini-

um associations, the condominium facility manager has several additional obligations towards co-owners including convening a co-owners' meeting at least once a year or instigating enforcement proceedings against defaulted co-owners. The condominium facility manager is liable to the co-owners for damages incurred to the condominium as a result of the manager's breach of its duties.

Engaging a professional condominium manager over establishing a condominium association might be more expensive. However, it usually brings some advantages to the co-owners. One of the greatest benefits of having a professional condominium manager is that the co-owners shift the responsibility for the condominium to a third party with professional experience. Ultimately, it is up to the co-owners to choose the most suitable option.

6. Commercial leases

6.1. Form and contents of a lease agreement

There are two main acts governing a lease of real estate. The *Civil Code* is a general legal act, stipulating general provisions on leases and special provisions on a lease of an apartment. *Act No. 116/1990 Coll. on Lease and Sublease of Non-residential Premises*, as amended, is a special act that regulates the lease of non-residential premises. Building as a whole and lands are not deemed non-residential premises, therefore, the general regulation of leases will apply.

Notwithstanding the aforementioned, leases of forest lands and agricultural lands have a specific regulation as well. Special provisions also regulate leases of real estate owned by the state, public authorities, or municipalities.

General lease agreements must include the description of a lease subject; naturally, it is strongly advised to incorporate at least provisions stipulating rent, lease duration, rights and obligations of the landlord and tenant, and termination rights. A *Civil Code* lease agreement does not have to be concluded in writing, even though it is strongly advisable.

A lease agreement of non-residential premises (such as an office lease), on the other hand, is regulated by the special act very rigidly and must be concluded in writing. The agreement must include the subject and purpose of the lease, rent, as well as its due date and method of payment, and if the lease is not agreed for an indefinite period, the agreement must also include the lease term. If these requirements are not included in the agreement, it is void.

Similarly, a lease of an apartment as a protected form of lease in Slovakia must include multiple statutory provisions, and requires a written form, with an alternative being the notarial

record of its content. The agreement must include a description of the apartment and the extent of its use. The rent must be included as well, including the number of payments for performances (services) related to use of the apartment. It might also comprise the description of the apartment's accessories and state.

If parties do not agree on the details, the statutory provisions of the respective regulation will apply to the relationship. That is the reason why it is common in commercial leasing, to agree on all rights and obligations, including maintenance, termination rights, right of extension, *etc.*, in the lease agreement and exclude the automatic application of the statutory provisions.

6.2. Regulation of leases

For the basic differences between legal rules governing various lease types, please see Section 6.1.

The provisions governing the general regulation of lease under the *Civil Code* are deemed excludable. On the contrary, a lease of an apartment, despite being regulated by the *Civil Code* as well, is strictly governed, and provisions covering such a lease cannot be excluded. The same applies in relation to the regulation of non-residential premises.

Leases of state-owned and municipality-owned property are subject to additional approvals of competent authorities, and the legal regulation governing these leases cannot be excluded.

6.3. Registration of leases

Leases of real estate with the term of five years and more may be registered with the cadaster, but such a registration is only voluntary and has no impact on the validity or effectiveness of the lease. However, it is advisable to register such a lease with the cadaster to put third parties on notice of the existence of the lease relationship.

Lease agreements concluded with the state institutions or municipalities usually require their prior approval by various bodies such as a municipal assembly and must be published in order to become effective.

6.4. Termination of leases and renewals

All lease agreements may be terminated or renewed by the agreement of the parties. Under the *Civil Code*, parties may derogate from any termination reason pertaining to the general lease agreement, and even agree on their own termination reasons. Article 676 *et seq.* of the *Civil Code* envisages mainly following termination reasons:

- The lease shall expire upon the lapse of the agreed term;
- Unless the landlord and the tenant agree otherwise, the lease agreement concluded for an indefinite period of time may be

terminated only by notice; and

- Unless otherwise provided by a special act, lease agreements for real estate may be terminated by a three-month notice.

Termination by withdrawal by the tenant is applicable when the subject of the lease becomes unfit for the agreed use, or health imperiling. Termination by withdrawal by the landlord, on the other hand, is available in cases of unauthorized use of the subject by the tenant, unauthorized subleasing, or if the tenant is in delay with payments of rent, and, at the same time, other statutory requirements have been fulfilled.

The act on non-residential premises (office leases) is very rigid and it is not possible to exclude the termination reasons it stipulates. The leases for a definite term may not be terminated for no cause. They expire upon the lapse of the agreed term. The landlord may terminate should the tenant use the premises contrary to the lease agreement or be in delay with payment of rent or services for at least a month. Additional reasons relate to the tenant's behavior, unauthorized subleasing of the premises, and other specific situations. The tenant may terminate the agreement mostly when the leased premises are not maintained in the agreed condition, or the premises cease to be suitable for the agreed use. Given that the parties cannot deviate from the reasons for termination by notice, parties usually agree on additional reasons in the lease agreement which shall represent a breach of contract and will give rise to a right to withdraw the agreement.

If the agreement is concluded for an indefinite period, both parties may terminate it without cause, if not agreed otherwise. The statutory termination notice period is three months, but it may be modified by parties.

Automatic renewal of lease applies for general lease (lands and buildings). If the tenant continues to use the property after the expiry of the term of the lease and the landlord fails to file a petition (action) for vacation of the property with the relevant court within thirty days, the lease agreement shall be renewed under the same terms under which it was originally agreed. A lease agreed for a term longer than one year shall always be renewed for another year.

A lease of an apartment is especially protected. The landlord may terminate it by notice only for strictly given statutory reasons, mostly pertaining to the tenant's behavior and termination of the agreement by withdrawal is forbidden.

Automatic renewal of a lease of an apartment is excluded.

6.5. Rent regulations and rent reviews

In private contractual relationships, the parties may agree on basically any rent. However, a lease of state-owned or municipal property requires the agreement on so-called "market rent."

It is usual that lease agreements include provisions on rent indexation fixed to the Slovak or EU inflation indexes.

6.6. Services to be provided together with the lease

Generally, services provided together with the lease depend on the agreement between parties, and, simultaneously, the landlord is obliged to keep leased real estate in a suitable condition for agreed or typical use.

Regarding non-residential premises, the landlord should also ensure the provision of services pertaining to the use of the premises (*e.g.* utilities).

Regarding apartments, a lease agreement must include the identification and amount of payments for performances relating to the leased apartment.

6.7. Fit-out works and their regulation

The parties may agree on any fit-out works. In addition to such an agreement, regarding the lease of an apartment, the tenant must not perform any construction work or any other material changes to the apartment without the landlord's consent.

Regarding the general lease and lease of non-residential premises, the tenant may perform changes to the property only with the landlord's consent, and it may demand reimbursement of the costs if the landlord undertook to do so. If the landlord granted its consent to the change but did not undertake to reimburse the costs, after the termination of the lease, the tenant may demand consideration for the increase in the value of the

property.

However, if the tenant makes any changes to the property without the landlord's consent, it is obliged to restore the property to its original state at its expense after the termination of the lease. If the landlord faces incurring considerable damage due to the changes made to the property, he is entitled to withdraw from the agreement.

According to the *VAT Act*, fit-out works that increased the value of the leased property, provided by the tenant, are deemed the non-monetary income of the landlord, provided that the landlord has not reimbursed such costs and agreed with said fit-out works. Upon fulfillment of the conditions prescribed by the *VAT Act*, such income may be depreciated.

6.8. Transfer of leases and leased assets

Generally, a transfer of a leased property has no effects on the lease agreement which remains valid and binds the new owner. On the other hand, the tenant may subsequently terminate the lease agreement by notice (even if the lease agreement is concluded for a definite period). In such a case, the termination reason is deemed to be the change of the landlord. The new owner/landlord does not have a right to terminate the lease.

The above effects of change of ownership to the leased property are the reason for which the acquisitions of shopping malls, office buildings, or warehouses with existing lease relationships are mostly done as share deals so that the leases are preserved.



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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

Under the *Turkish Constitution* (Constitution), everyone has the right to own and inherit property and these rights may be restricted only in the public interest. In addition to the protection of the Constitution and the Turkish courts, the property right is also protected by the European Convention on Human Rights and Fundamental Freedoms (ECHR), the First Protocol to the Convention, and the European Court of Human Rights. Although the Constitution recognizes the property right as a fundamental right, similar to the ECHR, it allows for expropriation and nationalization provided that appropriate compensation is paid, if it is set forth in the law, is in the public interest, and is proportional. Additionally, the Constitution prohibits any restriction that prejudices the spirit of the property right.

The key sources of Turkish law regarding real estate ownership and protection are the *Turkish Civil Code* (TCC), *Land Registry Law*, *Cadastral Law*, *Law on Expropriation*, *Zoning Law*, *Forestry Law*, and *Coastal Law*. The Turkish real estate legislation is accepted as stable and structured. There are also well-established court precedents in terms of real estate ownership and protection.

The TCC has comprehensive regulations on real estate and recognizes different types of ownership rights (*i.e.*, real property ownership, condominium ownership, permanent and independent construction right), rights *in rem* (*e.g.*, usufruct right and other easements), personal rights (*e.g.*, pre-emption right and redemption right), and property restrictions (*e.g.*, mortgages and pledges).

Although the right to own property is a right that everyone is entitled to, there are some restrictions when it comes to the real estate acquisition of foreigners, as explained under section 2.4.

Both consumers and investors follow the trends closely to enjoy their rights to own property through more economical and easier ways. In recent years, utilization of real estate certificates, real estate investment funds (REIFs), and infrastructure real estate investment trusts (REITs) as financial resources have become more common and provided more opportunities to real estate investors. Within the last decade, the residential real estate market has been positively affected by the legislative amendments that allow foreigners to acquire Turkish citizenship by investing in real estate. Large residential projects, the campaigns launched by real estate developers and banks, migration-driven demand, and hikes in foreign currency have boosted residential sales.

1.2. Registration of ownership

All real estate is registered with the land registry with exceptions that are explained further below. As per the *Land Registry By-Law*, lands, permanent and independent rights, and independent units subject to condominium ownership must be registered as real property with the land registry. Real properties that are reserved for public use and not subject to private ownership are not registered in the land registry so long as rights *in rem* are not established on such real properties in favor of third parties. For instance, forests, coastlines, and archaeological sites are not registered as these are not subject to private ownership. Additionally, rights *in rem* and personal real property rights that are defined in the law can be registered with the land registry, but personal rights that are not defined in the law cannot be registered.

The state is responsible for keeping true and accurate records of real estate through land registries which are established in each district. The entries in the land registry are kept both physically and electronically. The physical entries are recorded in the title books that are kept by the district land registry offices and the electronic entries are recorded under the unified online system named TAKBIS (*Land and Cadastre Information System*).

Finally, it is worth mentioning that the Turkish Consulate General in Berlin has a division operating as a land registry office, and the General Directorate of Land Registry and Cadastre is in the process of establishing new land registry offices abroad. This expansion will allow the parties who reside abroad to conclude their transactions remotely, without being obliged to personally attend the land registry offices in Turkey.

1.3. Publicity of real estate register

Land registries are open to the public, and anyone who has a legitimate interest in reviewing the entries is allowed to do so by proving their interest. The owner of the real property, the holder of rights *in rem*, and tenants are accepted among those who have a legitimate interest. Lawyers and trainee lawyers are allowed to review land registry records without submitting a power of attorney. Individuals holding a Capital Markets Board license, banks, and survey engineers may review the land registry records as well.

1.4. Protection of ownership

The entries in the land registry are binding. The transfer of ownership and acquisition of rights *in rem* become valid and gain effect once they are registered with the land registry. Agreements that result in the transfer of ownership or rights *in rem*, and agreements establishing rights *in rem* in favor of third parties are subject to strict form requirements. Under the

applicable legislation, sale and purchase agreements must be drafted by the land registry in the standard form. This practice is adopted to prevent any invalid or conditional transactions. The agreements regarding rights *in rem* are also examined by the land registry officers before they are executed by the parties. Both types of agreements are signed before the land registry office after a careful examination of the parties' legal competence. Agreements executed between parties in simple form are invalid.

As for personal real estate rights that are defined under the legislation (such as lease agreements and pre-emption rights), in principle, these are not required to be registered and the entries regarding personal rights are accepted as explanatory entries.

As stated under section 1.2., the state is responsible for keeping true and accurate records of real estate transactions. Both the state and the land registry officers are liable for damages caused to third parties due to inaccurate or false land registry records. If an unauthorized disposal is made due to the land registry officer's fault (for instance, due to insufficient examination) the owner can make a claim to the state and the relevant officer for their damages. If an individual or a legal entity becomes entitled to an ownership right or another right *in rem* based on their trust in the land registry, then their entitlement is protected. This principle is also known as the principle of trust. However, if a right *in rem* is established illicitly then those who are, or should be, aware of this illicit establishment, cannot rely on such faulty land registry record. A record is illicit when it is based on a non-binding legal transaction or does not have a legal reason. If a person's right *in rem* is harmed due to an illicit land registry record, then such an injured person may claim remedy against the ones who were not acting in good faith.

2. Real estate acquisition

2.1. Share deal or asset deal?

There are two common real estate acquisition structures: **(a)** asset deal and **(b)** share deal. In an asset deal, the purchaser directly acquires the ownership of real property, whereas, in a share deal, the purchaser acquires the shares of a company owning the target real property. In a share deal, the investor acquires the entire business of the target company including, but not limited to, the real estate, other assets, agreements, permits, and licenses, as well as the employees and liabilities. A share deal is only possible if the owner of the target real property is a legal entity.

The parties mainly structure the transaction depending on the parties' needs and expectations and the transaction costs. The tax implications are very important to consider when structuring a transaction. To find the most tax-efficient structure,

investors engage professional tax consultants. These consultants determine the possible tax implications of the transaction and develop the most suitable acquisition model for carrying out the transaction. For instance, if the target real property is owned by a legal entity, investors may prefer a share deal to avoid VAT (in particular cases) and the land registry charges. Despite its high costs, an asset deal may still be preferable, if the legal entity owning the target real property entails certain financial risks (due to its legal background/previous transactions, *etc.*). Additionally, since a share deal requires more comprehensive due diligence, the parties generally choose to proceed with an asset deal if they intend to close the transaction as soon as possible. Another way of acquiring real estate may be through a spin-off. A spin-off of the target real property into a newly established company and acquisition of this new company's shares may be also considered by the parties.

2.2. Share deal

Upon the parties' decision on consummating the business transaction, the parties generally execute a term sheet, letter of intent, or an agreement of a similar nature in written form to express the party's interest in carrying out the transaction. Such an agreement is generally non-binding and merely outlines the main terms of the transaction and the parties' conditions for the consummation of the transaction (*e.g.*, satisfactory completion of the due diligence, obtaining regulatory and internal approvals).

Subsequently, the purchaser conducts due diligence exercises on the target company (*e.g.*, legal, financial, accounting, business, tax) through its advisers. The due diligence allows the purchaser to understand the strengths, challenges, and opportunities of the target's operations, and it helps the purchaser to rationalize the acquisition decision and to establish the purchase price to be paid. If the outcome of the due diligence exercise is satisfactory for the investor, the parties start negotiating binding transaction agreements. In the case of a tender, the investor places a bid for the target upon completion of a satisfactory due diligence review and then the parties execute binding transaction agreements.

In a share deal, the parties enter into binding agreements, such as a share purchase agreement (SPA), a joint-venture agreement, or a share subscription agreement. Under these agreements, the parties may address, mitigate and settle the financial, tax, legal, or operational risks and/or exposures of the target company. The seller may provide representation and warranties to the buyer and the parties may agree to close the transaction once certain conditions precedent (CPs) are fulfilled. If there are any CPs, an interim period will be established where the sellers will remain as the owner of the target company but be under the obligation to close the transaction when the CPs (*i.e.*,

obtaining approvals, financing of the transaction) are met or waived. If there are assets or other elements of the target company that are not intended to be acquired, these are carved out from the company through separate legal transactions prior to the share transfer transaction and, to procure this result, such an undertaking should be regulated as a CP or a pre-completion covenant under the SPA.

SPAs are exempt from stamp tax. In a share deal, the transfer of shares is subject to **(i)** a corporate tax corresponding to 25% for the year 2021 and 23% for the year 2022 over capital gains derived from the transaction, if the seller is a legal entity; or **(ii)** an income tax from between 15% to 40% depending on the income gained from the transaction if the seller is an individual. A share deal is not subject to land registry fees.

Capital gains derived from the transfer of shares in a Turkish company are 75% exempt from corporate tax and 100% exempt from income tax (if the seller is an individual and the company has issued share certificates representing such shares) if the relevant shares have been held for at least two years prior to their transfer.

As the tax rates change from time to time, investors should consult with professional tax advisors before investing in real estate.

2.3. Asset deal

In an asset deal, the investors either close the transaction by directly purchasing the real estate through a title transfer before the relevant land registry if the due diligence is satisfactory, or the parties enter into a promise-to-sell agreement if there are CPs that need to be fulfilled before the transfer of title and/or the purchaser wishes to create contractual exclusivity over the target real property prior to the transfer of title. In an asset sale transaction, the purchaser's risk is generally limited and directly related to the real estate itself. The investors choose the method of executing a promise-to-sell agreement and include special terms to this agreement to address, mitigate, and settle the risks and/or exposures, as it is impossible to include non-standard terms in an official share and purchase agreement. These agreements may be annotated with the land registry. Once they are annotated, they become binding on third parties.

The due diligence works carried out in the context of a real estate-related business combination differ from share deals and asset deals. In an asset deal, the legal due diligence review is mainly conducted in relation to **(i)** the land registry records and cadastral records, **(ii)** the zoning plans, construction licenses, and building usage permits, and **(iii)** the material agreements.

Real estate sale and purchase agreements are exempt from the

stamp duty charge. However, real estate sale transactions are subject to a land registry fee corresponding to 4% of the sale value stated in the official deed that is to be paid equally by the seller and the purchaser (*i.e.*, 2% on each side). If the sale value is less than the real estate tax base of the property, then the land registry fee is calculated over the real estate tax base. Additionally, a working capital fee arises out of each transaction.

If the real estate is sold by a Turkish company before a two-year period elapses following the acquisition of the real estate, the income generated from the sale of real estate will be subject to corporate tax at 25%. This rate is expected to be 23% for 2022. Additionally, such sale transactions will be subject to Value Added Tax (VAT). The rate of VAT for the sale of residential flats having a surface area of less than 150 square meters is 1% and the VAT rate for the sale of any other type of real estate is 18% of the sale price.

However, if the real estate is sold two years after the real estate's acquisition, then 50% of the income will be exempt from the corporate tax provided that certain conditions are met. The sale of real estate that has been held for at least two years by its owner will not be subject to VAT provided that the Company does not engage in commercial activities, as explained above.

Additionally, the sale of real estate owned by individuals is exempt from VAT. However, such sales are subject to income tax if the real estate is sold before a five-year period elapses following the acquisition of the real estate. Capital gains arising from the sale of real property by individuals are subject to income tax at rates that vary depending on the income gained from the sale transaction.

As the tax rates change from time to time, investors should consult with professional tax advisors before investing in real estate.

2.4. Disposal process

Real estate promise to sell agreements must be prepared in statutory form and executed before a notary public in order to be valid. Although real estate promise to sell agreements are currently exempt from stamp duty, they are subject to notary fees and charges that change depending on the number of the signatories and the number of pages.

For a real estate sale and purchase agreement to be valid and take effect, it must be drafted by the land registry officers in the standard form and executed by the parties in the official form (*e.g.*, in the land registry office, in front of a camera). In practice, non-standard terms may not be included in an official sale and purchase agreement.

As to the transfer of shares in a joint stock corporation,

there are two types of shares in a joint stock corporation (*i.e.*, registered shares and bearer shares). For registered shares, a share transfer is completed by the endorsement of the share certificates (if any). For bearer shares, delivery of the relevant share certificate is sufficient to complete the share transfer. For both registered and bearer shares, subject to certain exceptions, there is no need for registration with the trade registry and if the shares (of joint stock corporations) that are to be transferred are represented by share certificates, SPAs are not subject to any special form requirement. However, the share transfer must be recorded in the company's share ledger, so that such transfer is valid for the company. If the relevant joint stock corporation has not issued any share certificates, a SPA in written form must also be executed between the parties.

As for limited liability companies, SPAs must be made in written form and notarized.

Under Turkish law, there are certain restrictions regarding foreign individuals, foreign companies, and foreign capital companies' acquisition of real property. The Land Registry Law prohibits foreign companies incorporated and resident abroad, from directly purchasing real property in Turkey. There are only three exceptions to this general prohibition. Accordingly, foreign companies carrying out their businesses within the scope of the *Turkish Petroleum Law*, *Tourism Incentive Law*, and *Industrial Zones Law* may acquire real property in Turkey. Foreign capital companies incorporated in Turkey that have foreign shareholders (i) individually or collectively holding 50% or more shares of the said company, or (ii) having the right to assign or dismiss the majority of persons in the company management, may acquire real property in Turkey subject to a permission process. In order to purchase real property, the foreign capital company must complete a series of bureaucratic transactions.

To directly purchase real property, Turkish companies that are foreign capitalized are required to apply to the corresponding real property's governorship. The governorship and the military and police departments will determine whether the target real property is located within a military or special security zone and, if so, whether the purchase of the particular property by the applicant endangers national security or not. Upon a positive assessment of the governmental authorities, the governorship informs the applicant company and the relevant land registry office that the requested purchase may be completed.

The same principles will apply if a foreign investor directly or indirectly acquires 50% or more shares of a Turkish company that owns real property (*i.e.*, share deal). In such an event, the relevant company must notify the Ministry of Economy, which will trigger the approval procedure explained above. If the relevant foreign capitalized Turkish company owns a real

property located in military and special security zones and the governmental authorities decide that the new shareholder's acquisition endangers national security, the company may be forced to dispose of the real property.

On a final note, there are approval procedures to acquire real estate in special zones such as organized industrial zones. As per the legislation regulating organized industrial zones (the OIZs), it is obligatory to obtain the relevant OIZ's permission to transfer ownership of the real property located in the OIZs.

No documents are mandatorily handed over to the purchaser upon the disposal, such as architectural projects, permits, and licenses, which are kept by the administrative authorities.

2.5. Registration of change of ownership

In the event of an asset deal, once the sale and purchase agreement is signed by the parties before the land registry, the ownership of the real property automatically passes onto the purchaser and the land registry officer registers the real property in the name of the purchaser.

For a share deal, since the subject real property is already registered in the target company's name, no further transactions at the land registry are necessary. In the event of a merger or a spin-off, once the share deal is completed, the trade registry will inform the land registry and the land registry will correct its records if needed.

2.6. Risks to be considered

As per the TCC, each joint owner of real property has a pre-emption right on the subject property. Such pre-emption right can be exercised when a joint owner sells their shares partially or in its entirety to a third person.

In the event of a share deal, pre-emptive rights can only be exercised if such pre-emptive rights are regulated in the company's articles of association or in a shareholders' agreement.

The *Turkish Code of Obligations* (TCO) regulates the buyer's inspection obligation. Accordingly, buyers are obliged to inspect the acquired assets at their earliest convenience. Conducting due diligence reviews on the target real property or company is just an extension of this inspection obligation. If the defects of real property remain undetected in the due diligence process, then the buyer's remedy options would vary depending on the defect and the parties' agreement. For instance, in the case of a structural defect in a building, the purchaser will have the option to request a remedy from the contractor of the building as per the TCO. The buyer does not have a uniform option with respect to requesting remedy for the damages arising from the defects.

3. Real estate financing

3.1. Key sources of financing

Investors often prefer to finance the lower percentage of their contemplated real property investment projects through their own savings and the remaining parts by using loans from both public and private sources, investment banks, development banks, and lending agencies.

Banks and other financing institutions determine the amount of the loan in line with the Earnings Before Interest, Taxes, Depreciation, and Amortization values of the borrower. In addition, the parties are free to determine the interest rates in line with current market rates that are to be accrued for three, six, or 12 months under loan agreements. Banks or financing institutions often require that the applicants prepare market, technical, financial due diligence reports and, most importantly, appraisal reports for the real property, which may vary according to the nature of a contemplated project, in order to negotiate the loan amount to be borrowed by loan applicants. In practice, investors execute loan agreements with a term of 10–12 years in order to finance their commercial real estate investments.

In addition to loans, sale and leaseback transactions, corporate bonds and Islamic financing structures are also commonly used. For major international projects, the Turkish Government can fund companies' debt in build-operate-transfer and build-lease-transfer models.

It is also worth mentioning that the Turkish real estate market has developed a financing method called “construction agreement in return for land share (or construction agreement in return for flat).” These contracts are mixed contracts that are not defined under the law and they are flexible enough to adjust for the special needs of the project. Under these agreements, the contractor undertakes the construction works and, in return, the landowner promises to transfer a certain ratio of its land share to the contractor. Depending on the project, the landowner may transfer its land in its entirety to the contractor at the beginning of the construction by establishing a mortgage on the property or obtaining a letter of guarantee from the contractor. The contractor then transfers the predetermined independent units (flats) to the landowner once the construction is finished. This method allows the contractors to avoid land costs and enables them to sell the independent units constructed on third-party land to finance the project.

Finally, some of the construction companies provide their individual customers with credit possibility/payment plans. Payment plans help to increase the feasibility of real estate sales.

3.2. Protection of creditors

Although each project and investment have their special conditions, real estate investors usually utilize their real estate as security. Mortgages and assignments of lease receivables are among the most common securities for real estate investments. Letters of guarantee, account pledges, commercial enterprise pledges, and share pledges are commonly used as well.

4. Real estate taxes

4.1. Transfer taxes

Please refer to our explanations under section 2.4.

4.2. Specific real estate taxes

Real estate in Turkey is subject to annual property tax according to their qualification. Real estate in the qualification of buildings is subject to annual property tax rates varying between 0.1% and 0.4%, whereas real estate in the qualification of lands is subject to annual property tax rates varying between 0.1% and 0.6%. These tax rates apply over the real estate tax base. Annual taxes are paid in two equal installments in May and November.

Recently, a valuable house tax has also been introduced in Turkey. Accordingly, if the value of the residential property is **(i)** between TRY 5 million and TRY 7.5 million, for the amount exceeding TRY 5 million, a valuable house tax in the amount of 0.3% will be payable for the amount exceeding TRY 5 million; **(ii)** up to TRY 10 million, TRY 7,500 for TRY 7 million, and a valuable house tax in the amount of 0.6% for the exceeding amount, and **(iii)** exceeding TRY 10 million, TRY 22,500 for TRY 10 million, and a valuable house tax in the amount of 0.10% for the exceeding amount will be borne.

As the tax rates change from time to time, investors should consult with professional tax advisors before investing in real estate.

5. Condominiums

5.1. Legal framework for condominiums

Condominiums exist under Turkish law as a special type of real estate which can be registered with the land registry. These are usually referred to as independent units. Condominium ownership grants the owner basic rights and benefits attached to ordinary real estate. As per the *Condominium Law*, condominium ownership is established on the independent units of a building structure constructed on land, which can be utilized separately on their own (such as residential flats, business offices, shops, stores, cellars, warehouses).

Before establishing condominium ownership and as a first

step, condominium servitude is established on the land where the independent units will be constructed based on the condominium principles agreed to in the management plan and the architectural projects of the building. Once the construction of the building structure is complete, the condominium servitude is converted into condominium ownership.

Condominium ownership provides the co-owners with the freehold title of their independent unit and a land share (which is calculated based on the value of their independent unit in comparison to the whole real estate). Even when the building structure is demolished, the co-owners' ownership rights continue on the land at their land share.

5.2. Rights and duties of co-owners

■ Rights

As per the *Condominium Law*, condominium owners have all rights and powers that the TCC grants to real estate owners and condominium owners can exercise such rights on the independent units belonging to them. Condominium owners can transfer their title to third parties and establish mortgages on their independent units. Additionally, condominium ownership grants the co-owners a right to utilize their respective buildings and the main real property's **(i)** common areas, **(ii)** infrastructure and installations (such as the elevators, general coal bunker, garage, terrace, laundry, and laundry drying areas is proportional), and **(iii)** appurtenances.

The *Condominium Law* allows condominium owners to make repairs, installations, and changes in their independent units that will not affect or harm the main real property or other independent units without obtaining the consent of the other co-owners. If a repair, installation or a change to be made in an independent unit affects the connected parts (parts that are connected to each other with a ceiling, floor, or wall) of multiple independent units, then these works can be made with the mutual consent of the affected units' co-owners.

Similar to condominium ownership, condominium servitude is also a transferrable and mortgageable right under Turkish law. Condominium servitude also gives their holders a right to demand and file a lawsuit for the fulfillment of the obligations regarding the completion of the building to be built on the land.

■ Duties

When using their independent units, appurtenances, and common places, co-owners are obliged not to cause disturbance to one another, not to violate each other's rights, and to comply with the provisions of the management plan.

Co-owners are obliged to care for the main property and

meticulously protect its architectural condition, beauty, and durability.

Co-owners can make no repairs, installations, or changes regarding their own independent units if these will damage the main property.

5.3. Liability of co-owners

Each co-owner is liable towards the other co-owners for the damages caused to the main real property and other independent units.

Each co-owner is obliged to bear the common expenses of the main property unless otherwise agreed in a management plan or another agreement. The co-owners cannot refrain from bearing the common expenses allocated to their independent unit, even if they do not use, or need to use, the common areas. If the co-owners do not cover their share of the common expenses, then any co-owner may file a lawsuit or initiate enforcement proceedings against such owner.

The tenants who use the independent units based on a lease agreement are also jointly and severally liable for the common expenses allocated to their independent unit. However, the tenant's liability is limited to the amount of rent he/she is obliged to pay.

5.4. Rights and duties of condominium associations

Condominium associations convene at least once a year with a qualified majority, which means that more than one-half of the co-owners and more than one-half of land share owners must be represented at the general assembly. All decisions, except for the ones that require a special quorum, are taken by the majority of the votes. Each co-owner has one right to vote, regardless of their land share. All condominium owners and their successors, managers, and auditors are obliged to comply with the decisions of the condominium associations.

The condominium associations prepare and amend the management plan; decide on the management style of the main property; appoint and dismiss the managers; audit the management operation projects, and income and expenditure reports submitted by the managers.

The disputes that may arise due to the use or management of the main property **(i)** between the co-owners; or **(ii)** between the co-owners and the manager and the supervisors; or **(iii)** between the supervisors and the managers, are also resolved and settled by the condominium associations.

The rights and duties of the manager of the condominium association are extensive. Performing the decisions made by the condominium association, making sure that the main property is being used in line with its purpose, insuring the main prop-

erty, and accepting the services that concern all of the whole co-owners are among the manager's rights and duties.

6. Commercial leases

6.1. Form and contents of a lease agreement

Under the TCO there is no form requirement regarding the validity of lease agreements and the lessors are not required to own the leased properties for a lease agreement to be duly executed.

The TCO also allows foreign legal entities or individuals to lease real property in Turkey. In principle, foreigners may freely lease real property in Turkey, subject to the same terms and conditions applicable to Turkish legal entities and individuals. However, foreigners are not allowed to lease real properties that are located within military zones and they must obtain written pre-approval from the governor's office to lease real properties that are located within special security zones.

The TCO does not set forth a time limit for lease agreements and they can be executed with a definite or an indefinite term. However, lease agreements with governmental and administrative bodies are subject to certain time limits.

From the tenant's perspective, the total investment amount made for commercial real property is one of the key factors when determining the term of the lease. In general, commercial leases are executed for five or 10 years for constructed premises. The term extends to 20 or even 30 years if the tenant undertakes to construct a building on the premises. In any event, it is common to include an early termination right in favor of the tenant in the agreement.

When it comes to provisions regarding the premises, a clear description of the leased premises and the condition of the premises at the time the landlord delivers it to the tenant should be stated in the agreement. Additionally, before entering into a lease agreement, the tenant should ensure that: **(i)** the leased premises are vacant and free from any other claims for tenancy or possession; **(ii)** there are no encumbrances on the premises that may hinder the tenant's lease; and **(iii)** the permitted usage type of the premises suits the tenant's prospective activities within the premises. Usually, all of these matters are stated in the agreements. It also is helpful to have the lease state that the leased premises are structurally sound, in good and proper working order, and in compliance with all laws, rules, and regulations.

For the leasing of stores in shopping malls, it is common to agree on a turnover-based rent. In these types of leases, tenants undertake to pay the base rent, regardless of their turnover, as well as the difference between the base rent and the turnover rent provided that a fixed percentage of their

turnover exceeds the base rent. For office leases and other commercial leases, the rent is usually agreed as fixed rent subject to periodic adjustment or as step rent.

6.2. Regulation of leases

The TCO does not distinguish between residential and commercial leases and has a very protective approach towards tenants for historical reasons. Most of the TCO's provisions in connection with commercial leases are statutory in favor of tenants and cannot be altered to the disadvantage of the tenants.

6.3. Registration of leases

Although it is possible to register lease agreements with the land registry, it is not a requirement of validity. On the other hand, registering the lease agreement with the land registry helps tenants to secure their leases in the event that the leased premises are sold to a third party.

32. When premises that are occupied by a tenant are sold to a third party, the new owner automatically becomes a party to the lease agreement. However, the new owner may file a lawsuit for the tenant's eviction based on their own (or a particular relative's) need for the premises. To prevent the eviction risk, a lease agreement should be registered with the land registry. Once a lease agreement is registered, the new owner will be deemed to have acquired the premises together with the lease and, therefore, will not be entitled to evict the tenant until the expiration of the lease term.

In practice, tenants prefer to register the lease agreement if they have made a significant investment into the leased premises or if the leased premises are significant for their operations. While registering a lease agreement related to leased premises in a shopping mall may not be critical due to the low risk of eviction based on the landlord's own need for use, it is recommended that leases of stand-alone buildings be registered.

6.4. Termination of leases and renewals

As per the TCO, leases automatically and consecutively extend for one year, unless the tenants serve a notice to terminate the agreement at least 15 days prior to the expiry date. In principle, landlords cannot prevent the extension of the lease agreements until the tenth extension year following the initial lease term. During this ten-year extension period, the landlords may only request the eviction of the property from the court, based on the grounds exhaustively listed under the TCO. However, after the tenth extension year, the lessors may terminate the agreement based on the expiry of the term by serving notice at least three months prior to the expiry date.

Both parties are allowed to terminate the agreement if the

lease relationship becomes unbearable for them due to a material reason.

The grounds on which landlords are allowed to terminate a lease are listed exhaustively and the parties cannot deem every breach as a material breach and grounds for termination.

Although the parties may determine additional termination grounds in favor of landlords, the validity of such provisions is much-debated among the scholars and, in any event, subject to the court's review. Termination grounds listed in the TCO are (i) the non-payment of rent, (ii) the landlord's need to use the premises for its own (or a particular relative's) need, (iii) the necessity to make material modifications to the premises, (iv) the tenant's written promise to evict the premises on a certain date, and (v) the tenant owns other habitable premises in the same area as the leased premises. To exercise its termination right based on the above grounds, the landlord must file a lawsuit.

The landlords may also terminate the agreement by serving a termination notice if the tenants fail to exercise due care for the premises and due consideration for others who share the building or for neighbors. However, until an eviction decision is rendered by the court, the tenant may continue to occupy the premises. The landlords may not terminate lease agreements without cause.

The tenants are allowed to terminate the lease if there is a material defect in the leased premises. The parties may determine additional termination grounds in favor of the tenants in the lease agreements.

If a tenant terminates the lease without cause before its expiry, their obligation to pay the rent continues until the landlord can find a suitable new tenant. In practice, the courts usually rule for the payment of up to six months' rent depending on the nature of the property. To avoid paying compensation, the tenants usually request a unilateral early termination right.

6.5. Rent regulations and rent reviews

Under the TCO, the parties may freely determine the rent while executing a lease agreement. However, due to the recent rapid fluctuations in exchange rates, an amendment was made to *Decree no. 32 on Protection of the Value of Turkish Currency* (Decree) on September 13, 2018, to restrict the use of foreign currency in certain types of agreements. As per the Decree, the rent and other contractual payment obligations cannot be denominated in or indexed to foreign currencies in the lease agreements executed between Turkish residents in connection with real properties. However, there are exemptions to this restriction. The rental fee may be denominated in a foreign currency if the tenant is a foreign individual/entity, or is a foreign capitalized Turkish company.

The TCO also provides a restriction on rental increases for residences and roofed workplaces leases. As per this restriction, if the rent is denominated in Turkish currency, the annual rent increase rate cannot be more than the average of the change in the consumer price index in the last 12 months to be announced by the Turkish Statistics Institute within each five-year lease term. On the other hand, if the rent is determined in foreign currency, the rent cannot be subject to an annual increase until the end of each five-year lease term. Additionally, both parties are allowed to initiate a lawsuit after five years for adjustment of the rent by the court based on its market value.

6.6. Services to be provided together with the lease

Services to be provided together with the lease may be agreed upon by the parties. However, as per the TCO, if the validity or continuity of a lease agreement is conditional upon the tenant's undertaking of another obligation that does not benefit the tenant and that is not directly connected to the utilization of the leased premises, the agreement that is linked to the lease becomes null and void.

6.7. Fit-out works and their regulation

The tenant may make alterations and renewals to the premises by obtaining the landlord's prior consent. If the landlord provides their consent to the tenant for the tenant's intended fit-out, the landlord cannot require the tenant to reinstate the leased premises to its original condition when it was delivered to the tenant and the tenant cannot request the value of its investment from the landlord unless the parties have agreed otherwise.

6.8. Transfer of leases and leased assets

As per the TCO, the tenants are not allowed to sublease the leased premises or transfer the lease agreement to a third party without obtaining the landlord's consent. For commercial leases, the landlord cannot refrain from giving their consent to the transfer of the lease without a valid reason. When a lease is transferred, the transferor remains liable to the landlord for up to two years.

According to the TCO, if the leased property is transferred to a third party for any reason after the conclusion of the lease agreement, the new owner becomes a party to the lease agreement. This rule also applies when a third party acquires a right *in rem* on the leased property that affects the tenant's rights.



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The Arzinger logo, consisting of the word "ARZINGER" in a bold, black, sans-serif font, followed by a red square icon containing a white stylized 'Z' or 'A' shape. The logo is centered within a white circle that has a green border.

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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: REAL ESTATE 2021

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1. Real estate ownership

1.1. Legal framework

The constitution guarantees the right to ownership and the right to judicial protection. The key sources of law guaranteeing private ownership are domestic legislation and international law applicable to Ukraine.

Ukrainian law does not recognize different types of ownership and all real estate owners are generally equal in their rights.

There are no restrictions for foreign capital in the real estate space and foreign investors are entitled to invest directly or indirectly in all types of Ukrainian real estate assets (commercial, residential, corporate/ industrial/ infrastructure, non-developed land, *etc.*) subject to certain conditions.

No significant regulatory burden is associated with the property transactions, which means that no usual regulatory approvals or FDI screenings are needed to acquire real estate in Ukraine. The only regulatory approval might be merger control due to the quite low filing thresholds that apply to both direct and indirect share and certain asset deals.

It is also important to remember that all foreign documents are subject to apostille or legalization, and a notarized translation in Ukrainian is necessary.

However, under the *Land Code of Ukraine*, the foreigners and foreign companies are not allowed to acquire agricultural land into ownership (either directly or indirectly) – it may be owned only by Ukrainian citizens, state, and municipalities as well as legal entities owned exclusively by them. These restrictions can be lifted after 2023 only upon approval of such decision at the referendum. Otherwise, foreign capital can use lease of agricultural land.

The rules for expropriation in Ukraine are quite clear. There are several grounds for expropriation of ownership to real estate, including paid (expropriation for public needs or public necessity, in case of war or emergency situation, purchase of agricultural land by a foreigner) and non-paid (as a penalty for certain criminal offenses) cases. We are not aware of the recent nationalization, *i.e.* expropriation cases.

1.2. Registration of ownership

Real estate transactions (acquisition, disposals, and leases exceeding three years) are subject to mandatory certification by a Ukrainian notary and the notary is taking care of the title – registration with the public registry – State Register of Proprietary Rights to Real Estate kept by the Ministry of Justice.

Regardless of such registration, it is important to properly

keep title documents as the notaries require their presentation when a real estate transaction is done.

In addition, the land and some information about it (designated use, limitations, easements, *etc.*) is registered in the State Land Cadastre, and such registration is mandatory as well.

1.3. Publicity of real estate register

Both the State Register of Proprietary Rights to Real Estate and the State Land Cadastre are publicly accessible online.

1.4. Protection of ownership

Registration of a title in the State Register of Proprietary Rights to Real Estate certifies the title.

The owner may claim in court return of the real estate if it was unlawfully disposed of, removal of any obstacles preventing the owner from freely using or disposing of the real estate, require access to the real estate from other real estate owners (*e.g.*, claim establishment of an easement), *etc.*

If real estate was disposed of without proper authorization, the owner may claim termination of registration of such new (illegal) owner's rights in *anti-raider* commission at the Ministry of Justice as a pre-trial measure, which may be quite cost- and time-efficient. If unsuccessful or skipped for some reason, the owner may claim in court invalidation of the unlawful transaction, cancellation of registration of the unlawful rights, return of the real estate, and damages. In some scenarios, the return of the real estate may be claimed even from a good faith acquirer.

In the case of unauthorized use, the owner may claim termination and prohibition of such use, return of the real estate, as well as damages.

2. Real estate acquisition

2.1. Share deal or asset deal?

Share purchases are the prevailing option when it comes to investment in real estate, especially while acquiring yielding properties. Not only it is faster and more flexible, but typically the parties may also apply foreign law and subject the contract to arbitration. Historically, share purchases were also a lot more tax efficient, however since the withholding tax was introduced for sales of real estate rich companies, share acquisitions may not always be the most tax-efficient choice. Share transaction also allows the investor to continue business as before without having to assign all contracts, transfer employees, *etc.* Also, it allows creating effective partnership and conclusion of shareholders agreements.

On the other hand, asset deals are used when the scope of the

due diligence of the owner company was limited, or substantial risks associated with the history of the company owning the real estate were detected. Alternatively, an investor may not be interested in continuing business as previously and may want to cherry-pick the assets as opposed to buying the shares in the company holding them.

2.2. Share deal

Prior to entering into a deal investor should consider conducting in-depth due diligence of the asset and the investment vehicle as it will bear the historical risks associated with the company (title to shares, debt, existing contracts, *etc.*), as well as any historic flaws in the title to the real estate. The risks are usually dealt with in the SPA, specifically by including extensive warranties, conditions precedent, indemnities, liquidated damages clauses, *etc.*

SPAs are usually governed by foreign law to allow for greater flexibility and proper balance of parties' interests. Arbitration clauses and choosing foreign law are very usual in share deals.

Another important topic to account for is the correct structure of the transaction to avoid any unforeseen complications, in particular with certain restrictions on foreign ownership to agricultural land or extra taxes.

The main taxes involved in a share deal are corporate profit tax (although, usually paid outside of Ukraine to ensure tax efficiency of the deal) and the 15% withholding tax if an SPV holding a real estate rich company (50% or more of the shares value is comprised of real estate) is sold. Although, the withholding tax was introduced quite recently and the approaches to its application are not completely clear so far.

The share deal is not subject to VAT or other asset-transfer taxes.

2.3. Asset deal

An asset deal is more straightforward than a share deal as it must be governed by Ukrainian law and is not arbitrable.

Same as in the share deal, the investor should consider advanced due diligence of the asset and comprehensive warranties. At the same time, the investor should bear in mind that while on paper Ukrainian law provides the parties with freedom of contract allowing any provisions to be inserted thereto, not all provisions are considered legal after all. For instance, liquidated damages are often discarded by courts. Basically, the most commonly recognized remedies of the buyer are conditions precedent to fix any remediable risks and fines for breach of contract. While warranties are often included in contracts, they were largely untested by caselaw. Only recently the warranties were included in Ukrainian legislation, which

now allows for any contractual remedy to apply in case of their violation with the damages being a standard one offered by law.

The main taxes involved in an asset deal between legal entities are 18% corporate profit tax for the seller, a 20% VAT, and a 1% pension fund duty for the buyer.

2.4. Disposal process

In a share deal, there is no notarization requirement and a simple written form is sufficient. However, a notary must be involved to notarize the signatures under the mandatory shares transfer act, the new shareholders and ultimate beneficial owner in the Unified State Register of Legal Entities, Individual Entrepreneurs, and Non-Governmental Organizations (unless the company being sold is registered outside of Ukraine).

In an asset deal, an agreement must be notarized by a notary, which means not only the notary will check the title, the authority of signatories, and the absence of any restrictions on disposal (which is the main scope of the notary's job), but it will also check the agreement for compliance with the law.

The notary's fees are subject to negotiations and are usually up to 1% of the transaction value for lower-scale transactions.

There are cases when consents or approvals are required (*e.g.*, mortgagor's, tenant's consent, spousal consent where the individual seller was married at the time of buying the property, *etc.*). The law does not envisage a list of documents to be transferred with the property.

2.5. Registration of change of ownership

The registration fee for a share transfer registration is UAH 680 (approximately USD 26), and for a real estate transfer, it ranges from UAH 230 (approximately USD 9) to UAH 11,350 (approximately USD 432), depending on the terms of the registration (from five business days to two hours).

In most cases, both share deals and asset deals are registered right away (within the same day).

The registration authority is, most often, a notary which checks all documents, makes scan copies, uploads them to relevant registers, and amends relevant entries in the registers.

2.6. Risks to be considered

A joint owner of the real estate, if any, and a tenant, have pre-emptive right to purchase the property. In the case of agricultural land, a person possessing the subsoil use permit for the land also possesses the pre-emptive right. Quite rarely other contracts, *e.g.* easements or emphyteusis, may also contain pre-emptive right provisions.

There may also be various encumbrances on the real estate, such as mortgages, arrests, tax pledges, prohibitions of alienation, *etc.* Limitations imposed by special regimes, such as protection zones, cultural heritage objects, *etc.*, must also be considered. Usually, an unsatisfied purchaser may claim defects of the acquired real estate only if the defects were hidden and could not be identified at the time of transferring the real estate. However, the regulation largely depends on the contract.

3. Real estate financing

3.1. Key sources of financing

Given the difficult situation in the Ukrainian financial market and the underdeveloped domestic capital markets, in the last few years, local debt financing and refinancing of property transactions have not always been attractive for the developers. The majority of developments are equity-financed by the developers themselves. However, larger developers with a good reputation typically receive financing from local or international banks or international financial institutions against pledge or mortgage of assets.

The situation in the residential market is worse for the buyers, especially in construction progress. Mortgages are not generally available due to certain weaknesses in Ukrainian real estate development legislation, which makes it too risky for the banks to take developing residential assets into mortgages, and the market is fueled by the equity of investors and developers. Thus, it is commonly using payments by installments.

It is important to note that both mortgages and pledges are registrable in Ukraine.

3.2. Protection of creditors

Typical security usually includes mortgages and pledges, as well as (sometimes) suretyships. A more advanced transaction will also include:

- the conditions precedent in loan agreements;
- tri-partite agreements with the key tenants or provisions in the key lease contracts on the landlord's replacement for the mortgagee or the contract's termination in case of enforcement of the mortgage;
- pledges of bank accounts with conditions for automatic withdrawal, *etc.*

4. Real estate taxes

4.1. Transfer taxes

The transfer taxes are in accordance with 2.2 and 2.3 above.

4.2. Specific real estate taxes

The following taxes are charged on ownership of the land/real estate:

- land tax at the rate set out by the municipality (usually may not exceed 3% of the normative monetary valuation of the land plot but depends on several factors, such as whether or not normative land valuation was done, designated use of the land, and the type of the title);
- property tax at the rate set out by the municipality which may not exceed 1.5% of the amount of minimum wage (for January 1 of the applicable year) per square meter of property (in 2021 – UAH 70.8 (approximately USD 2.7) per square meter).

5. Condominiums

5.1. Legal framework for condominiums

In Ukraine, once a person acquires an apartment in an apartment block, he/she automatically becomes a joint owner of the common spaces in the building, as well as any ancillary buildings (such as boiler houses). It may also relate to the land plot underlying the building; however, it is quite rare in Ukraine as the condominiums seldom obtain the title to the land underlying residential buildings. Although, they are entitled to acquire or lease the underlying land.

At the same time, it is important to note that in most cases the joint ownership is never registered or otherwise evidenced and only exists *on paper*. Usually, an apartment owner is entitled to use the common spaces but their management is generally done by a management company or a condominium association.

5.2. Rights and duties of co-owners

The co-owners are entitled to choose a form of management of the property being either a management company or a condominium association. The co-owners will have lesser rights to participate in the house's management in the former case and more – in the latter case.

5.3. Liability of co-owners

Co-owners bear joint and several liability for the use of their joint ownership.

5.4. Rights and duties of condominium associations

Condominium associations regulate the size and procedure for payment of various property maintenance payments to be made by the co-owners, determine their expenditures, enter into agreements with facility management companies, conclude

contracts, conduct ongoing and capital repair, lease any of the common premises, submit lawsuits, *etc.*

At the same time, it is not common for a condominium association in Ukraine to set up any rules of co-living, except for rules for the use of common space.

6. Commercial leases

6.1. Form and contents of a lease agreement

The leases must be concluded in writing, and if the lease term exceeds three years – be notarized and the lease right registered with the State Register of Proprietary Rights to the Real Estate.

A standard commercial lease will include the following provisions (that may depend on the sophistication of the landlord and the type of the leased property):

- the designated use of the property;
- rent (and turnover payment, if applicable);
- operating expenditures compensation;
- utilities;
- payment procedures;
- rights and duties of the parties (*e.g.* to keep the premises open for visitors, to maintain security, *etc.*);
- code of conduct (if any);
- repair;
- procedure for acceptance and return of the property;
- fire safety, sanitary conditions, and other;
- parties' liability;
- early termination, *etc.*

It is important to understand, that there are different legal regimes for a lease of the buildings and a lease of land. While there is very much discretion in the lease of buildings (except for public properties, which are subject to a dedicated special regulation), a land lease is subject to a number of mandatory provisions and is regulated by a special law.

6.2. Regulation of leases

Ukrainian law is fairly dispositive in terms of leases regulation and it does not contain a lot of overbearing mandatory rules. Therefore, the parties are free to regulate their relations in the lease contract.

6.3. Registration of leases

A real estate lease should be executed in writing, be notarized, and the lease right should be registered with the State Register of Proprietary Rights to the Real Estate if the lease term

exceeds three years.

6.4. Termination of leases and renewals

As a rule, the landlords limit the tenants' opportunity to unilaterally terminate the lease. Mostly, the tenant is entitled to termination if the landlord does not conduct the required capital repair of the property, denies the tenant's access to the property without a good reason, or if utilities are not supplied to the property for a prolonged time. Also, a tenant may terminate the lease if (i) the real estate's quality is not as the landlord promised in the contract and it is not suitable for the designated use, or (ii) the landlord fails to conduct necessary capital repair of the real estate, both of which are the statutory grounds for unilateral termination.

The law provides that the landlord may terminate the lease if the tenant: (i) uses the property against the designated use or in breach of the agreement; (ii) subleases or assigns the lease to a third party without the landlord's consent; (iii) negligently poses a threat to the property; or (iv) does not conduct capital repair if it was obliged under the agreement. The landlord may also sue the tenant for termination in case the tenant systematically violates the payment obligations.

The parties' ability to terminate the contract without a cause largely depends on their negotiation positions.

The lease is automatically renewed if the tenant continues using the property within a month after the lease's termination without the landlord's objections. Also, a tenant compliant with the contract is granted a pre-emptive right to conclude a new lease and must notify the landlord of its intent to exercise the right before the lease termination, but the landlord may require changing of conditions of the contract.

6.5. Rent regulations and rent reviews

The law does not regulate matters of rent and its review – this is up to the parties to decide.

6.6. Services to be provided together with the lease

In most cases, the landlord will be responsible for utility services subject to further compensation of the costs by the tenant. In commercial leases, the landlord will usually provide other operational services: security, cleaning, maintenance of common parts, *etc.*, as well as in some shopping malls will also require a separate marketing fee for the marketing of the shopping mall.

6.7. Fit-out works and their regulation

The law stipulates that any improvements of a leased property made with the landlord's consent may be either detached

and taken by the tenant (if separable) or compensated by the landlord after the lease termination. However, speaking about compensation for non-separable improvements, in the vast majority of cases the landlord will require the tenant to waive such right in the contract.

From a taxation point of view, if the lease is used in the tenant's business activity, the expenses made for the fit-out of the property (as well as depreciation expenses) will be deductible from its taxable income subject to certain conditions.

6.8. Transfer of leases and leased assets

Transfer of the leased asset does not impact the contract's validity. The new owner becomes the new landlord automatically unless the contract provides otherwise, so, the lease follows the property.

Transfers of lease usually require the consent of the other party and do not influence the validity of the contract.



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