Building a better working world

The Polish Real Estate Guide 2021

The real state of real estate

Photos by Adam Borkowski on Unsplash (@borkography)

Preface

This guide to the Polish real estate market was prepared by EY, a global leader in assurance, tax, transaction, advisory and legal services. It aims to provide its readers with a broad view of the market and the current investment climate, as well as legal and tax information, in a practical format to help you make informed investment decisions. Our combined market expertise in this market has enabled us to produce what we hope will become an indispensable reference tool on the state of the Polish real estate market.

In conjunction with the views contained in this guide, it is recommended to seek up-to-date and detailed information on the commercial climate at the time of considering your investment, as this can change at any time. Unless stated otherwise, this guide reflects information valid as at January 2021.

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Polish Real Estate Market

1.1

Poland in a nutshell

€529bn
GDP
6th Biggest economy in EU in 2019

€13,780
GDP per capita, compared to €31,100 of EU average

38.4m
The largest population across the CEE markets

€104.9bn
EU funds
The largest beneficiary of EU funding (2014-2020)

$21.8bn
Inflow of FDI
Poland belongs to the group of the top 20 FDI receivers in the world

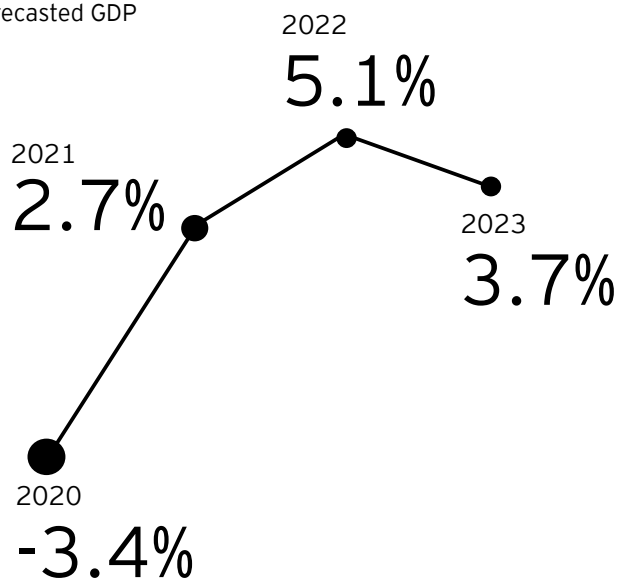
€1,500 centres
Top BPO/SSC/R&D location employing 338,000 people

The Polish economy is one of the most sustainable ones within the EU with positive mid-term outlook. Poland was the only country within the EU to avoid recession over 2008-2010 and has been outpacing EU-average GDP growth for many years. Nevertheless, the global SARS-CoV-2 pandemic did not miss Poland. For 2020 it is estimated that the decrease amounted to approx. 3.6%. However in 2021 the GDP is expected to rise by 2.7%.

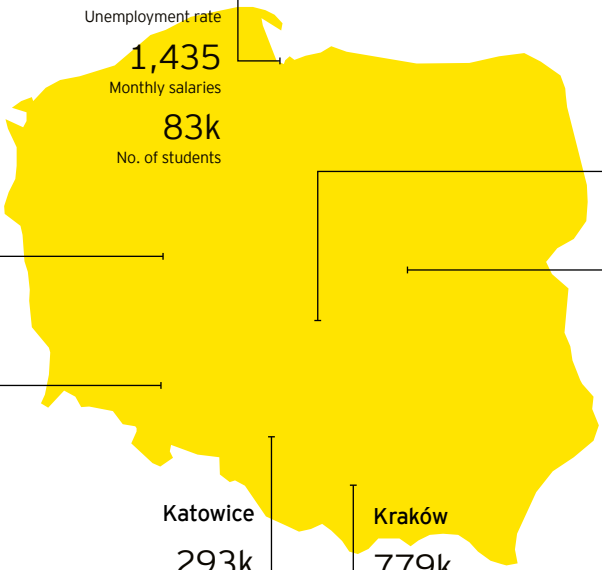
4.1%

GDP growth in 2019 vs. 1.3% in Euro Zone
Fifth fastest GDP growth rate in the EU

Forecasted GDP



While Warsaw continues to be the country's key business centre, Poland has many strong regional clusters. Cities such as **Kraków, Wrocław, Łódź, Tri-City (Gdańsk, Gdynia, Sopot), Poznań** and the **Katowice** conurbation have developed business-friendly environment and have attracted many foreign investors.



Poznań

535k
Population

2.0%
Unemployment rate

1,349
Monthly salaries

115k
No. of students

Tri-City

753k
Population

3.0%
Unemployment rate

1,435
Monthly salaries

83k
No. of students

Łódź

680k
Population

5.9%
Unemployment rate

1,158
Monthly salaries

70k
No. of students

Warsaw

1,791k
Population

1.8%
Unemployment rate

1,588*
Monthly salaries

245k
No. of students

Wrocław

643k
Population

2.4%
Unemployment rate

1,316
Monthly salaries

117k
No. of students

Katowice

293k
Population

1.7%
Unemployment rate

1,453
Monthly salaries

113k
No. of students

Kraków

779k
Population

3.1%
Unemployment rate

1,427
Monthly salaries

145k
No. of students

(1) Population as of June 2020
(2) Unemployment rate and Monthly salaries for 2020
(3) No. of students as of 2019 for voivodship
* as of December 2020

Poland ranks high in terms of investment attractiveness among manufacturing companies as well as business service providers, which has been confirmed by a number of rankings as well as investment placements.

Investor confidence has been confirmed by the following facts:

Poland may become a **beneficiary of BREXIT**, attracting financial institutions and other business services that are considering a move away from London. However, the long term effects of Brexit are hard to define at this point.

Poland holds **7th position in EY's European Attractiveness Survey 2020** in terms of the number of FDI projects.

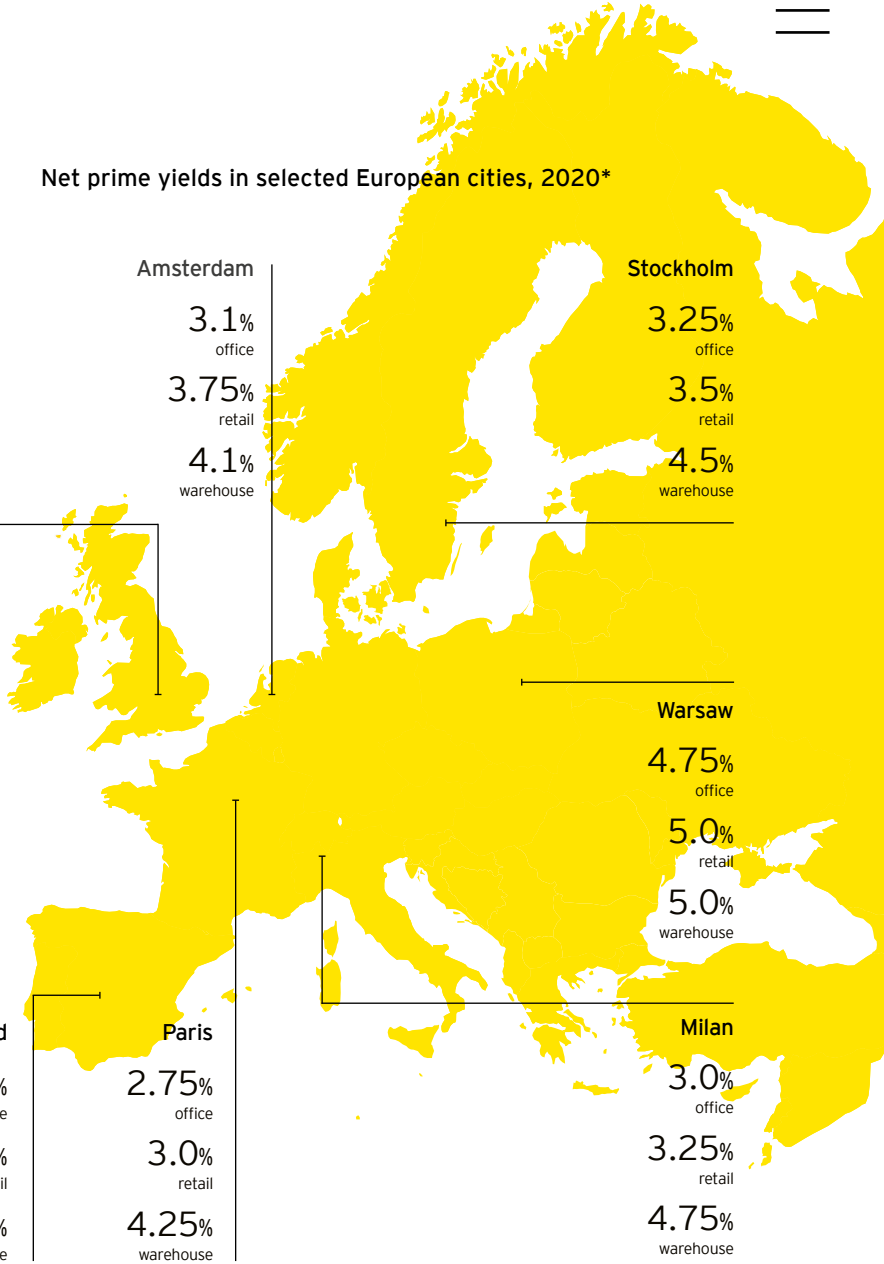
Kraków and Warsaw are included in **the first half of Top 100 Super Cities** of Tholon's Services Globalization Index 2020, which considers innovation, startup ecosystem and digital transformation as key drivers.

In September 2018 **status of Poland was upgraded** by FTSE Russell Index to Developed from Advanced Emerging. Thanks to this upgrade, Poland joined the most developed economies. Moreover, S&P set Poland's long-term foreign currency credit rating to A-.

Poland's **student population exceeding 1.2 million** drew companies such as Samsung Electronics, Delphi Automotive, BSH, Sanofi, GE Engineering Design Center, ABB, Intel, Google, Unilever to open their R&D centres in the country.

PropTech solutions are gaining popularity. Smart solutions are becoming popular especially in the office sector. Following the office sector, such innovations can be implemented in the industrial market (automation in logistics) and retail sector (omnichannel).

Net prime yields in selected European cities, 2020*



* The current situation related to the SARS-CoV-2 virus pandemic may affect yield levels in the near future.

Poland is also the largest CEE market (excluding Russia) in terms of volume of modern real estate stock. The pipeline supply remains high, supported by strong occupier demand.

11.7m m^2

Office

14.9m m^2

Retail

20.8m m^2

Warehouse

Property market - total modern stock

Investment market

Capital destination in Poland

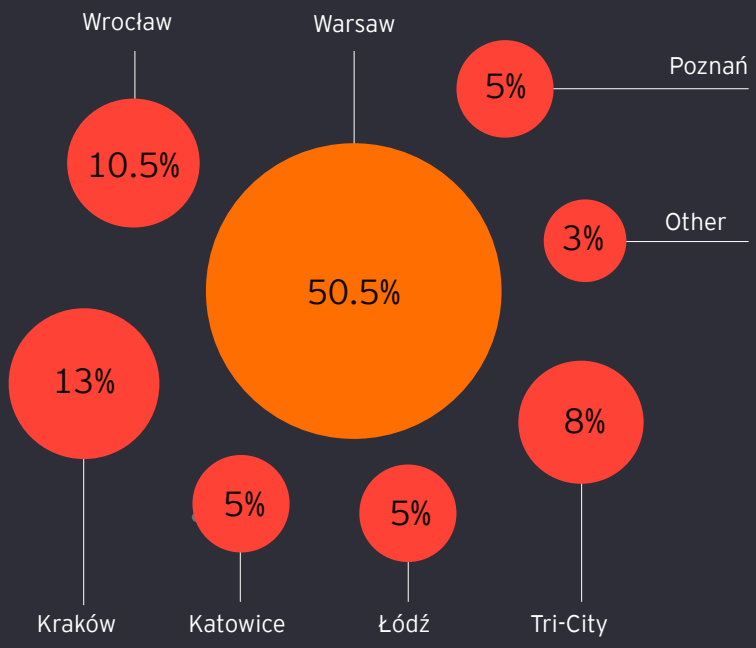
Investment market slowed down in 2020 by approx. 32% (yoy), reaching €5.3bn. Yet yields remained stable in case of warehouse and office sectors. For the first time industrial assets scored the highest market share, accounting for 49% of investment market, followed by office, which attracted 38%of capital.

The most active investors in 2020 include: Credit Suisse, CGL, GIC, GLP, Savills IM.

1.2 Office Market Snapshot Review

At the end of 2020 the total stock of modern office space in Warsaw and regional cities reached almost 11.7m m². Warsaw dominates the office market with the most development, letting and investment activity. Yet, regional cities also play an important role, serving primarily as Business Process Outsourcing (BPO)/Shared Services Centre (SSC)/Research&Development (R&D) centres.

Office Market Share 2020



Despite pandemic outbreak Poland is still a very attractive country to invest, therefore it will continue to attract many foreign companies that will expand or open new branches here and generate additional demand.

	Stock (m^2)	Pipeline supply (m^2)	Vacancy rate	Prime rental range (€/m^2/month)
Warsaw	5,900,000	520,000	9.9%	20-24
Kraków	1,550,000	135,000	13.8%	13.5-15.5
Wrocław	1,230,000	107,000	14.8%	13.5-15
Tri-City	890,000	140,000	9.3%	13-15
Łódź	580,000	53,000	16.2%	12-14
Katowice	590,000	180,000	9.0%	13-14.5
Poznań	580,000	57,000	13.1%	13.5-15

Market changes due to COVID-19

- Possible delay of planned projects.
- Increased number of sublet offers.
- Plans to implement a permanent policy of combining work in a remote mode with the work in the office.
- Reduction of speculative developments.
- Increase of lease renegotiations and decreased interest in expansion.
- Verification of space requirements by tenants and the resulting need to reduce space.
- Reducing tenants' activity in terms of relocation and office change - postponing decisions.
- Changes in the internal procedures of companies, which allow the implementation of processes in remote mode
- Base rents at a relatively stable level - possible minor adjustments.

We also asked employers about the work model they plan to implement after the pandemic ends. Interestingly, about half of the respondents have not yet made such a decision. Remote or hybrid work is a considered option, but companies do not know yet whether they will use these solutions. Among those employers who are already creating solutions for the coming years, only 7% do not plan to use any form of work outside the office. Other companies have already decided to use hybrid operation in the future. Most of them plan it 1 or 2 days a week. Only a few companies think about 3 days, and none of them declared providing remote work 4 days a week.

Source: EY Report, Organization of work during a pandemic. Challenges for HR in 2021.

Trends

A different look at office space.

The pandemic completely changed our habits and will affect the organization of office space in a long term. Future offices will be adapted to new anti-epidemic standards which means:

1. Implementation of a shift system, project work, employee rotation on a office space
2. The use of easy-to-clean finishing materials,
3. Implementation of remote solutions to limit activities by direct touch on common areas
4. Taking care of air quality - greater air exchange, filtration, higher level of humidity
5. Technological solutions for managing the space and oneself in it
6. New technologies, e.g. monitoring with thermal imaging cameras controlling body temperature
7. Changes to the layout of work stations (greater spacing, higher partitions, smaller open spaces)
8. Reduction of the space of conference rooms (greater share of online meetings)
9. Functional separation of the zone dedicated for employees from the zone for guests and visitors

Further expansion of SSC in regional cities.

Expansion of SSC is a driving factor for office market in regional cities. Beyond biggest regional markets, developers are interested in smaller ones, like Rzeszów, Częstochowa or Toruń which are characterized by lower operating costs and labor force accessibility.

New generations of employees creates a workspaces.

Given the low unemployment rate, employers are still struggling to attract young talent. Friendly designed and equipped with modern technologies office is one of the motivational elements to change or start a new job. The trend of changing the workspace will be intensifying, which will positively influence the demand for office space.

Public sector.

Increasing role of the public sector in the office space rental market. Approximately 20% of lease transactions on the Warsaw market in 2020 were concluded by companies from the public sector, including the largest lease agreement in the history of the Polish office market - agreement concluded by PZU in Generation Park (approx. 47,000 m^2).

Mix-use projects and function change.

Both in Warsaw and on the regional marketas, we can observe an increase in mix-use projects aimed at diversifying functions, more conscious shaping of the urban fabric, but also minimizing risks on investors' side. Another form of diversifying functions is changing the function of previously mainly office areas and supplementing them with other functions, e.g. residential. The best example of this trend is the Mokotów district in Warsaw.

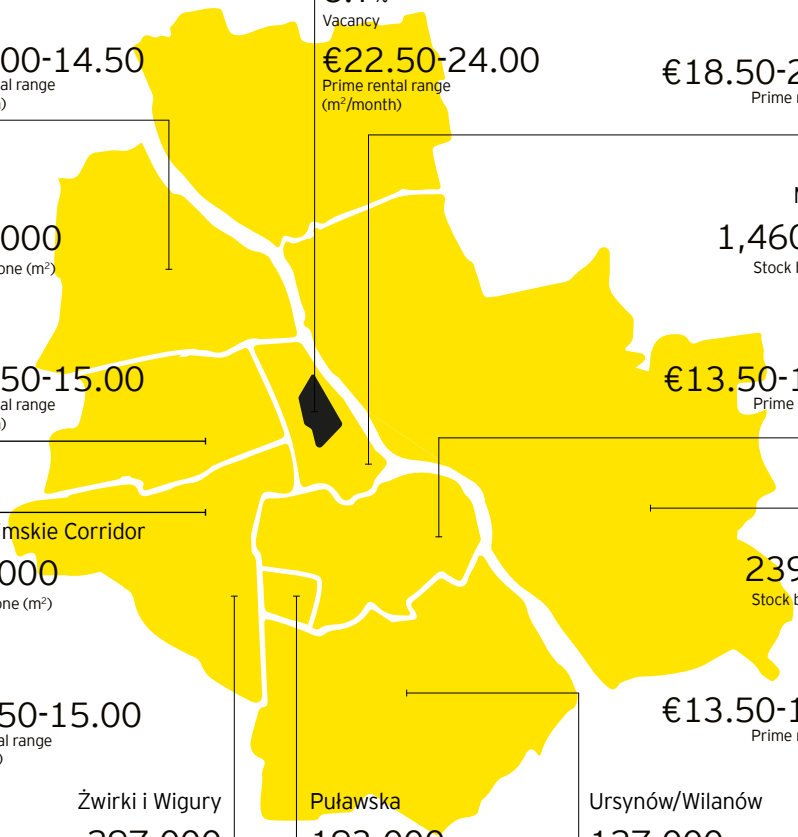
Growing importance of co-working spaces.

Hybrid models of renting space (standard rental combined with flexible space) are becoming more and more popular. Following tenants' needs for more flexible office space, especially in this turbulent times, many co-working operators open their offices, especially in Warsaw. They usually choose A-class office buildings in attractive locations. Such spaces are rented not only by freelancers and start-ups, but also multinational companies. This trend shows changing habits of occupiers focusing on workspaces that enables cooperation on a bigger scale and stimulates creativity and effectiveness.

PropTech and WaaS.

PropTech and WaaS (workplace as a service) have been gaining popularity. Smart solutions in the office space and flexible workspaces will be introduced on a larger scale in the upcoming years. Due to such changes, more impact will be put on targeting needs of potential individual clients.

Focus on cities - Warsaw



North
120,000
Stock by zone (m²)

7.7%
Vacancy

€14.00-14.50
Prime rental range (m²/month)

Central Business District
932,000
Stock by zone (m²)

6.7%
Vacancy

€22.50-24.00
Prime rental range (m²/month)

City Centre
1,532,000
Stock by zone (m²)

9.1%
Vacancy

€18.50-20.00
Prime rental range (m²/month)

West
252,000
Stock by zone (m²)

6.3%
Vacancy

€14.50-15.00
Prime rental range (m²/month)

Mokotów
1,460,000
Stock by zone (m²)

14.9%
Vacancy

€13.50-14.50
Prime rental range (m²/month)

Jerozolimskie Corridor
747,000
Stock by zone (m²)

6.3%
Vacancy

€14.50-15.00
Prime rental range (m²/month)

East
239,000
Stock by zone (m²)

9.3%
Vacancy

€13.50-14.75
Prime rental range (m²/month)

Żwirki i Wigury
297,000
Stock by zone (m²)

8.7%
Vacancy

€14.00-14.50
Prime rental range (m²/month)

Puławska
193,000
Stock by zone (m²)

5.2%
Vacancy

€14.00-14.75
Prime rental range (m²/month)

Ursynów/Wilanów
127,000
Stock by zone (m²)

6.8%
Vacancy

€14.25-14.75
Prime rental range (m²/month)

Focus on cities - Warsaw

Supply of office space across the city stands at **5.90m m²**. About **520,000 m²** is currently under construction. It is forecasted to bring around 340,000 m² of new office supply in 2021.

Gross take-up in 2020 reached a level of 600,000 m², decrease by about 30% YOY. New transactions accounted for ca. 57% of total take-up, whereas the volume of renewals and expansions totalled ca. 43% of volume of letting activity.

The vacancy rate increased to 9.9%, which is 2.1pp higher when compared to 2019. The highest vacancy rate was recorded along in the Mokotów, which shows decreasing interest of tenants in this district. The lowest rate of approx. 5.2% was seen in the Puławska zone, which is one of the smallest in terms of office supply.

Letting activity in the CBD and City Centre accounted for 46% of total volume.

Forecast for Warsaw

Due to the high supply of new office space in 2021-2022, an increase in the vacancy rate can be expected.

The Wola district will continue to attract the majority of occupiers at the expense of Służewiec which is facing structural vacancy with possible conversion of function in the mid-term horizon.

Prime rents are forecasted to slightly decrease in the short-term, due to growing vacancy, suspending relocation process in many companies and declining demand.

1.3 Retail Market Snapshot Review

14.9m m²
Modern Retail Stock

€7,143/€12,120
Average purchasing power per inhabitant Poland / Warsaw

260 m²
Average density per 1,000 inhabitants

5.3%
Average vacancy rate in 8 major cities

266,600 m²
New supply (2020)

284,200 m²
Under construction

€110-130 m²/month

Prime rent in Warsaw

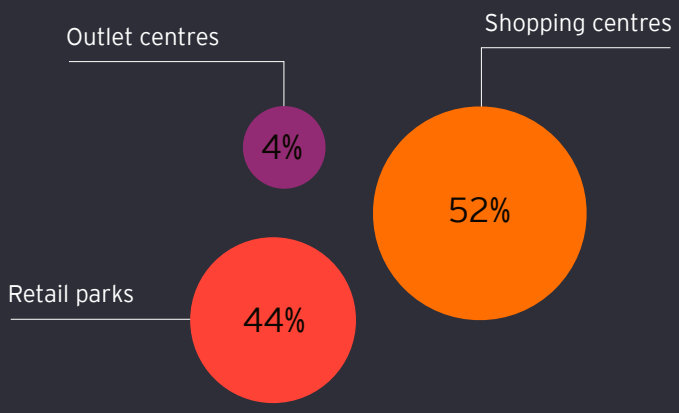
€45-60 m²/month

Prime rent in major agglomerations

New retail schemes delivered to the market in 2020 totalled 266,600 m² and the aggregate modern retail stock exceeded 14.9m m².

Additionally, more than 284,200 m² is currently under construction with delivery by the end of 2021.

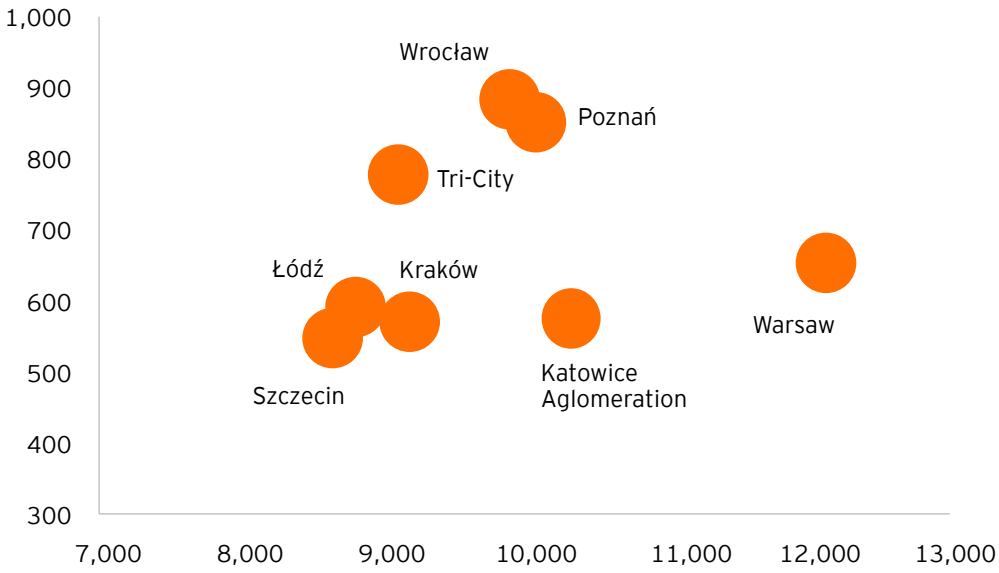
Modern retail stock by type



The bulk of new supply, with bigger retail schemes currently under construction, is located in key markets. Further development of the modern retail sector will continue in medium and small-size cities, however the type of new retail accommodation will be mainly driven by convenience and leisure element.

While the average density rate for Poland stood at 260 m² / 1,000 inhabitants at the end of the year, there are major differences among individual cities. Some of them are clearly reaching a saturation point with density rates over 750 m² / 1,000 inhabitants.

Retail density and annual purchasing power in major agglomerations



The outbreak of the COVID-19 pandemic has largely affected the retail real estate sector. Restrictions on the operation of shops in shopping centres were introduced three times in 2020. This influenced consumers' shopping habits, including more online shopping or choosing smaller, local shops. Convenience stores were the ones that fared best during the lockdown, recording the highest increase in turnover volumes before trade restrictions were imposed. The positive performance of convenience centers stemmed from their high share of food operators and the specific nature of such establishments (local entities, mostly with direct shop entrances and with no common areas).

The only category of tenants that has clearly benefited from the lockdown are home decor and equipment (including DIY) stores. Lots of time spent at home and no restrictions on DIY shops has caused customers' spending in this category to almost double as compared to the beginning of the year.

Shopping centres' owners and tenants were negotiating. Tenants, which were obliged to close their stores due to government restrictions, were exempted from paying rent and operating fees in exchange for an extension of lease agreements for a duration of lockdown time plus additional few months.

In the light of the SARS-CoV-2 pandemic, an increase in vacancy rates is expected over the coming months due to the risk of bankruptcy of some tenants or liquidation of less profitable stores. The pandemic may also translate into an increase in unemployment, and thus a decrease in purchasing power and a visible drop in turnover in retail facilities.

Poland is on the radar of retail newcomers. In 2020 several brands entered the market, including Primark, Urban Outfitters, American Vintage, Falconeri and Armani Beauty. The lack of availability of units suitable in size in prime locations is the main entry barrier for many international retailers.

The largest commercial objects opened in 2020 were: Wiślanka Gallery in Żory, Decade in Nysa and Chełm Gallery in Chełm. Elektrownia Powiśle, which is another mixed-use project, started to operate in Warsaw. The commercial area of any of the newly opened objects did not exceed 25 thousand sq.m.

Trends & forecast

The wave of modernisations, repositioning and extensions continues.

Even for well-performing schemes with a strong position on the market, it is absolutely necessary to constantly monitor the market trends and adopt to the quickly changing spending patterns and consumer behaviour.

Personalization.

Many young people divert from mass, repetitive retailers and service providers. They value standing out from the crowd and appreciate possibility to personalize their clothes, jewellery or meals. Retail chains need to adjust their offer to these needs to keep their turnover on expected level.

Place making, expansion of food offer and leisure entertainment is in.

Shopping centres are a place for social interaction, where people not only shop, but also spend their leisure time on eating out, playing sports and entertainment. This trend is clearly visible across all of the types of retail accommodation with some of the space reconfigured into different functions (enlargement of food courts and catering offer, new meeting places, etc.).

Retailers and landlords need to be connected.

In order to be ahead of competition, they have to embrace the power of Big Data, Internet of Things and Artificial Intelligence. As e-commerce market is developing rapidly, omnichannel strategies have also become a common practice in Poland.

This trend is set to continue and will evolve fast along with development of new technologies. Due to the fact that recently mobile devices accounted for significant volume of all e-commerce sales, apart from well-designed website also user-friendly mobile apps are expected to be strongly desired among customers.

Retail as a part of mixed-use schemes.

Large agglomerations, especially Warsaw, provide the opportunity to develop multi-functional complexes, where retail offer is supporting element. By combining different commercial functions such as retail, office, entertainment and culture to form one unit, mixed-use schemes create a unique and recognizable place on the map of the city. This type of potential projects is increasingly part of developers' strategy.

Small and local shops.

Due to the development of the trend of locality and the wish to make shopping as close as possible to the place of living, in the near future, convenience facilities and shops located on shopping streets in residential complexes will be the most popular.

E-commerce is getting significance.

A year ago, the growth in the e-commerce segment was due to the introduction of a ban on Sunday trading. This year, the outbreak of COVID pandemic and the closure of shops in shopping centres have led to even greater increases. Due to the transfer of many aspects of life to the internet, the shops have taken care of well-designed and intuitive websites and simple payment methods. What is more, because of lockdown and closed shops, consumers had to get used to this form of shopping.

1.4 Warehouse Market Snapshot Review

20.8m m²
Total modern warehouse stock

5m m²
Take up

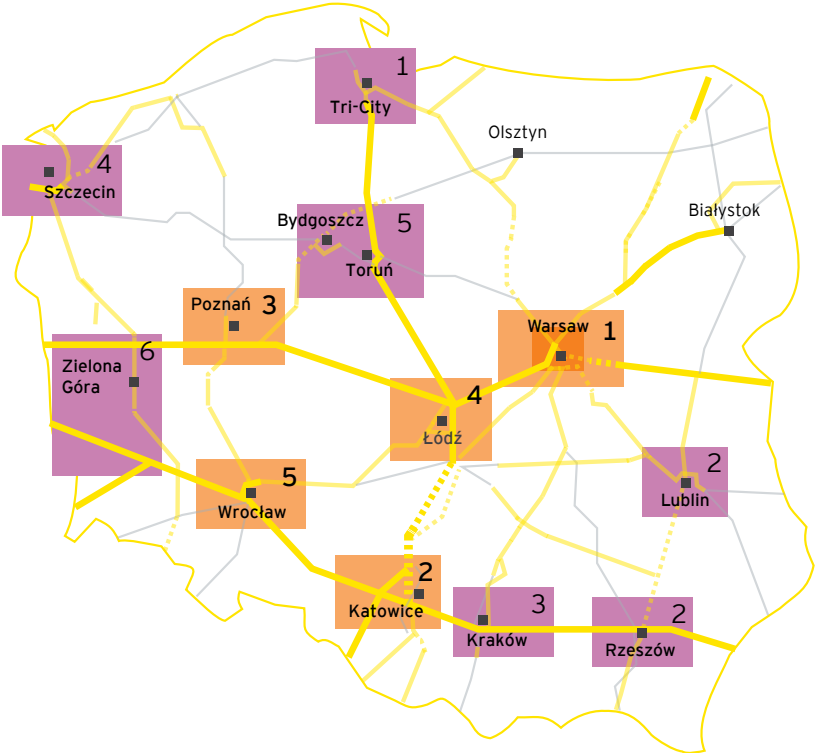
8.4%
Overall vacancy rate in 2020

1.9m m²
Pipeline supply

€4.50-5.10 m²/month
Prime warehouse rent

€2.80-3.60 m²/month
Average warehouse rent

Map of logistic hubs with road infrastructure



Primary hubs:
1. **Warsaw I & Warsaw II**
2. **Upper Silesia**
3. **Poznań**
4. **Central Poland**
5. **Lower Silesia**

Secondary hubs:
1. Tri-City
2. Eastern region
3. Kraków
4. Szczecin
5. Bydgoszcz/Toruń
6. Western region

Major national roads

Highways

- Existing
- Under construction
- Planned

Expressways

- Existing
- Under construction
- Planned

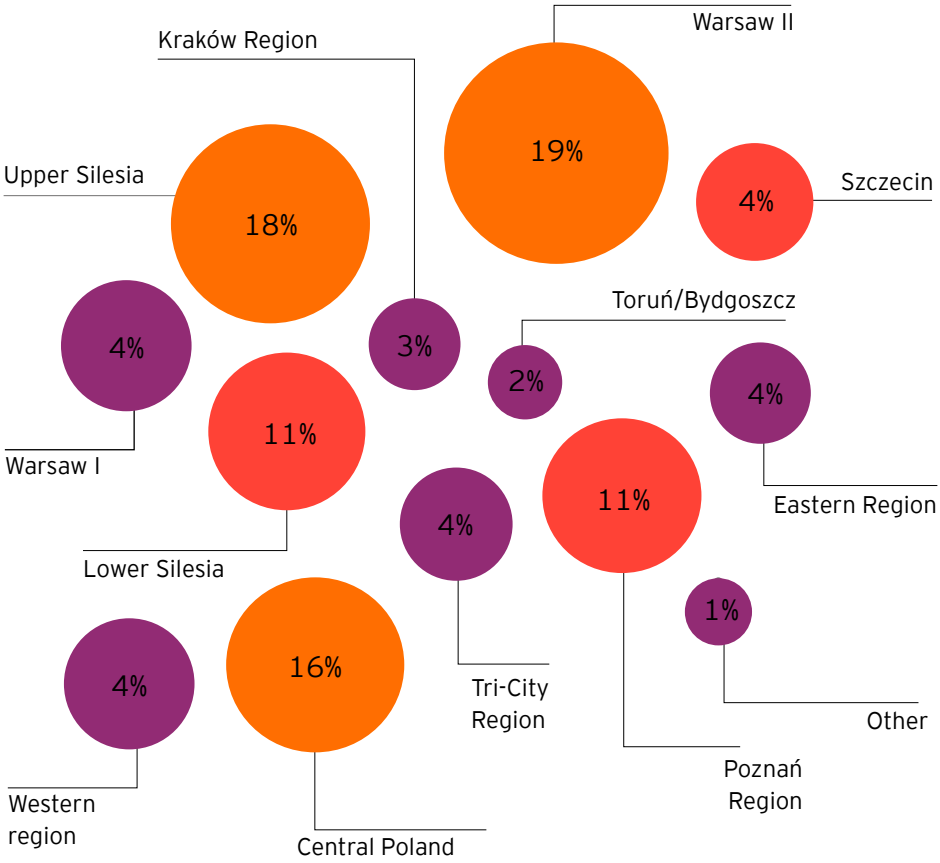
Booming in previous years warehouse market has retained its momentum despite the COVID-19 pandemic. It has been mainly fueled by the e-commerce sector and multi-channel sales models implemented by conventional retailers, which contributed to record demand that will likely amount to approx. 5m m^2. Approx. three-quarters of concluded transactions were new leases and extensions.

As the speed of delivery is of growing importance, the demand for last-mile logistics, SBUs and automation solutions is growing.

With approx. 2m m^2 completed in 2020, the total stock stood at the level of 20.8m m^2 by year-end with perspective of further development in 2021, as developers secure plots of land for future investments.

There are 5 key warehouse clusters, as well as 6 emerging ones. The bulk of warehouse space is located within the Warsaw region (located within a 50 km radius from the capital city), followed by the Upper Silesia and Central Poland regions.

Warehouse stock by region



The high supply of new warehouse space in 2019 and 2020 resulted in an increase of the vacancy rate up to 8.4%, the highest level over the last 6 years.

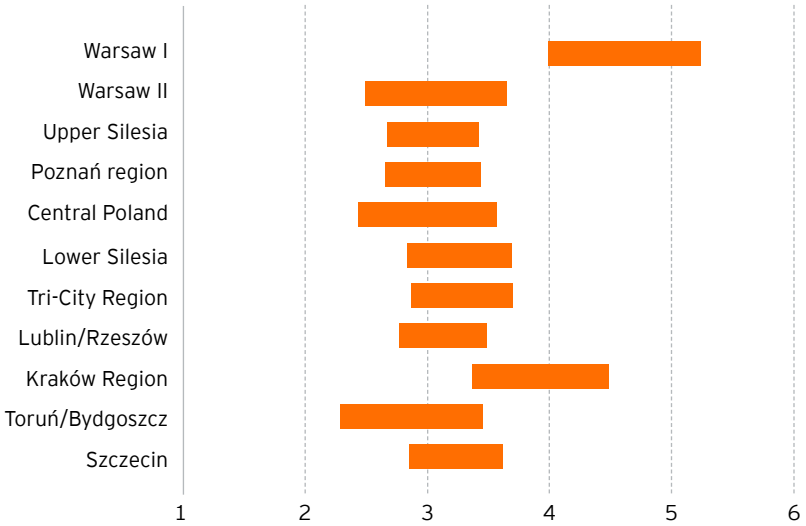
The development activity seems to be temporarily scaled back, due to high vacancy rates and general market insecurity. The investors limit speculative investments and focus on BTS projects.

Gross take-up in 2020 reached level of 5m m^2. Upper Silesia, Warsaw region and Central Poland attracted the bulk of letting activity. However, there is a noticeable increase in funds and developers' interest in emerging locations, especially east and south Poland. The largest transactions include pre-let agreements of Panattoni BTS Świebodzin (200,000 m^2) Hillwood Łódź Górna (73,000 m^2) and 7R BTS Radzymin (67,500 m^2).

Logistics operators, retail chains and e-commerce were the most active occupier sectors. High level of demand has been matched by extraordinarily high supply. The rents have remained stable, yet high large amount of available space may in the future lead to diminishing rental rates or more generous tenant incentives.

The highest rents are still recorded for prime assets located in Warsaw I and Kraków region.

Rental levels by region (€/m^2/month)



Trends & forecast

Warehouses remain strong in face of COVID-19.

Whereas other sectors of commercial real estate struggle with the pandemic ramification, warehouse sector notes exceptionally high demand, decent developers' activity and dominating share in investment market.

The growth of e-commerce, new standards in logistics services, multi-channel sales and fortifying the supply chain will ensure lasting performance of warehouses in the nearest future, regardless of the pandemic development.

Prospects for warehouse and industrial market remain bright.

Poland's central location, its size, improving transport infrastructure, as well as, strong performance during the COVID -19 pandemic, are the undisputed fundamentals that stand behind a positive forecast for the warehouse sector in the foreseeable future.

Growing importance of „last mile delivery" and SBU.

Due to fast developing e-commerce and growing customer expectations, "last mile delivery" properties located in the cities have been gaining popularity, also in the form of Small Business Units (SBUs).

Emerging locations gradually turn to an alternative to mature hubs, the latter leading to labour shortages and risk of cost increase.

With very tight availability of labour force and low vacancy rates in established warehouse hubs, more and more developers as well as occupiers are eyeing up opportunities in new locations. Built-to-suit options in emerging regions such as Bydgoszcz-Toruń, Lublin, Rzeszów, Zielona Góra are more cost-effective.

Lack of qualified workforce.

Fast developing industrial market leads to shortages in human capital. Therefore, developers and users will choose emerging regions to satisfy their needs for qualified workforce.

1.5

Hotel Market Snapshot Review

Over

10.8m
of tourists

1.7m
foreign tourists in 2020

Almost

22.3m
nights spent

4.0m
nights spent by foreign visitors

Over

2,630
hotels

24%
Average hotel room occupancy in Warsaw in 2020

Decreasing occupancy rate of hotel rooms in Poland by

54.8% YOY

Decreasing number of tourists staying at hotels by

47% YOY

Review

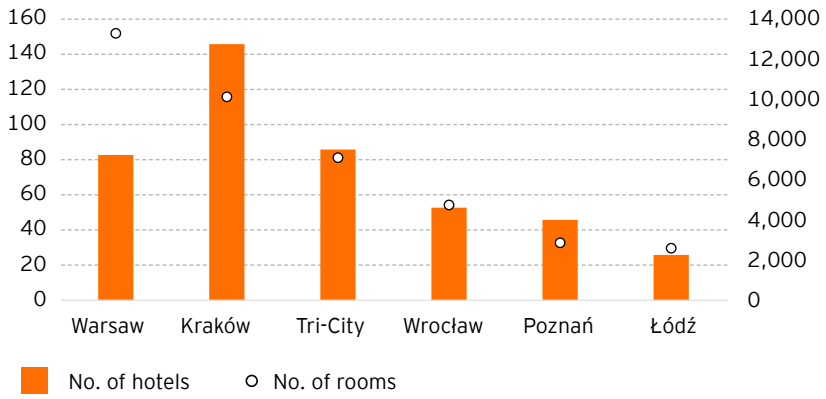
Rapid growth of the hotel market till 2019 in Poland was reflected by the increasing number of new hotels, growing number of tourists, as well as the growing interest in the Polish market from international hotel brands.

The key drivers for the development of hospitality business in Poland were: economic growth, rising popularity of Poland as a holiday and MICE destination, as well as the development of medical tourism in Poland. Another important factor positively influencing the development of the hotel market in Poland was the dynamic growth of the BPO/SSC sector.

The outbreak of the COVID-19 pandemic caused delays in the new hotels openings. Openings scheduled for spring 2020 took place during the holiday months.

The number of categorized hotels in Poland exceeds 2,630. Kraków is the city with the highest number of hotels. However, when considering the number of hotel rooms, Warsaw takes the lead with 32% more hotel rooms than Kraków.

Number of hotels and hotel rooms in main cities in Poland in 2020



The number of tourists staying at hotels in Poland was around 11m in 2020, which is an decrease of approx. 70% compared to the preceding year. The share of Polish guests using hotel infrastructure has been rising till 2019, but due to COVID-19 pandemic outbreak in 2020 and the government restrictions concerning hotel and borders closures, the number of tourists has fallen dramatically. In 2020 foreign tourists accounted for approx. 15.7% of the total number of tourists staying in hotels, which translated into approx. 24% fall in comparison to 2019. The average hotel room occupancy in Poland in 2020 equalled to approx. 24% and was approx. 30pp lower than in 2019 (Central Statistical Office data).

As far as operating models are concerned, international hotel chains entering the Polish market are mainly interested in management or franchise agreements. Pure lease agreements are accepted only in the case of prime locations in major cities and usually by hotel chains entering the Polish market.

Major pipeline of hotels includes Best Western and Hotel Praski in Warsaw, AC by Mariott in Kraków, Q Hotel Plus in Wrocław and Lhotel in Łódź.

Focus on Warsaw

Warsaw is the largest hotel market in Poland in terms of supply of hotel rooms. It is also usually the first choice for the international brands entering the Polish market.

According to data published by the Central Statistical Office, in July 2020 there were 83 categorized hotels in Warsaw offering 13.267 rooms. Three star hotels constituted 39% of all hotels in Warsaw and accounted for 27% of hotel room supply. Only 20% of hotels were in the four star standard, but they provided the most rooms, accounting for 35% of total hotel room supply in Warsaw. 15 five star hotels accounted for 26% of total number of rooms. The Warsaw hotel market is mainly based on business trips and events such as conferences. In 2020, most conferences were cancelled and business trips due to remote work were limited to a minimum. When in January 2021 the occupancy of hotels in Warsaw amounted to more than 60%, in March, there was a decrease to 22%. The record low month was April, when occupancy was only 8%. The maximum occupancy after pandemic outbreak was noticed in September when it was almost 31%.

Warsaw is the largest event spot in Poland and one of the top MICE locations in Central and Eastern Europe. A trend of hotels designed specifically to suit business and MICE clients was emerging till 2019. In 2020 Holiday Inn Express and Nobu have been opened. Those projects aim to appeal to business sector, offering conference, event facilities and working spaces. They are also located in the vicinity of the airport and office hubs.

Trends & forecast

Decreasing occupancy and possible consequences.

The hotel market was one of the most affected markets by the COVID-19 pandemic. Government restrictions such as the closure of borders and as a consequence much lower tourist traffic and hosting only business guest led to a significant decrease in hotel occupancy and their revenues. At the moment, it is impossible to predict the effects of a pandemic, but based on the events of 2020, it can be noticed that the activity of the hotel market is directly correlated with epidemiological situation.

Customers choices.

In pandemic situation for hotel customers, it will be important to choose hotels which are adapted to the current situation. Customers will be more likely to choose categorized facilities where formal safety and cleanliness rules are applied. The online check-in system will be more popular to reduce unnecessary direct contacts.

Short-term rental apartments as a consequence of changing market.

Over the recent years hotel market's supply noticeably changed due to increasing share of short-term rental apartments offered by platforms such as Airbnb. They are usually more affordable

than traditional hotel rooms, but often equally attractive and conveniently located which makes them an interesting alternative for part of tourists. As assets that guarantee higher rates of return they are also attractive for developers and investors who aim to maximize profits. Since short-term rental apartments seem to meet guests' expectations it is probable that in the following years their share in supply will continue to grow.

Diversification of offer.

Hotel chains tend to diversify their image, introducing new brands and styles. In recent years several major chains have implemented less formal, alternative brands, often aiming to attract young, active, urban clients. The facilities are often designed to create unique guest experience, as well as more cameral and personal feel.

The companies also often adapt to changing market, entering condo-hotel sector and exploring alternative accommodation options.

New investments.

Foreign investors have not ceased to see Polish as a place to start investing in hotel sector. Smaller players focus their analyses mainly on the Warsaw and other large regional cities, while larger operators are also interested in smaller cities as well as resorts. However, at the moment, decision-making processes are prolonged, real investment starts are postponed and earlier planned investments are being exited.

1.6 Residential Market Snapshot Review

Largest
residential market in Central and Eastern Europe

Almost

220k
apartments completed in 2020

A drop in sales volume in top six primary markets

53k
units compared to 65.4 k in 2019

Major trends:

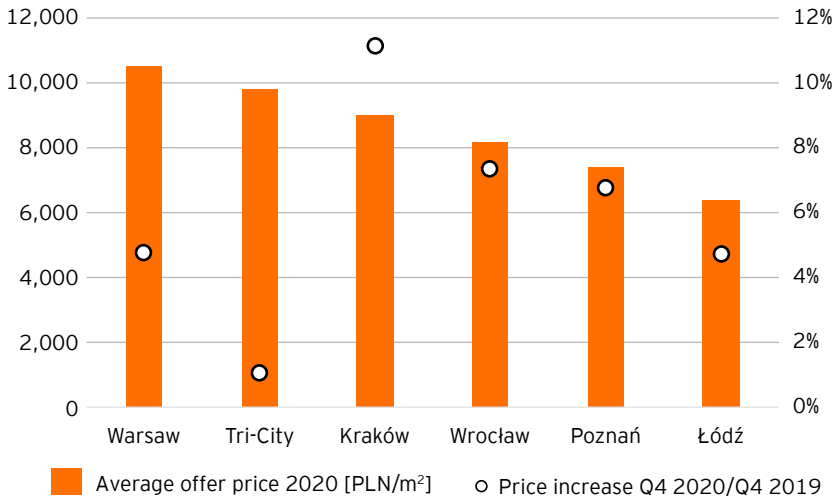
- rising prices
- rising demand for detached houses
- developing rental market

Review

The Polish residential market is the largest in Central and Eastern Europe, however it still lags behind Western EU in terms of ownership structure (with a predominant share of owner occupied housing stock), age of housing stock and level of market saturation. However, last few years showed that Poland is on track for catching up with more developed western markets. Rental market, also this of an institutional nature, is growing rapidly and number of upscale apartments in developers offer in Warsaw, Kraków and Tri-City increases every year.

Nevertheless, the year of 2020 has been marked by the global SARS-CoV-2 coronavirus pandemic. Due to the economic crisis the boom on the Polish residential market has been stopped. Despite a significant drop in interest in buying apartments in second quarter,

Offer prices on six major primary markets at the end of 2020



which affected the overall year result, prices in major Polish cities remained at a stable, high level. The estimated domestic price growth rate in 2020 amounts to 6%.

Looking at the year as a whole, the residential market has handled the negative effects of the pandemic remarkably well, taking into account the pandemic circumstances. The area that became the most affected by the crisis are sales. The decrease in the quantity of sales was caused mainly due to a slump in the second quarter of the year, when the pandemic was gaining strength and the country was in a state of lockdown. In the second half of the year, the market rebounded and the numbers began an upward trend to reach the sales levels of the time before the pandemic. Overall, the number of sold apartments at the end of 2020 was 19% lower comparing to the end of 2019. Considering the regional markets, the decline in sales in 2020 varied. The smallest decreases were recorded for Tri-City (-9%) and Łódź (-14%). An interest in buying homes is expected to remain high due to very cheap mortgages caused by lower interest rates.

When it comes to the new supply, in 2020 the number of completed apartments in major polish cities noted 24% decrease YOY. During that year number of obtained building permits In Poland amounted to 275,938 which represents 3% increase compared to year of 2019.

Currently investing in real estate attracts not only private buyers but also increasing number of investment funds that are more and more interested in polish rental market, especially in Warsaw, Wroclaw and Kraków. The living sector is also expanding, and despite the pandemic, its position has even increased as this asset class has proven to be the most resilient of the real estate industry.

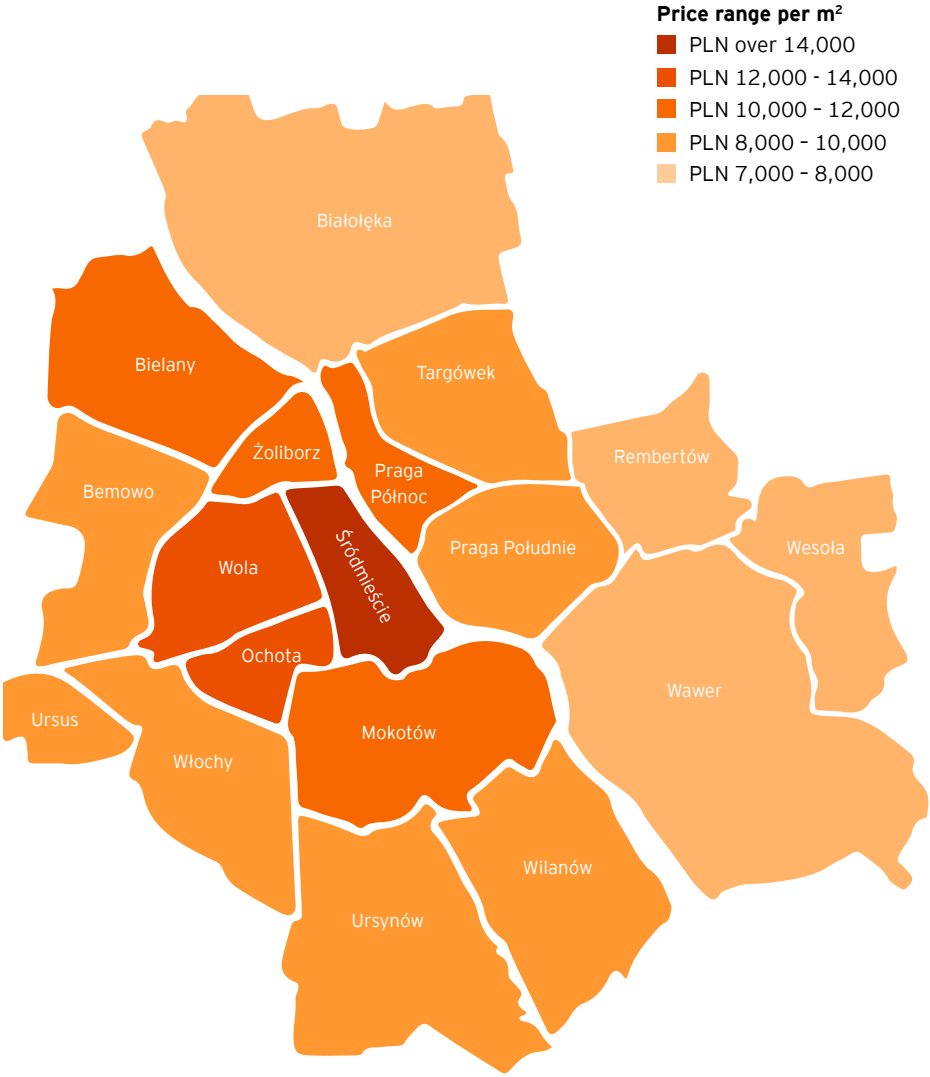
However, the rental market collapsed during the pandemic. Many long-term leases have been terminated and tenants have returned to their family homes. Due to restrictions on tourism, the short-term rental market has practically disappeared. Owners of these types of premises have often chosen to repurpose the premises into a slightly more secure long-term lease.

Focus on Warsaw

Warsaw's residential market remains the most developed in Poland. The demand is driven mainly by in-migration, the highest income level in Poland and well developed labor market. Warsaw is a popular location for shared service centers and office investments. Employment perspectives as well as major universities located in the city are a magnet for young people from other regions of the country and large number of foreigners. All these factors result in increased demand for residential developments. Developers are trying to meet this strong demand by completing over 20,000 apartments annually.

On the other hand, rental market is going through hard times. Due to SARS-CoV-2 coronavirus pandemic the demand for rental housing has been significantly reduced. First of all, it was connected with the return of students to their hometowns and their termination of long-term leases, as well as with the lack of tourist traffic and thus the lack of demand for short-term rentals. Average rents, at the end of 2020 amounted to 58 PLN per m^2/month which constituted 3% decrease compared to 2019. The level of rent is also affected by the conversion of short-term leased premises into long-term leased ones.

Despite the global pandemic, the prices of apartments are still growing. The most expensive flats of average offer prices equal to or greater than PLN 10,000 per m^2 are located within seven districts: Śródmieście, Mokotów, Żoliborz, Ochota, Wola, Bielany and Praga Północ.



source: EY market research

Trends & forecasts

Positive outlook despite global pandemic.

In 2020 there has been no collapse in demand for residential real estate in Poland. By starting to work remotely on a massive scale, people have begun to pay more attention to where they spend their days, pushing some to find a new, more comfortable place to live. Demand is expected to remain strong in 2021.

Real estate market as a safe place to invest.

The real estate market will be driven by very low interest rates that have been established in response to the crisis caused by the global pandemic. Not only are they boosting demand from individual buyers purchasing apartments for personal purposes by lowering the cost of mortgages, but they are also making real estate a safe alternative to invest capital in uncertain times.

Price increase on major primary markets.

Global pandemic did not hit hard on polish residential market. As a result of growing construction costs, regulations introduced by the government and European Union as well as increasing average salaries prices most likely will continue an upward trend.

Construction cost and land prices on a rise.

For several years now residential market has been encountering difficulties such as continuously growing construction costs and increasing land prices. Due to the limited availability of labor force on the market, the higher minimum wage as raised by the government and increasing prices of building materials the total investment cost is expected to continue to rise. The decreasing availability of development land will also be driving up the average total development cost.

Hard times ahead of rental market.

The pandemic has very clearly affected the rental market. Both some students and people who can work remotely have returned to their family homes. The demand for rented apartments has clearly decreased. For the same reasons, the situation allowed landlords to negotiate rental prices, causing them to drop. There is also a trend of changing the purpose of rental housing from short term rental to long term rental, due to the lack of people, especially tourists, willing to visit new places. Nevertheless, it is expected that the recently observed increase in the interest in institutional rentals will maintain its high level.

Rising demand for detached houses.

The pandemic has significantly changed consumers' preferences for the type of residence they own. More and more people are choosing to buy a detached house or a building plot in the suburbs instead of an apartment in the city center. This is connected with the possibility of remote work and also with the desire to have a comfortable place to live with its own garden. Demand for such properties is also

fuelled by rising apartment prices which are already unacceptable for many and it is cheaper to build or buy a compact single-family house. However, as a result of growing take-up, there is also already a noticeable increase in the price of small construction plots outside big cities.

Student housing as developing asset class.

Despite the limitations in the access to the universities, due to global pandemic, the interest in student housing remained at a high level. Many students are still willing to live in the city where they are studying. Due to low quality of existing stock and growing demand private student houses are becoming more popular in Poland. Constantly growing students population, including dynamically rising number of international students create demand for new type of assets. First purpose-build student accommodation (PBSA) are now operating and seems to became very attractive asset class for investors and developers. Supply is still very low and operating or planned in the biggest university cities (Poznań, Łódź, Lublin, Wrocław, Kraków and Gdańsk). Main players are i.e. Griffin (Student's Depot) and Base Camp and Golub GetHouse.

Co-living as an emerging trend on major markets.

Co-living is a new type of housing based on shared economy model. The intention of this concept is to provide its residents with convenient accommodation and simultaneously empower them to actively participate in life of surrounding community. On western markets this trend is known for decades, while in Poland the era of co-living is just beginning. Today only one project – the Clipster located in Gdańsk represents this type of housing stock. The second – Smartti Mokotów is to be completed by YIT in Warsaw, Mokotów district.

1.7

Investment Market Snapshot Review

€5.6bn

Volume of investment transactions in 2020

€289m

Volume of the largest transaction in 2020

€2.7bn

Invested capital allocated in warehouse

4.50-5.75%

Prime office yields

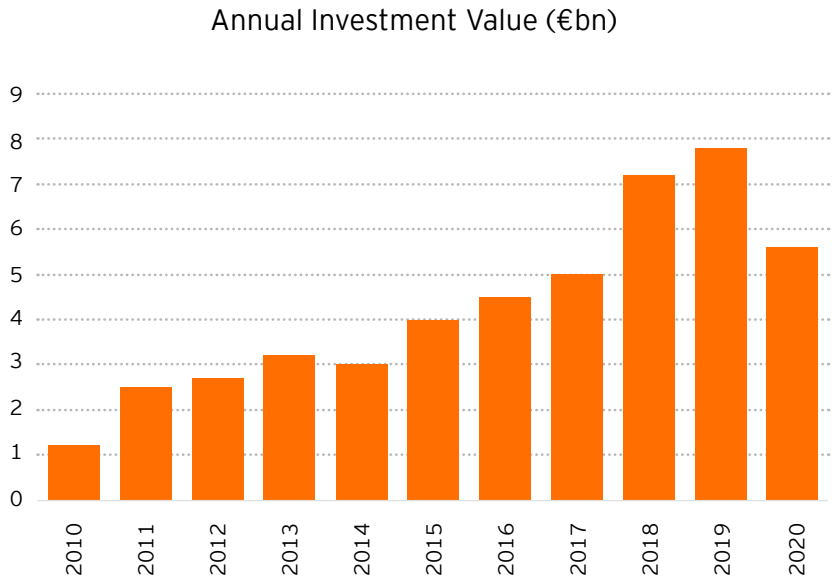
5.00-5.75%

Prime retail yields

5.50-6.25%

Prime warehouse yields

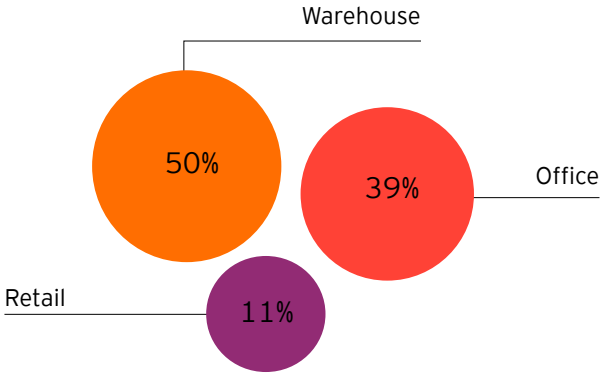
After booming two years, investment market commenced 2020 with exceptional result of €1.7bn in the first quarter. In March, however, the markets slowed down, as many investors adapted "wait and see" strategy in light of the pandemic. Despite the challenges of COVID-19 the transactions have been unlocked and a number of deals have been concluded, especially at the turn of 2nd and 3rd and in the 4th quarter. Some of the properties sold in 2020 were a part of larger, European portfolios. The total investment volume decreased by approx. 28% YOY and settled at the level of €5.6bn.



As the industrial market kept its pace, mostly due to the development of e-commerce sparked by the pandemic, it has dominated transaction structure, claiming approx. 50% of the market. Office market followed with 39% share, amounting to €2bn.

2/3 of the office transactions have been concluded in Warsaw. The retail sector has struggled the most due to multiple lockdowns, and achieved the volume of €650m. The demand for retail properties has been fueled by convenience centers, as they were more resilient to the COVID-19 consequences. The transactions of convenience schemes have obtained similar volume to 2019.

Annual Investment Volume by Sector, 2020



Among largest transactions observed on the Polish market were the acquisitions of large international portfolios, such as Goodman Industrial Portfolio, consisting of 22 properties, sold for €1,005m or PEL Portfolio, consisting of 29 properties, sold for €900m.

Most notable transaction of portfolio located entirely in Poland was Madison's acquisition of 46.5% shares in ELI industrial portfolio, worth €289m.

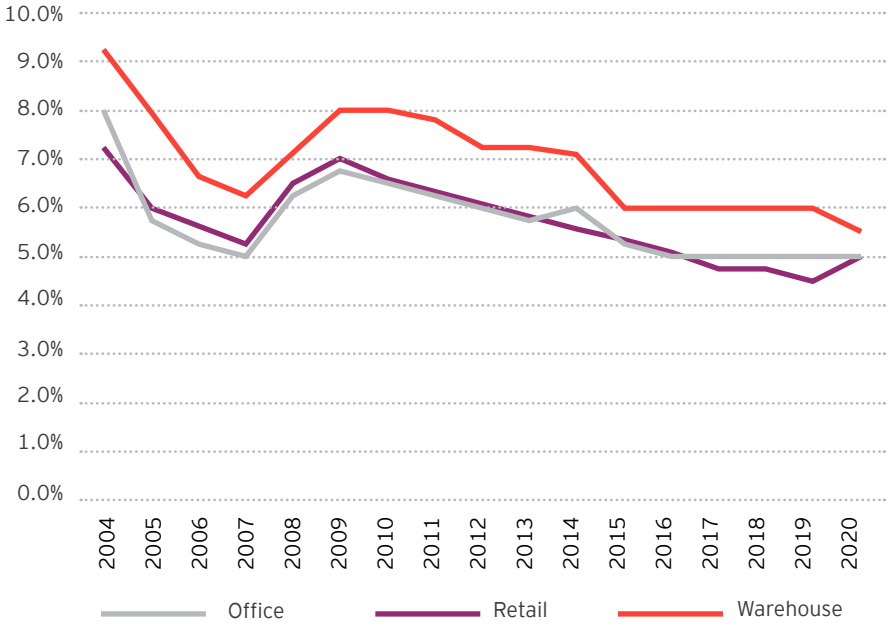
Most of the office transactions have been concluded in Warsaw, with properties such as Wola Center (€102m), T-Mobile Office Park (€100m) or Generation Z (€98m). Transactions in regional markets have contained the sale of Equal Business Park (€130m) and High5ive III-IV (€128m) in Cracow or Silesia Business Park A-B (€51m) in Katowice.

The transaction of Buma office portfolio was signed in October 2020 with the price of €200m.

Most of the capital inflows to Poland from Europe, Asia, United States and South Africa.

Despite the COVID-19 pandemic the results achieved on the investment market are relatively strong. Exceptional volumes in industrial sector and good performance of office sector, especially in comparison to other countries in the region, and relatively good economic outlook suggest that Poland will remain attractive to investors looking to achieve higher returns, while maintaining a relatively low risk profile.

Prime yields curve



Trends & forecasts

Poland will continue to be on the radar of investors.

Given its size, market fundamentals, steady occupier demand as well as yields higher by 2-3pp as compared with developed Western Europe markets, Poland will attract investors' interest over the course of the coming quarters.

Accelerated Industrial market will keep its pace.

Industrial investment volume have been record high in 2020. The accelerated development of e-commerce will continue, as will the investors' interest in logistic properties. Industrial sector will remain significant in the investment structure.

In their search for opportunities, investors are eyeing up not only primary, but also secondary markets.

In view of the insufficient supply of prime products in Warsaw, regional cities are much sought after by investors as a destination for capital allocation. Tier-2 and tier-3 cities have slightly higher risk profiles and a lower depth of the market, however yields are 2-3pp higher.

Retail market will focus on convenience and retail parks.

As the market is increasingly saturated with traditional shopping centers, investors' focus shifts towards retail parks and convenience centers, especially as they have shown a greater resilience to COVID-19 fallout and usually offer higher yields.

1.8. What does the future of Real Estate look like?

Real Estate market is undergoing changes as new technologies are introduced and becoming more common, now even faster. Professionals have to shift from traditional real estate perspective to a broader approach that takes into account technologies that improve "real estate experience", but those technologies may also disrupt real estate cycles.

The question is, how and to what extent the cycles will be disrupted. There are arguments for and against both smoother and more extreme cycles.

Technologies and RE market

- Autonomous vehicles to instigate a location paradigm – will any real estate sub-sector not be impacted?
- AI, VR, RPA, apps versus traditional Real Estate jobs.
- 'Co' phenomenon – the space may change, the method to buy it will change but will people stop aspiring to own and own more?
- How far can the personalization of space go?
- How individual ownership of assets thrive in a truly connected and integrated urban infrastructure?
- How do we maintain engagement in the live/work anywhere world?

Legal and tax aspects of investing in real estate

This Chapter considers the most important legal and tax issues arising during each of the following five stages of a real estate investment:

- Financing
- Acquisition
- Development and construction
- Operation and exploitation
- Sale

The Chapter is arranged so that each of the above aspects is dealt with in a separate section (2.3.-2.8.), considering legal implications first, followed by an assessment of related important tax consequences.

The section 2.1. on the legal background (below) will introduce the reader to certain concepts and terms that may not be commonplace in transactions elsewhere in Europe. This should be read as a general introduction to the legal environment in Poland. The chapter also contains section 2.2. on investment vehicles and structures presenting information on the most common structures used in real estate investments in Poland. Taken together, they form the basis for understanding the most relevant legal and tax implications of investing in real estate in Poland.

Legal, financial and tax due diligence are also fundamental to any investment cycle and given the importance of due diligence to any transaction, we discuss the relevant procedures and key considerations in detail in section 2.9.

The year 2021 has brought some important changes in the Polish legal system. Regulations introduced legal measures dedicated for the entrepreneurs to target negative effects of the COVID-19 pandemic and also important new obligations which are directly affecting real estate market in Poland.

Changes of the real estate law (adopted):

1. Construction law – – 2020 brought the largest amendment to the Construction law in years. Amendments to the Construction Law, introduced in the Act of 13th February 2020, simplify and accelerate the investment and construction process and increase the stability of decisions made in this process. The changes entered into force on 19th September, 2020. The most important amendments concern:

- **A new division of the construction project**
  The regulation introduces the new division of the construction project. Division of the project will simplify and accelerate the procedure. Pursuant to the new procedure, the architectural and construction administration authority in the first place approves the project of land development together with the architectural and construction design by issuing a building permit. The technical project is submitted to the construction supervision authority only at the stage of submitting the application for a use permit.
- **Simplified legalization process**
  Under the current regulations, unauthorized construction, the construction of which was completed of at least 20 years ago, will be legalized according to a new, simplified and free of charge procedure, after the presentation of technical expertise confirming that an arbitrarily erected buildings can be used safely.

- **Change of the list of facilities performed on the basis of the notification (without the need to obtain a building permit)**
  The list of buildings, the construction of which does not require a building permit, has changed in the amended Construction law. The catalog of construction works that do not require a building permit (but require notification), include i.a. aboveground home terraces with a building area of more than 35 m2, fences with a height of over 2.20 m2 or exits from national and provincial roads and parking bays on these roads.

- **A new catalog of facilities, the construction of which does not require both a building permit and notification**
  The list of buildings and other facilities whose construction do not require the consent of the architectural and construction administration authority has been extended to include, among others cash deposit machines, ticket machines, parcel machines, machines for storing parcels, vending machines and other machines up to a height of 3 meters.

- **No model form of the building permit**
  From September 19, 2020, architectural and construction administration authorities will not use the applicable template of a building permit specified in the regulation. From now on, the decision will be issued in accordance with the provisions of administrative law, without a specific template.

- **No possibility to challenge the validity of the building permit 5 years after its issuance**
  The new regulations introduce the rule that the building permit cannot be invalidated if 5 years have passed from the date of its delivery or publication. This is a key, significant change, taking into account that, on the basis of the previously applicable regulations, building permit could be revoked in the event of a gross violation of the law regardless of the lapse of time, which was often the reason for withdrawing from the transaction process. Thus, this change introducing a five-year limit, undoubtedly leads to the stabilization of the investor's business plans.

2. Spatial Planning and Development Act – The amendment to the provisions of the Spatial Planning and Development Act, in force from October 31, 2020, is aimed at digitization of spatial planning in Poland. The new regulations will introduce new possibility for investors to verify information for the purpose of the potential investment area and its surroundings.

The new regulations require the authorities issuing spatial planning acts to create digital planning data. This obligation also applies to acts already in force. The acts of spatial planning include: voivodeship spatial development plans, studies of conditions and directions of spatial development, local spatial development plans, local reconstruction plans and local revitalization plans.

3. Geodetic and Cartographic Law - Adopted on 13th February 2020 amendment to the Geodetic and Cartographic Law is aimed at eliminating excessive limitations, including bureaucratic limitations, occurring in the process of geodetic and cartographic works (for instance related to reporting of geodetic and cartographic works), sharing materials from geodetic and cartographic resources and fees for providing such documentation, transfer of the results of geodetic and cartographic works and their verification. Additionally, the act provides for changes in the procedure of obtaining professional qualifications in the field of geodesy and cartography.

The act introduces the legal basis for providing the planning documents using geoinformation techniques. In a consequence investors will be able to independently search for specific locations, real estates or plots of land.

4. The Act of March 2, 2020 on special solutions related to preventing, counteracting and fighting against the COVID-19 - Due to the outbreak of COVID-19 pandemic, Polish legislator introduced a special regulation into the Polish legal system, directly interfering with the lease relationship in commercial facilities with a sales area exceeding 2,000 m2. The provision provides for the termination of mutual obligations of the parties to a lease, tenancy or other similar agreement during the period of the prohibition to operate in commercial facilities (trade ban).

Potential changes of the real estate law in 2021:

1. Development Act – Office of Competition and Consumer Protection (UOKiK) called for adoption of legal provisions that will provide higher protection for purchasers of apartments acquired from real estate developers. The above-mentioned changes include i.a. the modification of security mechanisms of open escrow accounts. The open escrow account may be additionally secured by the bank or insurance guarantee. It is planned to replace the above-mentioned securities with an obligation of a developer to make a contribution payment on each payment made by the purchaser via the open or closed escrow account in the certain percentage of the value of each transaction, to a newly created Developer Guarantee Fund. The accumulated funds will be disbursed to the purchasers in case of the developer's bankruptcy. The proposed changes may increase the level of protection of purchasers of apartments, however may also lead to increase of the purchase prices.

2. Investment Act – legal works are conducted to introduce an act aiming at improvement of the investment process. However, the act will also establish certain restrictions on carrying out investments. The biggest concerns raise planned restrictions on carrying out investments on the basis of zoning decisions. Carrying out investments in the areas not covered by the local spatial development plans will be limited. Currently, due to small coverage of Poland with local spatial development plans, over half of the investments in Poland is carried out on the basis of the zoning decisions. Entry into force of the planned changes will prevent most of investments from being carrying out.

3. Simple stock company – a new type of a company is to be introduced in the Polish legal system. The new structure of a simple stock company (PSA) combine the advantages of a joint-stock company and a limited liability company.

The proposed structure is to be introduced as a solution for the start-ups and new-tech environment, however, due to its universal character it can facilitate projects development. Pursuant to the recent changes in law, regulations on simple stock company will enter into force in 2021.

Changes of tax law in 2021:

Taxpayers in Poland face significant changes in tax law as of 2021. The amendments continue to be in line with global and European trends aimed at introducing measures against tax evasion and tax avoidance, i.e. actions undertaken within the Base Erosion Profit Shifting (BEPS) initiative by OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), as well as works within the European Union, which resulted in developing the Anti-Tax Avoidance Directive (ATAD).

There are also tax changes which originate from the local developments and in many cases they stretch even beyond measures recommended by international bodies.

We highlight below selected key changes which impact the real estate market in 2021.

Taxation of limited partnerships and general partnerships

Limited partnerships (pol. spółka komandytowa) shall be treated as CIT taxpayers in Poland. In a similar manner, general partnerships (pol. spółka jawna) shall be subject to CIT in Poland where partners (who are not exclusively individuals) in such a partnership are not disclosed to the tax authorities. Importantly, the limited partnership will be able to solely decide whether the new regulations imposing the CIT taxpayer status will apply to it from 1 January 2021 or from 1 May 2021.

Introduction of the new definition of Polish real estate rich company into the tax laws and new mechanism of settlement of the tax on capital gains

Starting from 1 January 2021 amendments to the Polish PIT and CIT Act entered into force, which introduced i.a. new definition of Polish real estate rich company and obligation of real estate rich company to settle Polish income due tax on capital gains earned by non-Polish tax resident on disposal of shares or similar rights in such company.

As follows from the new regulations, the Polish real estate rich company is an entity obliged to prepare balance sheet based on the accounting regulations in which:

- in the case of entities starting their activity - as at the first day of the tax year / financial year at least 50% of the market value of assets consisted, whether directly or indirectly, of the market value of real estate located in Poland or rights to such real estate and the market value of such real estate exceeded PLN 10m;
- in the case of other entities than those specified above - as at the last day of the preceding tax / financial year at least 50% of the book value of assets consisted, whether directly or indirectly, of the book value of real estate located in Poland or any rights to Polish real estate, where the book value of the real estate exceeded PLN 10m. Moreover, the revenues from rental, subletting, lease, sublease, financial lease or any similar agreement, or disposal of real estate or rights to real estate or shareholding interests in other real estate companies represent at least 60% of total tax / financial revenues of such entity in the preceding tax / financial year.

If the entity meets the above definition, a new mechanism of settlement of the tax on the disposal of its shares or similar rights should apply. Namely, if the seller is located outside Poland (i.e. is non-Polish tax resident) and the subject of the transaction are shares or similar rights in real estate rich company giving at least 5% of voting rights / rights to participate in the company's profit or similar rights, the obligation to settle tax on the capital gains earned by the seller in Poland should

apply to the real estate rich company (whose shares or similar rights are being disposed). If the real estate rich company has no information to calculate the tax base, the tax should be paid based on the market value of the shares or similar rights being disposed.

Real estate rich companies located outside the EU / EEA should be obliged to appoint a tax representative in Poland to perform the remitter duties referred to in the preceding paragraph. The tax representative should be jointly and severally liable with the real estate rich company for settlement of the due tax on disposal of its shares or similar rights. Failure to appoint a representative may be subject to a penalty of up to PLN 1m.

Reporting of entities owning Polish real estate rich companies

Real estate rich companies and taxpayers holding directly or indirectly shares or similar rights giving at least 5% of voting rights / rights to participate in the company's profit or similar rights in real estate rich company should be required to provide tax authorities with the information on:

- the entities holding directly or indirectly shares or similar rights in the real estate rich company – in the case of information provided by real estate rich companies;
- the number of shares or similar rights, held directly or indirectly in the real estate rich company – in the case of information provided by taxpayers owning Polish real estate rich companies.

The information should be provided by the end of the third month after the tax / financial year end of the real estate rich entity. The information should be provided electronically and should be valid as at the last day of the tax / financial year of the real estate rich company.

Publication of tax policies

Entities that generate revenue in excess of €50m during the tax year or tax capital groups (tax consolidation regime in Poland) will be required to publish annual information on the execution of their tax policy.

Such taxpayers will be required to publish the information on their website by the end of the 12th month following the end of the tax year.

The scope of the information to be published is broad and may concern business sensitive areas.

Limitations in the utilization of the tax losses

Starting from 1 January 2021, there is a limitation in utilization of tax losses in cases where the taxpayer has taken over another entity or acquired an enterprise or an organized part of an enterprise or has received a cash contribution for which it acquired an enterprise or an organized part of an enterprise.

In abovementioned cases, utilization of tax losses by the taxpayer should be prohibited if:

- the subject of the primary business activity carried out by the taxpayer after the takeover or acquisition will be wholly or partially different from the subject of its primary business activity actually carried out before the takeover or acquisition,

or

- at least 25% of shares or similar rights in the taxpayer are held by an entity or entities which did not own such rights as at the last day of the tax year in which the taxpayer incurred the loss.

In practice, such regulations may prohibit the utilization of the past tax losses in case of mergers, demergers, carve-outs and other restructuring activities.

Investment structures

For many years the Polish real estate market has developed investment structures that were widely used by investors. However, the abolishment of well-grounded investment fund structures for real estate investments marked a radical watershed. While legislation that led to the significant limitations of the investment fund structure was being drafted, at the same time the Polish government promised an attractive alternative for the real estate market, the REIT (Real Estate Investment Trust) regime. Real estate investors familiar with REIT regimes of other countries were in the past not too often asking for a similar vehicle to expand into Poland. That was because investment funds offered a comparable – if not more efficient – vehicle for Polish real estate investments. These days are over now, the global real estate funds community is still awaiting the new Polish REIT to become an option. Unfortunately, the works on REIT legislation is still in progress and there is no certainty about the final shape and timing of REIT tax incentives to come into force in Poland.

Major withholding tax reform

In 2019, Polish WHT regime has been significantly reshaped. Some of the changes were delayed until mid-2021.

Measures that has been introduced include:

- Obligation to assure **due diligence** when making payments subject to WHT
- Obligation to follow new definition of a **beneficial owner**, which includes, among others, test that recipient carries out "real economic activity" with a required level of substance

The following amendments were delayed until 1 July 2021:

- Replacement of direct application of WHT exemptions or treaty benefits with a "pay and refund" system for payments exceeding PLN 2m (approx. $530k / €440k)

- Application of statutory WHT rates (19% or 20%) instead of treaty rates or exemptions, unless additional actions are taken, such as:
  - Providing a statement filed by the tax remitter confirming application of lower WHT rates or exemptions
  - Applying for an opinion issued by the tax office confirming WHT exemptions.

New rules relate to both intra-group and third-party payments.

The reshaped WHT regime is expected to expose all board members of Polish companies making cross-border payments, as well as board members of foreign taxpayers claiming refunds, to an increased level of risk related to criminal charges.

ATAD 2 Directive implementation

On 1 January 2021 a Polish bill implementing the Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 („ATAD 2II") designed to prevent exploiting hybrid mismatches became effective.

Within it, several regulations have been included concerning **the issue of discrepancies in the classification of economic entities by various tax jurisdictions** (the so-called hybrid entities, treated for tax purposes as transparent in one jurisdiction and at the same time as non-transparent in another) as well as **payments** (including hybrid instruments that in one jurisdiction may be considered as an equity instrument and in the other as a debt instrument, e.g. participatory loans or convertible bonds), which may lead to different treatment of revenues and costs recognized by the taxpayers for tax purposes.

"Estonian CIT"

As of 1 January 2021, joint stock companies and limited liability companies have an option to defer CIT settlements until the profit distribution (known as the "Estonian CIT"). However, in order to apply Estonian CIT a number of conditions must be met, such us: all shareholders should be natural persons, company cannot hold shares in other entities, annual revenue of a company cannot exceed PLN 100m, company should meet specific employment and investment expenditures' thresholds. A company can make an election and choose the Estonian CIT for a 4 year period, which can be then prolonged.

Changes in TP rules

The amended law introduces new documentation obligations for entities concluding the transactions with entities located in tax havens, including transactions concluded with entities having beneficial owner located in tax haven. Also new documentation thresholds have been established with respect to the above transactions.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2.1

Legal background

2.1.1. General remarks

In general, Polish real estate law provides quite clear and stable rules which allow potential investors to make well-founded decisions about entering into real estate transactions. Additionally, there are measures and institutions which enable investors to safely conclude transactions adapted to their needs and expectations.

Below we present key information on real estate law in Poland which constitute the base for other comments in this chapter.

2.1.2. Legal titles to real estate

The most common legal titles to real estate in Poland are the freehold rights, i.e. the ownership right and the perpetual usufruct right, obligation rights, such as lease, lease with the right to collect profits or leasing. Polish law also provides several limited property rights such as easements or usufruct.

Ownership right

Ownership (prawo własności) is the broadest right to real estate in Poland. As a rule, ownership comprises the right to possess and use real estate for an unlimited period of time and transfer or encumber the real estate. The ownership right may be limited by statutory law, principles of community life and the socioeconomic purpose of the right. The most common limitations result from construction law and local spatial development plans adopted by local authorities (municipalities).

Right of perpetual usufruct

Perpetual usufruct (użytkowanie wieczyste) is a right to use the real estate which may be granted by the State in relation to the land owned by the State or a local authority. In either case the respective entity (the State or the local authority) remains the owner of the land.

The perpetual usufruct right is similar to the ownership, however, there are several key differences:

- The perpetual usufruct right is created for a defined purpose (developing a project or conducting a specific activity) set out in the contract. If the perpetual usufructuary is in breach of these provisions, this may lead to an increase in the annual fees or even termination of the contract by the common court
- The perpetual usufruct right is created for a specific term, in principle for a period of 99 years (not less than 40 years).

The holder of the right may apply for extending the term of the perpetual usufruct for a further period of 40 to 99 years following the lapse of the initial period (to be refused only in case of important social interest).

- The perpetual usufructuary is obliged to pay to the owner a one-off initial fee which amounts from 15% to 25% of the total market value of the land and then an annual fee of up to 3% of the total market value of the land.

The rate of 3% is the basic rate provided by the law; however, there can be other rates (0.3%, 1%, 2%) applied to the real estate assigned for specific purposes, strictly listed in the legal provisions (e.g. 2% for tourists purpose).

Once created, the perpetual usufruct right can be inherited, transferred to third parties or encumbered (i.e. mortgage, easements). The holder of the perpetual usufruct right enjoys the right to use the real property and to draw benefits from it, e.g. rental income.

If the real estate transferred for perpetual usufruct is a piece of developed land, the buildings and other constructions erected thereon are sold to the perpetual usufructuary in addition to the establishment of the perpetual usufruct right. If the buildings are erected after the perpetual usufruct right is established, they also become the perpetual usufructuary's property. Separate ownership of the buildings due to the perpetual usufructuary is a right strictly connected with the right of perpetual usufruct and, in consequence, the buildings share the legal „lot" of the land. In particular, the ownership of buildings may be transferred only with the right of perpetual usufruct. Once the perpetual usufruct right expires, the holder of the right is entitled to a reimbursement corresponding to the current market value of the buildings and other improvements legally implemented on the land that is the subject of the perpetual usufruct right.

Conversion of the perpetual usufruct into ownership in general requires consent of an owner of a real estate (the State or a local authority) and is executed in a civil law sale agreement (buyout). However, selected perpetual usufructuaries (in particular natural persons), subject to certain conditions, may demand perpetual usufruct be converted into ownership in a simplified administrative procedure.

The conversion is subject to a fee which is equal to the difference between the value of ownership and the value of the perpetual usufruct right. On 1 January 2019 the perpetual usufruct of lands developed for residential purposes was converted into ownership right by virtue of law.

Leases

Polish law distinguishes between two types of leases: lease (najem) and lease with the right to collect profits (dzierżawa). Leases are used mainly for commercial and residential premises. Leases with the right to collect profits are used especially for industrial and agricultural property. Under a lease agreement, the lessor undertakes to hand over the real property for the lessee's use for a fixed or non-fixed term, and the lessee

undertakes to pay the lessor an agreed rent. The contract for lease with the right to collect profits, however, provides for the lessee's additional right to collect profits from the real estate.

Easements

Easements (służebności) over land are limited property rights which may be granted over a piece of real estate (encumbered property) for the benefit of another piece of real estate (master property). Depending on the content of an easement deed, the holder of the master property may be entitled to a limited use of the encumbered property (active easement), or the holder of the encumbered property may be restricted in the exercise of his own rights for the benefit of the master property (passive easement).

Polish law distinguishes between two types of easements:

- Ground easements, which are established for the benefit of the owner or perpetual usufructuary of the land and are transferred together with the property (whether that encumbered or the master property)
- Personal easements, which are established for the benefit of a natural person and are non- transferrable (nor can the right to exercise them be transferred).

The Civil Code also lists a separate category of easement, i.e. utility easement which may be established for the benefit of entrepreneurs being utility providers. A utility provider may ask the land owner to establish an easement over his land in order to install (and then operate and maintain) e.g. electricity cables, installations serving to supply and to channel liquids, gas, steam or other facilities. If the real estate owner refuses, the utility provider may demand that an easement be established in return for an appropriate remuneration.

It should be noted, however, that easements are not always disclosed in the land and mortgage register.

In consequence, the potential investor should verify whether such rights are not being executed by carrying out an on-site inspection, i.e. during a due diligence review.

Usufruct

Usufruct (użytkowanie) of real estate is a limited property right which allows its holder to use the real estate and collect benefits similar to those to which the ownership holder is entitled. The scope of the usufruct may be limited by specified profits being excluded, or to a designated part of the real estate. Usufruct is created by a contract. Usufruct is non-transferable, strictly connected with the usufructuary, so the right expires on the usufructuary's death (or liquidation, in the case of legal entities). Moreover, a usufruct expires if not exercised for ten years.

Usufruct is similar to lease with the right to collect profits, yet its legal nature is different. Usufruct, as a limited property right, is effective erga omnes (it is effective in respect of third parties) and lease with the right to collect profits is effective only between the parties to an agreement.

2.1.3. Real property registers

There are two types of land registers in Poland: the land and mortgage register (księga wieczysta), the main purpose of which is to register titles and encumbrances over real estate and the land and buildings register (ewidencja gruntów i budynków), the main purpose of which is to describe the physical features and the use of the land and buildings.

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Land and Mortgage Register

Land and mortgage registers are kept by district courts and provide information on the legal status of real estate, e.g. the location of parcels of land, the ownership status of land, encumbrances on the land, mortgages.

Land and mortgage registers are publicly available for review by anybody (even those with no legal interest) and may be also reviewed on-line, via IT system.

Entry of a right in the land and mortgage register is presumed to reflect the actual legal status of the real estate. Should there be any inconsistency between the legal status of real estate, the content of the register prevails in favor of the person who acted in good faith (rękojmia wiary publicznej ksiąg wieczystych). In consequence, if a purchaser acquires a property in good faith from a non-owner registered as owner, the acquisition is valid and the true owner cannot argue to the contrary. His only recourse is an indemnity claim against the vendor. In consequence, an excerpt from the land and mortgage register is the key document that should be obtained and analyzed before a decision to acquire real estate is made.

The public credibility warranty does not confer protection on gratuitous dispositions or those made in favor of the acquirer in bad faith. It is also excluded by a mention in the land and mortgage register concerning e.g. filled, but yet unexamined application to the register.

Land and Buildings Register

The land and buildings register is kept by local authorities and is a uniform collection for the whole country of systematized, updated data on land, buildings and premises, their owners and other natural persons and entities holding the land, buildings and premises.

2.2 Investment vehicles and structures

2.2.1. General remarks

Further to the Polish Commercial Companies Code of 15 September 2000 (hereinafter referred to as the Commercial Companies Code) the legal entities can be divided into two groups: partnerships and companies. There are two main differences between them: (i) generally, partners in a partnership take full responsibility for the partnership's liabilities (subsidiary responsibility) and (ii) partnerships are not legal persons, however, they may acquire rights and incur obligations.

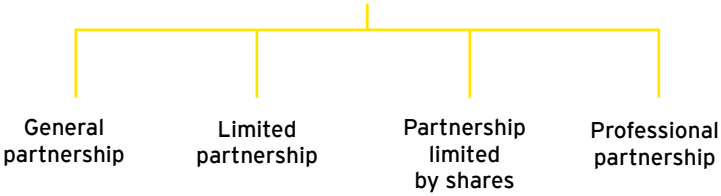
Investing in real property is generally carried through separate entities - so called special purpose vehicles (SPV). Polish legal regulations do not impose any specific legal form for such an entity. Consequently, an entity organized in any form legally accepted in Poland may serve as an SPV, however in practice these most frequently operate as limited liability companies and limited partnerships, which will be presented below as constituting legal forms most commonly used by the investors.

There are two ways for an investor to introduce the SPV into its capital structure: the SPV may be bought or established by the foreign investor. There are numerous service providers offering the sale of established companies or partnerships (so-called „shelf companies"), that can be used straight away. However, this is always more expensive than setting up a new entity.

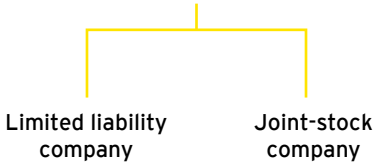
Apart from the legal forms mentioned above, a foreign investor may also operate in Poland and invest in real property:

- Directly through its branch
- By entering into a joint-venture.

Partnerships



Companies



2.2.2. Limited liability company

A limited liability company (spółka z ograniczoną odpowiedzialnością) is commonly used as the SPV for real estate investments or development projects.

The features of the limited liability company are set out in the Commercial Companies Code, the most important of them being:

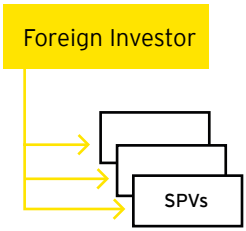
- it may be created by one or more persons for any purpose allowed by law (it may not be formed solely by another single-shareholder limited liability company)
- liability of the shareholders is limited to their contribution to the share capital of the company
- the share capital of the company shall amount to the minimum of PLN 5,000 (ca. €1,200) and is divided into shares of equal or non-equal nominal value
- the share capital can be covered by a contribution in-kind
- limited liability company is a legal person and as such, it is a party to specific rights and obligations
- it acts through its body, i.e. the management board; the members of the management board, in general, are not liable for the company's liabilities.

The Commercial Companies Code provides for an institution of a „company in organization". This means, that a limited liability company set up by signing the articles of association may acquire rights on its own behalf, including the right of ownership of real estate and other rights, incur obligations, sue and be sued even before its registration with the registry court (which takes approximately 4 weeks since application to relevant court was filed).

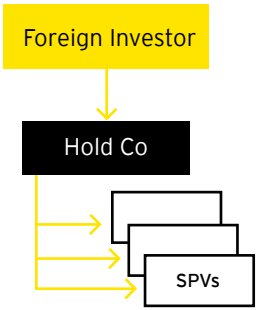
It is also possible to register a limited liability company with the registry court via the Internet, however this includes certain restrictions – limited possibility to form the contents of articles of association and exclusion of in-kind contribution.

The SPVs may be set up directly by the foreign investor, being the only shareholder. It is possible to establish several SPVs by the same shareholder in order to divide the investment risk between them. However, depending on the preferences of the investor and bearing in mind possible overall effectiveness, a simple one step structure may be enlarged and involve, for example, a holding company, abroad or in Poland, which manages the investment holds the shares of the SPVs.

One step structure with several SPVs, allowing diversification



A structure with a holding company, gathering several SPVs



2.2.3 Partnerships

The main features of partnerships are the following:

- Partners act in the name of the partnership
- Partners are responsible for the liabilities of the partnership
- The assets of the partnership include any property contributed to the partnership
- There are no minimum capital requirements (excluding the partnership limited by shares in case of which the minimum share capital amounts to PLN 50,000, i.e. ca. €12,000)
- Although it is not classified as a legal person, a partnership may acquire rights on its own behalf, including the right of ownership of real estate and other rights, incur obligations, sue and be sued
- In recent years the number of partnerships used for the purposes of investment structures significantly grew.

Limited partnership

A limited partnership (spółka komandytowa) is a partnership of which at least one partner is liable to the creditors for the obligations of the partnership without limitation (the general partner - komplementariusz) and the liability of at least one partner (the limited partner-komandytariusz) is limited to the value defined in the partnership agreement.

As a consequence, rights and obligations in the partnership should be split between two entities (limited partner and general partner). It is a common practice that the investor takes the role of the limited partner in order to avoid the full liability, whereas an additional limited liability company is established to serve as a general partner in the SPV. In case of limited partnerships also various structures may be involved, depending on the specific needs of the investor. Most commonly however, the limited liability company will possess a minority position in the SPV and will be a 100% subsidiary of the investor, nevertheless it may take specific functions in the SPV - e.g. management duties.

Partnership limited by shares

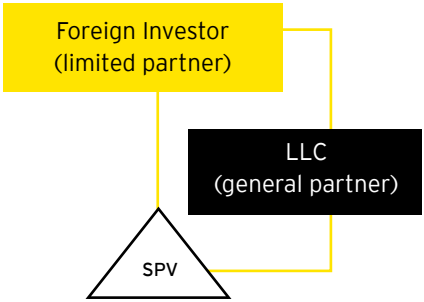
A partnership limited by shares (spółka komandytowo-akcyjna) conducts a business enterprise under its own business name, where at least one partner (general partner - komplementariusz) bears unlimited liability towards the creditors for obligations of the partnership and at least one partner is a shareholder (akcjonariusz).

Partnership limited by shares is the only partnership in case of which there are minimum share capital requirements, i.e. the share capital of at least PLN 50,000 (ca. €12,000).

The specific features of this entity results in two kinds of involvement in the partnership, the general partner represents the partnership and takes subsidiary responsibility for the partnership's obligations, while involvement of the shareholder is purely of a financial nature.

The partnership limited by shares is subject to some additional restrictions provided for by the Commercial Companies Code:

Structure with limited partnership



- In case of in-kind contributions the auditor's opinion is required
- Profit-sharing occurs in groups (separately shareholders and general partners).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	Limited liability company	Limited partnership
Legal personality	YES	NO
Can be established by a single shareholder/ partner	YES (NO if to be established by a LLC, which has only one shareholder itself)	NO
Can acquire real property	YES	YES
The shareholders/ partners are personally liable for the company's debt	NO	general partner – YES limited partner – NO
Minimal share capital	5.000 PLN (ca. €1,200)	NO
Management board	obligatory	NO
Supervisory board	voluntary*	NO
Taxation of income (from exploitation or sale of assets)	19%/9% at the company level	19%/9% at the partnership level
Taxation of the distribution of income to shareholders / partners	19% under certain conditions there can be relief for shareholders who are legal persons (based in Poland or in the EU/ EEA). Reduced rates for foreign shareholders on the basis of double taxation treaties (depending on the treaty).	19% - expected that under certain conditions there can be relief for partners who are legal persons (based in Poland or in the EU/ EEA). Reduced rates for foreign parters on the basis of double taxation treaties (depending on the treaty). Practice to be observed.

	Limited liability company	Limited partnership
Civil law transaction tax on shareholder / partner loans	NO	0.5% on the value of the loan payable by the partnership
Applicability of interest deduction limitation rules	YES	YES
Ability to offset profits and losses from various projects (carried out in separate companies/ partnerships)	NO only in the case of establishing a tax capital group	NO
Taxation in Poland of the sale of shares in the company / partnership	19% possible relief for foreign shareholders on the basis of double taxation treaties (depending on the treaty)	19% it is not clear whether the same relief possible in the case of partnerships

Tax features

Due to CIT law changes, from 1 January 2021 limited partnerships shall be treated as CIT taxpayers in Poland. In a similar manner, general partnerships shall be subject to CIT in Poland where partners (who are not exclusively individuals) in such a partnership are not disclosed to the tax authorities. Partnerships limited by shares are CIT taxpayers already since 1 January 2014.

Partnerships pay other taxes, such as VAT, real estate tax, and civil law transaction tax, and they may pay withholding taxes (e.g. withholding tax on interest and royalties as well as withholding tax on remuneration paid to individuals, as a tax remitter).

The table compares the business and taxation aspects of the limited partnerships and limited liability companies:

Due to changes to regulations, tax attributes of limited liability company and limited partnership in an investment structure become similar with some minor differences such as:

- The general partner is entitled to reduce the amount of tax by an amount corresponding to the tax paid by the company attributable to his share in the company's profits
- Exemption of up to 50% of the limited partner's income from taxation but not more than 60k PLN.

Cross-border structure

Typically, foreign investments are structured in such a way that the overall level of taxation of the financing, exploitation, and potential capital gain is appropriately managed, seeking to avoid double taxation.

The tax treaties concluded by Poland should prevent double taxation. Investigating the tax treaties and the applicable rules in the different relevant jurisdictions will help to determine what structure, given the specific circumstances, should be arranged.

Additionally, bearing in mind the general anti avoidance regulation introduced to the Polish tax regulations and CFC („Controlled Foreign Company") rules, the cross border investments should be each time carefully examined and properly structured also from the business perspective to ensure their effectiveness from the tax point of view.

2.2.4. Joint venture

Polish legal regulations do not provide any definition of a joint venture, nevertheless, it is a useful solution to combine entrepreneurs' efforts in achieving the common goal.

The joint venture constitutes cooperation of two entities resulting in setting up a new company (the investment on such basis is carried through the given company, as described before) or it may be only a very close cooperation between the two entities, which allocate capital for activities implemented jointly by sharing costs and revenues under a joint venture contract, without creating a separate business entity.

The objectives for the creation of joint ventures are:

- Gaining access to new markets
- Synergies
- Risk diversification
- Achieving economies of scale
- Gaining access to cheaper sources of supply and cheaper financing
- Joint development and sharing of technology
- Overcoming barriers and administrative duties created by the country of one of the partners.

2.2.5 Investment Fund - closed-end fund

The sole object of the investment fund's activity is to invest the monies acquired from the participants in shares, securities, money market instruments and other property rights - including real property.

The Act of 27 May 2004 on the Investment Funds differentiates in general between Open-End Investment Fund and Closed-End Investment Fund (hereinafter referred to as FIZ).

FIZ is a legal person. The primary principle of the FIZ is the fixed number of participation titles (investment certificates) issued in exchange for contributions made by its participants (investment certificate-holder). FIZ does not issue participation titles on every demand of an investor as is the case with the open-end investment funds, but rather in discretionary periods of time. In order to subscribe for investment certificates, the participant has to make a contribution to the FIZ. Generally, the participants may contribute to the FIZ cash, shares or real estate.

The FIZ's bodies are the Management Company, the Board of Investors (controlling body) and General Investor's Meeting.

The Management Company (Towarzystwo Funduszy Inwestycyjnych) is a legal entity separate from the Investment Fund. According to the legal provisions only a joint-stock company with its registered office in Poland holding authorization to conduct the activities related to creating investment funds and managing them issued by the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego), may be an investment fund management company. This means that the Management Company carries out its activities on the basis of the permit issued by the Polish Financial Supervision Authority and under its supervision.

A Management Company may be formed by an investor, however, it is common practice that already existing Management Companies are engaged to take this role. In such a case an investor makes an agreement with a Management Company.

Consequently, the investor only holds investment certificates in the FIZ and through this structure invests in particular property.

The Management Company fulfils two primary functions: (i) at the beginning - it acts as a founder of the FIZ, (ii) when the FIZ is established and registered - it becomes its governing body (represents FIZ in transactions with third parties).

In accordance with the Act on Investment Funds, the Management Company shall be liable to the participants in the FIZ for all the damage caused by the failure to perform or improper performance of its duties as regards the management of the FIZ and its representation.

The above shows that the structure needed to implement FIZ is complex and requires:

a) engaging a Management Company,

b) establishing an FIZ,

c) establishing the operating companies, which may acquire the real property.

Establishing a FIZ structure has important advantages. First of all, it allows for additional financing for the investments to be raised by selling investment certificates. This may be very useful in entering in larger, long-term real property investments.

Until the end of 2016 the use of this structure, if properly implemented, could have led to deferral, or even exemption from taxation, of the operating and capital gains generated from real estate, as FIZ was generally exempt from CIT in Poland.

Similarly, a foreign investment fund established in the EU or EEA country could be used (the Polish CIT law in force from 1 January 2011 provides for such a possibility explicitly).

Due to changes that came into force as of 1 January 2017, income of FIZ or a foreign investment fund resulting from:

- A share in profit generated by tax transparent entities
- Interest on loans issued to tax transparent entities and interest on those entities' other liabilities towards the fund
- Interest on a share in tax transparent entities
- Donations/ gifts or other free or partially free benefits from tax transparent entities
- Interest (discount) on securities issued by tax transparent entities
- Transfer of securities issued by tax transparent entities or shares in such entities.

is no longer CIT exempt. Set-up of the structure designed for real estate holding which could benefit from the CIT exemption is, therefore, even

2.2.6 Real estate investment trusts

General remarks

Real estate investment trust (hereinafter referred to as REIT) is a fund investing in commercial real estate, guaranteeing a regular dividend for investors. According to the European Public Real Estate Association, the average dividend funds in Europe for the period 2010- 2015 amounted almost 5 percent. Worldwide, REITs offer investors many advantages: high liquidity and rate of return, exemption from corporate income tax and, finally, a regular dividend of up to 90-100 percent of profit.

However, despite the extensive legislative work carried out in the previous years, this form of investment has not been regulated by the Polish law.

2.2.7 Public-private partnership

General remarks

Public-private partnership (hereinafter referred to as PPP) is one of the rising forms of cooperation between public authorities and the private sector. It allows for an increase in the efficiency of public services through the use of private sector experience and for the sharing of risk between public and private entities.

PPP enables a mutual advantage for the public and private sector - for public entities it guarantees an additional source of capital and as a consequence provides the public sector - with funds to allocate for other purposes. On the other hand, the public sector may provide to private investors the long-term certainty of cash flows from public sources.

In Polish law the legal framework for PPP is established by two acts that regulate the cooperation between public entities and private partners:

- The Act of 19 December 2008 on Public-Private Partnership, hereinafter referred to as the Act on Public-Private Partnership
- The Act of 21 October 2016 on Concession for Works and Services, hereinafter referred to as the Act on Concessions, which has replaced the previous Act of 9 January 2009 on Concession for Works and Services.

The main similarities between the Act on Public-Private Partnership and the Act on Concessions are as follows:

- Cooperation between a public and private partner
- Private partners receive payments for the service rendered
- Constitute a special form of tender agreements.

A competent authority in the matter of public-private partnership to the extend regulated in the Act is the Minister competent for regional development. However, according to the recent amendments, issues related to the preparation or implementation of projects under public-private partnership may be entrusted to Polish Development Fund S.A.

Selection of the private partner

The Act on Public-Private Partnership basically distinguishes two ways of selecting the private partner. The ways of selection depend on the type of the private partner's remuneration and are as follows:

- If the remuneration of the private partner is represented by the right to exploit the work or services that are the subject of the contract or in that right together with payment selection of the private partner shall be done applying the Act on Concessions subject to provisions of the Act on Public-Private Partnership
- In other cases, the selection of the private partner shall be done applying the provisions of the Act of January 29, 2004 on Public Procurement Law (hereinafter referred to as Public Procurement Law) subject to provisions of the Act on Public-Private Partnership.

In cases where the Act on Concessions and Public Procurement Law do not apply, the selection of the private partner is made in a way that ensures the maintenance of fair and free competition, as well as the principles of equal treatment, transparency and proportionality. If the public partner brings in real estate as its own contribution, the provisions of the Act of August 21, 1997 on the Property Management (hereinafter referred to as the Act on Property Management) must be taken into account.

Implementation of PPP

Pursuant to the Act on Public-Private Partnership public and private entities conclude an agreement under which the private partner commits itself to implement the project at an agreed remuneration and to cover in whole or in part the expenditures for project implementation, or cover them through a third party, while the public entity commits itself to collaborate for the purpose of achievement of the project goal, in particular by making its own contribution. The PPP contract can also provide that for the purpose of its performance, the public entity and the private partner shall establish a company, or the private partner can join the company established by the public entity.

Financial restrictions

The total joint amount up to which bodies of government administration can contract financial liabilities on the basis of contracts of PPP in a given year is specified in the Budget Act.

However, as a rule, the financing of a project from the State budget to the amount exceeding PLN 100 million requires a consent issued by the minister responsible for public finance. When issuing the consent the minister responsible for public finance shall consider the influence of the planned budget expenditures on the safety of public finance.

The concession contract - legal basics

The Act on Concessions specifies the rules and procedures for contracting concessions for works or services and the legal protection measures.

The duration of a concession contract should take into account the recovery of the concessionaire's expenditure incurred with reference to the performance of the concession. A concession contract is concluded for a limited period.

The concessionaire under the concession signed with the concession-granting authority is obliged to perform the subject of concession for remuneration, which constitutes in case of:

- The concession for works - exclusively the right to exploit the works that are the subject of the contract or in that right together with payment by concession-granting authority
- The concession for services - exclusively the right to exploit the services that are the subject of the contract or in that right together with payment by concession-granting authority.

2.3 Real estate financing

a more complex exercise than before.

2.3.1. Modes of financing the SPVs / investments

The most important thing in starting investments, is to provide financing for the SPVs, so they can operate and develop real property.

There are several methods of financing the company, some funds can be received from outside, but some may come from the capital group - e.g. from the parent company. In many cases both solutions are possible.

Loan and credit agreement

By loan agreement a lender undertakes to transfer the ownership of a certain amount of money to a borrower, while a borrower undertakes to return the same amount of money . Loans can be granted by any entity / person and may be relatively freely regulated by the parties.

A credit agreement is a specific kind of external financing, which is regulated by the Banking Law of 29 August 1997 and can be granted only by banks. By a credit agreement a bank agrees to provide a specific amount of money for a specific purpose and time, and the borrower agrees to use the credit for its intended purpose, and pay back the amount of credit along with due reward in the form of bank interest.

On the financial market there is a wide choice of bank credits and their price depends on various factors as: duration, available collaterals, financial condition of the borrower. Additionally, banks may charge the borrower with a different fees such as, for instance, a preparation

(origination) fee for all work connected with the preparation of the credit, or a commitment fee for and undrawn portion of the credit.

Banks also generally require certain collaterals for the credits. Among others, the most popular are:

- Mortgages
- Share pledges
- Asset and bank account pledges
- Powers of attorney to bank accounts
- Security assignments of receivables of the borrower
- Notarial submissions to execution
- Subordination agreements.

A mortgage is the common form of security required by Polish banks - especially required in real estate financing transactions.

Mortgage shall be defined as a right, under which the lender (creditor) may satisfy his claims from the property, regardless who is the current owner of the property, and with priority over other personal creditors of the borrower, whose credits are not secured with mortgage.

A mortgage becomes effective after entering in the Land and Mortgage Register. The entry takes effect at the date of filing, so even though the registration may take several months, market practice is such that banks pay out the amount of the credit before the entry takes effect but upon receipt of confirmation of filing of the application for registration of a mortgage in the Land and Mortgage Register.

A mortgage is a very secure solution for the bank, as in the case of the debtor not being able to pay off his debt, the real property may be sold in a public auction and thus, the bank may retrieve the whole amount of debt.

Shareholder's loan

A loan from shareholders has two important advantages over the bank loan. First, it is in general a cheaper solution and what is more, it does not bare the risk of enforcement in case of difficult financial situation of the borrower.

Bonds

Bonds can be issued by a legal entities, including legal entities from outside the territory of Poland if they conduct business activity or has been established in order to issue bonds, a partnership limited by shares, credit unions, local government units and financial institutions. Bonds can be defined as securities that are issued in series and certifies that the issuer is a debtor of the bondholder and assumes an obligation towards the bondholder to provide specified benefits. Bonds may be either registered or bearer bonds.

The advantage of this form of financing is the ability to fairly freely determine the benefits that are associated with bonds.

The construction of the bonds does not have to be limited to a simple financial benefit in the form of repayment of the bonds plus interest representing an income of the bondholder. While issuing bonds, the company is free to formulate the gratification to be provided to bondholders, such as the possibility of participating in profits of the company, or the conversion of bonds into shares.

The bonds may be distributed on an open market (by way of a public offering), in search for an outside financing, or serve as a mode to transfer funds from another related company. It should be noted that there are several companies in the real estate sector listed on the Polish bonds' open market.

In the case of SPVs which aim to obtain financing from the shareholders, the gratification (a mutual benefit) to the parent company as a bondholder will be of secondary importance. A practical solution is that if the SPV generate future earnings from real property, bonds could entitle bondholders to participate in the profit.

Due to the high degree of freedom in the framework of this instrument, it is very recommended as an optimal way to bring the funds downwards.

We would like to note, however, that the issuing of bonds creates additional obligations for the bond issuer, related to providing data to assess the financial condition of that entity. Additionally, if the issuer operates for more than a year, it is required to provide financial statements prepared as at the balance sheet date, no earlier than 15 months before the date of the publication of the terms of issuing the bonds, along with the auditor's opinion.

Promissory notes

In order to obtain financing SPVs may issue promissory notes.

A promissory note may include a deferred payment date. It should have a clearly defined due date, in the form of a calendar date. There are exemptions from this rule - e.g. an 'a vista' promissory note - which provides that the payment is made on demand from the payee or within a certain period after the demand. Additionally, an 'in blanco' promissory note allows a payee to fill in (at its own discretion) - the conditions of such promissory note (e.g. date of payment) within the scope foreseen by a mutual agreement.

The obligation from the promissory note does not have to be accompanied by any other legal relationship that it secures. It means that the holder has an unquestionable claim from promissory note, even if, for example, promissory note liability was not based on any other particular obligations - such as loans.

Similarly as in the case of the loan agreement, the issuer of a promissory note becomes a debtor. With the use of a promissory note, SPVs can easily obtain funds from the parent company in a less formal, quicker way and easily settle the debt in any suitable timeframes.

Increase of share capital

Raising capital is a common way of financing companies. It can be carried by increasing the nominal value of the shares existing or creating new ones; both ways lead to an increase of the share capital.

This process is associated with either changes in articles of association (a formal mode that requires filing the changes in the articles of association with the National Court Register) or an increase based on the current provisions of the articles of association (informal mode). The aim is to change the capital structure of the company by defining the share capital at a higher than current level. To cover the increase of the share capital, the funds may be paid in cash or in-kind contributions can be made.

The capital increase is a more formal process in comparison to the additional contributions (referred to below) and loans, but the advantage of this form of financing is the ability to contribute in various forms, such as cash or in-kind.

A significant drawback of this method of financing SPVs is relatively difficult process of withdrawing the invested capital.

This is carried through the reduction of share capital (Articles 263 - 265 of the Commercial Companies Code), which involves again additional costs (notification, registration) and is time-consuming (e.g. includes three months for objection to the reduction that can be brought by creditors).

Additional contributions

This method of financing is provided by the Commercial Companies Code, but it is applicable only to the limited liability company. According to the provisions, the articles of association of the company may require the payments (additional contributions) from the shareholders in a specific amount paid by the shareholders in proportion to their shares. In fact, it is worth noting that partnership agreements can also oblige the partners to additional payments - such a solution is possible based on the freedom of contract principle.

Payments of additional contributions in a limited liability company do not affect the value of shares in the share capital of the company, and therefore the share capital of the company remains unchanged after the additional contributions. The payments increase the company's own funds, which are thus quite freely allocated for the specific need, and this is certainly beneficial for the SPV.

2.3.2. Tax implications

Equity financing versus debt financing

Below we present the main differentiating factors when considering the two form of financing the investments.

	Equity financing	Debt financing
Forms of financing	Capital injection In-kind contribution Additional payments to share capital	Shareholder loans Bonds Other debt instruments
Receipt and repayment subject to income taxation?	NO Equity financing is generally subject to a 0.5% civil law transaction tax on share capital increase. Contributions to a reserve capital (share premium) should not be subject to civil law transaction tax. The tax must be paid within 14 days of the date of the agreement. The tax liability rests with the company.	NO Loans are generally subject to civil law transaction tax at the level of 0.5% of the loan principal. The tax must be paid within 14 days of the date of the loan agreement, and the tax liability rests with the borrower; several exemptions apply: ‣ Loans granted by shareholders to a limited liability company or joint stock company ‣ Loans granted by foreign entities which are engaged in credit and financing activities (such as group treasury companies) ‣ Loans recognized as an activity subject to Polish or foreign VAT (e.g. bank loans) ‣ Bonds issuance is generally not subject to civil law transaction tax.

	Equity financing	Debt financing
Rights	Shares in the company give shareholders the right to control the company and the right to financial benefits from the company.	Creditors have the right to interest, as a rule no control nor participation in profits.
Forms of repatriation of funds	Dividend Redemption of shares Liquidation proceeds	Interest
Deductibility of payments for tax purposes?	Generally NO Exception: there is a possibility to deduct from the taxable base of the hypothetical costs of obtaining external funds in case the company receives funding in the form of additional payments to equity or retained profits are used. Capital financing costs cannot exceed PLN 250k in the tax year. This notional interest deduction applies from 2020 (including also retained earnings from 2019).	YES Subject to thin interest limitation rules (see below)
Withholding tax (see also additional remarks below)	19% This rate may be reduced or eliminated based on relevant tax treaty concluded by Poland.	20% This rate may be reduced or eliminated based on relevant tax treaty concluded by Poland.

	Equity financing	Debt financing
Applicability of exemptions under EU directives? (see also additional remarks below)	YES EU Parent-Subsidiary Directive (EU PSD), subject to conditions: ‣ The entity receiving the dividend is taxed in another EU / EEA country (or in Switzerland) on its worldwide income (and is not subject to tax exemption on its total income) and ‣ Has held or will hold at least 10% (in the case of a company resident for tax purposes in Switzerland, at least 25%) of the shares in the Polish company paying the dividend for at least two years; this condition can be met prospectively. If the condition to hold the amount of shares for an uninterrupted period of two years is not satisfied, withholding tax (as a rule at 19%) together with the penalty interest for late payment will be due ‣ The legal title for the holding must be ownership rather than any other legal title	YES EU Interest Royalties Directive (EU IRD), subject to conditions ‣ Interest is paid to a related EU / EEA company which holds directly at least 25% of shares of the paying company for an uninterrupted period of 2 years (or the lender and the borrower have a common parent company which directly holds 25% of shares in each of them). The preferential rate should be also applicable in the case where the period of two years of continuous holding of shares lapses after the day of interest payment ‣ Interest recipient is not subject to income tax exemption, applicable to all revenues regardless of the place where they were acquired ‣ The relevant DTT or another international agreement (concluded between countries of the payer and the recipient tax residency) stipulates rights on Poland to demand tax information from the tax authorities of the country of residence of the interest recipient

	Equity financing	Debt financing
Applicability of exemptions under EU directives? (see also additional remarks below)	‣ The double tax treaty or another international agreement vests rights on Poland to demand tax information from the tax authorities of the country of residence of the dividends' owner or the country in which the dividend income is received ‣ The recipient is a beneficial owner of the payment. Irrespective of the EU PSD, as of 1 July 2021 new "pay-and-refund" mechanism expected to apply to all payments subject to WHT in Poland (unless additional measures are taken).	‣ The recipient is a beneficial owner of the payment. The EU Interest-Royalty Directive rules only applies as long as the interest is set at a market level. Consequently, any off-market portion of interest can be subject to withholding tax at the standard 20% rate (instead of the treaty-reduced rate / WHT exemption) in Poland. Irrespective of the EU IRD, as of 1 July 2021 new "pay-and-refund" mechanism generally applies to all payments subject to WHT in Poland (unless additional measures are taken).

Additional remarks

Starting from 1 July 2021, Polish withholding tax system will be „pay-and-refund" system, meaning that a Polish entity remitting the payment is obliged to withhold tax at a standard rate (19% on dividends, 20% on other payments), and the recipient may apply for WHT refund. WHT exemption or application of a lower WHT rate will be possible in a limited number of cases where a Polish remitter will submit to the tax authorities statement confirming that all conditions for the relief are met (such statement may, however, trigger personal criminal penalties and additional tax liability) or tax authorities will issue a clearing in a form of a special tax opinion.

The Polish company distributing the dividend or paying out interest to non-residents can be held liable for mistakes, e.g. if it applies an incorrect tax rate.

A certificate issued by a foreign local tax office confirming the tax residence of the foreign dividend / interest beneficiary must be obtained by the Polish company in order to allow application of the lower withholding tax rate or exemption. An additional requirement is that the Polish entity paying dividends / interest should also hold a written confirmation from the recipient that the latter does not benefit from tax exemption on its worldwide income, if the exemption is to apply.

In addition, Polish tax remitter is obliged to assure due diligence when making payments subject to WHT and must follow new definition of a beneficial owner (which entails, among others, that a recipient carries out genuine business activity).

Dividends, interest and royalties would not benefit from the EU Parent-Subsidiary Directive or the EU Interest-Royalties Directive based tax exemption if such payments are connected with an agreement, a transaction, or a legal action or a series of related legal actions, where the main or one of the main purposes was benefitting from these tax exemptions and such transactions or legal actions do not reflect the economic reality. For the purpose of the above rule, it is considered that a transaction or a legal action does not reflect the economic

reality if it is not performed for justified economic reasons, but results, in particular, in transferring the ownership of shares of a dividend paying entity or in earning revenue by that entity which is then paid as a dividend. As there is no well-grounded practice regarding actual application of similar provisions, details of each structure should be analyzed carefully to determine and address potential issues with taxation of dividends.

Dividends paid between companies which are resident in Poland for tax purposes may be exempt from withholding tax provided that the dividend recipient has held or will hold (on or after the day when the dividend is received) at least 10% of shares in the dividend paying company for at least two years. Due to introduction of "pay-and-refund" system, such dividends would be subject to a standard 19% WHT and the recipient could apply for a refund unless special conditions are met.

If the conditions for exemption are not met, non-creditable withholding tax is levied on dividends at the rate of 19%.

Redemption of shares and liquidation distributions

The redemption of shares and the return of equity to shareholders are permitted under Polish law. The formal procedure is time-consuming and usually takes several months.

Standard, voluntary redemption of shares is subject to the same tax treatment as disposal of shares. It means that as a rule such redemption will be subject to tax in Poland, unless relevant double tax treaty provides for tax exemption.

Other than voluntary redemption of shares (compulsory redemption of shares) is taxed in the same way as dividends and is subject to the applicable withholding tax (taking into consideration the appropriate tax treaty).

Liquidation proceeds are subject to the same tax treatment as dividend, but any withholding tax relief can only be sought under a relevant tax treaty.

As of 1 January 2015 the Polish CIT provisions explicitly state that in case of in kind remuneration for settling the liability (e.g. upon shares redemption or in kind dividend payment) the value of liability settled in such a way constitutes a taxable revenue of the paying entity. This applies respectively also to look through entities.

New rules in force as of 1 January 2021 provide that the distribution in-kind of liquidation proceeds would be also seen as a taxable event in Poland for the entity that is liquidated (deemed sale of distributed assets).

Tax deductibility of interest paid on loans

Generally, interest on loans is deductible for tax purposes when actually paid or compounded (added to the principal so that it constitutes a basis for new interest calculation), i.e. accrued interest may not be treated as a tax deductible cost until it is actually paid or compounded.

In general, it should be possible to treat interest on loans drawn to acquire shares in a Polish company as tax deductible. Nevertheless, as of 1 January 2018 interest deductible against operating profit of an acquired entity (as a result of any „debt push down" strategies) is not deductible. In lack of grandfathering rules, also interest resulting from "debt push down" reorganizations performed before 1 January 2018 are disallowed as of that date.

In addition, interest on acquisition loan should be allocated to capital gains basket, therefore it does they do not decrease the taxable revenue from general business activities.

It is important to note that interest accrued during the development of real estate on the part of the loan used to finance that development is not directly deductible.

The cost of such interest should be added to the initial value of the newly developed real estate (i.e. the new building) in order to increase the basis of its future depreciation for tax purposes. However, this rule applies only to real estate which is the company's own fixed asset. It does not apply to projects constructed for resale (e.g. residential

projects). In such cases, based on the practice of the Polish tax authorities interest may be treated as tax deductible under the general rules (although the practice was changing in this respect over the years).

Level of interest

The Polish tax authorities are usually interested in the conditions of loan agreements concluded between related parties. These conditions should be the same as, or comparable to, the sort of financing conditions which non-related parties would agree upon, in accordance with „the arm's length principle". Too high an interest rate could lead to an adjustment of the Polish borrower's taxable income.

In addition, other conditions in the loan agreement which are unjustifiable or unfavorable to the borrower could result in further tax adjustments. According to regulations governing the documentation of transactions between related parties, taxpayers are required to prepare specific transfer pricing documentation.

Additionally, any interest on debt which exceeds maximum amount of a taxpayer's credit capacity acceptable by a third party creditor is disallowed (so called "arm's length credit capacity").

Restrictions on the tax deductibility of interest paid on loans

Net financing costs (i.e. financing costs offset with interest revenue) are limited to 30% of tax adjusted EBITDA.

The limitation covers all financing (including historic debts that used to benefit from earlier thin capitalization regimes). The limitation also applies to third-party (e.g. bank) financing. Limitations apply if the net financing costs exceed PLN 3m (ca. €660k) annually. Non-deductible costs can be carried forward for 5 years. In view of unclear provisions, the tax authorities disallow adding up both thresholds (30% of EBITDA and PLN 3m).

Foreign currency financing

As the foreign currency liabilities are reported for accounting purposes in PLN, foreign exchange differences (gains or losses) accrue in the accounting books of the Polish company. Foreign exchange differences accrue also on loan liabilities in PLN denominated in foreign currencies. These gains or losses are recognized for tax purposes only when realized, i.e. when the related liability is paid or set off (or when the due interest is compounded) and should be allocated to appropriate revenue basket. However, audited companies can report foreign exchange gains or losses in accordance with accounting standards upon notifying the tax authorities, provided that such reporting in accordance with accounting standards will continue for a period of at least three tax years.

2.4 Acquisition of real estate - asset deal and share deal

2.4.1. General remarks

As many other jurisdictions, Polish law provides different methods of acquiring real estate by an investor, among which an asset deal and a share deal are the two most commonly used.

Both methods bear various legal and tax consequences which have to be considered in any given case and therefore there is no generally accepted rule when a share deal or an asset deal shall be applicable. The interests of the seller and the buyer, the particulars of the case and the power of each party to negotiate have to be considered while choosing one of these two forms.

In practice, if a share transaction is properly structured, this can be the most tax efficient disposal method to use. In a well-organized corporate structure, taxes on capital gains can be entirely avoided or in some cases deferred.

From the buyer's perspective, it is usually more tax efficient to buy the property directly than to buy shares in a company holding the property. The buyer can then depreciate as much as the real market value of the building for tax purposes. On the other hand, if the shares are bought at a higher price than the book value of the company's assets, goodwill paid in return for the shares can be recognized for accounting purposes. Unfortunately, such goodwill cannot be amortized for tax purposes. Furthermore, a company owning real estate with a low book value has a deferred tax exposure with respect to any future capital gains made on the disposal of that real estate. Thus, the buyer of shares will most likely try to negotiate a discount on the transaction price to eliminate this negative tax aspect.

The purpose of this chapter is to outline the main features of these two types of real estate transaction from both the legal and tax perspectives, and to examine the consequences of each structure.

2.4.2. Legal aspects

Methods of acquiring real estate by an investor

Asset deal

Purchaser acquires all or some of the assets of the company. It is possible to divide out certain elements, such as real estate and acquire only those parts.

Share deal

Transaction involving acquisition of shares in a company as a result of which the buyer purchases the whole or a part of the shares in the share capital of the company (i.e. the target company)

Definition of a share deal and asset deal

Despite the fact that the share deal and asset deal are equally popular, their object and manner of conducting are different.

The key differences between these two methods of acquisition concern the extension and nature of purchased items and are presented below.

- A share deal is defined as a transaction involving acquisition of shares in a company as a result of which the buyer purchases the whole or a part of the shares in the share capital of the company (i.e. the target company)

- An asset deal is where the purchaser acquires all or some of the assets of the company. Unlike a share deal, in an asset deal it is possible to divide out certain elements, such as real estate and acquire only those parts.

Representations and warranties

In order to secure the purchaser's interest extensive representations, warranties and related indemnities should be included in the share purchase agreement. The scope of warranties and representations as well as detailed legal consequences of their breach have to be regulated in the sale agreement in details as Polish law does not provide for a specific legal regulation of this issue.

- In an asset deal, the seller's representations and warranties concern, in particular, the validity of the seller's title to the real estate, the information regarding encumbrances (if any), the statement confirming that the development has been carried out in accordance with the binding provisions of law and technical plans and that relevant permits are valid
- The seller's representations and warranties in a share deal usually include the representations and warranties typical for an asset deal regarding real estate, but also extensive representations and warranties relating to all aspects of the company's activity: in particular tax, employment, accounting, corporate and contractual matters.

It is recommended that the sale agreement provides for specific instruments supporting the enforceability of the indemnities securing the representations and warranties. In market practice, part of the purchase price is retained in an escrow account or a bank guarantee is obtained from the seller.

Types of agreements

There is a number of documents related to both transactions. Usually, in order to clearly state the intentions, goals to achieve during negotiations and the key principles of the transaction, the parties sign a letter of intent prior to signing the real estate purchase agreement.

Transfer of the property-related rights

In many transactions, it is necessary to obtain various types of consents or permits regarding the transfer of the rights related to the property, the lack of which may affect the legal effect of the entire transaction.

In the share deal the purchaser does not obtain any direct rights to the assets as these remain the property of the target company. Consequently, the property- related rights and obligations (such as leases, property management agreements, warranty claims under construction contracts and contracts of insurance, permits) remain with the corporate entity holding the real estate and no formal assignment is required.

In the asset deal, except for the lease agreements, the property-related rights and obligations are not automatically transferred as a result of the sale agreement. The lease agreements are transferred automatically with the acquired asset. As regards the remaining agreements, as for the formal assignment, it is, in general, necessary to obtain the consent of the other party of each contract. In case of licenses, decisions etc. it should be analyzed case by case what actions have to be undertaken in order to transfer them to the purchaser. This means that the ability to assign the property-related rights or assuming the obligations is examined individually, in light of specific regulations or contractual provisions, which may prevent or restrict transferability.

Therefore, a share deal is a type of transaction usually considered by investors when the target company conducts regulated activity as all permits required for its operation stay in the company.

Potential restrictions related to the sale of a property

In case of transactions involving real estate, several restrictions resulting from applicable legislation may apply. As a general rule, transactions structured as assets deals are more likely to be subject to a greater number of such restrictions. These include as follows below.

A. Merger clearance

Due diligence review preceding any asset or share deal should answer the question whether the legislation governing merger control will be applicable, in particular, whether a notification of the transaction to the Office of Competition and Consumer Protection is required. Should such notification be required, the closing of the transaction must be suspended until the clearance of the President of the Office of Competition and Consumer Protection is granted.

A notification on the planned transaction to the Office of Competition and Consumer Protection is required if any of the following conditions is met:

- The combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of €1 billion or
- The combined turnover of undertakings participating in the concentration in the territory of Poland in the financial year preceding the year of the notification exceeds the equivalent of €50 million.

However, the Polish antitrust law provides for certain exceptions from the obligation of notification even if the above conditions are met, in particular, when the turnover of the undertaking over which the control is to be taken did not exceed in the territory of Poland in any of the two financial years preceding the notification, the equivalent of €10 million; the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over by a competitor or a participant of the capital group to which the competitors of the to-be-taken undertaking belong; the concentration applies to undertakings participating in the same capital group.

B. The pre-emption rights

It may happen that the public authorities have a statutory preemptive right to real estate which is about to be sold. The right of pre-emption is a right to acquire the property before it can be purchased by any other person or entity. Where the real estate is subject to a right of pre-emption held by State Treasury or local authority, it may only be sold to a third party under the condition that the beneficiary of that right does not exercise it. If such a property is sold without observing this right, the sale is considered to be null and void.

The notary executing the conditional agreement will send a copy of it to the State Treasury or local authority, which may then exercise its preemptive right within one month of receiving the conditional agreement. If the public authority does not exercise its preemptive right within that period, the parties can conclude the final agreement, which effects the unconditional transfer of the title to the real estate.

C. Restrictions for foreigners

As regards foreigners residing or having their registered seat within the territory of the European Union or European Economic Area, no special restrictions regarding acquisition of real estate by foreigners apply. The conditions differ with respect to the investors from remaining countries to which the following restrictions apply, As a general rule, such foreigners (or Polish entities controlled by such foreigner) are required to obtain a special permit of the Minister of Internal Affairs for acquiring a real estate in Poland. The permit is necessary when acquiring ownership of real estate or perpetual usufruct on the basis of any legal event (e.g. purchase, in-kind contribution, merger with a Polish entity, taking up shares in Polish entities).

The permit is issued upon a written request of a foreigner, provided that:

- A foreigner's acquisition of real estate does not pose a threat to the State's defense, national security, public order and is not contrary to the social policy and public health considerations

- The foreigner proves that there are circumstances confirming his bonds with Poland (i.e. for example the buyer has Polish origins or is conducting business or agricultural activities in the territory of Poland under the Polish law).

The Minister's decision concerning real estate acquisition should be issued within one month (two months in particularly difficult cases). The permit is valid for two years from the day of issuance.

The acquisition of real estate without a permit is invalid. A foreigner intending to acquire real estate in Poland may apply for a promise of the permit. The promise of the permit is valid for one year. During this period a permit cannot be refused unless the actual circumstances pertinent to the decision have changed.

D. Restriction in acquiring agricultural land

New legislation restricting trade of agricultural land was passed and came into force as of 30 April 2016. The regulation restricted trade of agricultural land for both Polish and foreign (EU and non-EU) entities.

Under the new law on shaping the agricultural system, agricultural land is the land used for agricultural purposes or land that may be used for such purposes, excluding land intended for other purposes in applicable local spatial development plans.

On the basis of the amendment to the Act (which came into force in June 2019) some restrictions have been limited to allow broader trade of agricultural land.

In consequence, in case of the sale of agricultural land, in particular the following restriction will apply:

- Agricultural land may be acquired only by individual farmers having agricultural education and residing in the same municipality where the land is located for at least 5 years. The above will not be applicable to the transfer of agricultural land of an area smaller than 1 ha

- An obligation to obtain a permit (in a form of an administrative decision) of the General Director of the National Agricultural Support Center for sale/acquisition of an agricultural land to/by persons other than individual farmers, including companies, under pain of invalidity. The above will not be applicable to the transfer of agricultural lands of an area smaller than 1 ha
- General prohibition on sale or transferring possession (e.g. under lease agreement) of an agricultural land within 5 years from its purchase
- National Agricultural Support Center possess a pre-emption right to agricultural land regardless of the area unless acquired under the permit of the Chairman of the Agricultural Property Agency
- National Agricultural Support Center is also authorized to exercise its buyout right in case other acquisitions that acquisitions under sale agreement e.g. merger, division or transformation of a current owner (perpetual usufructuary) of the land
- National Agricultural Support Center is entitled to buy of an agricultural land in case of partners change in partnerships
- National Agricultural Support Center has been also equipped with a pre-emption and buyout right to purchase shares in companies owning an agricultural land, e.g. in case of share purchase agreements or share swap (excluding shares in public listed companies).

The above corporate rights attributed to the National Agricultural Support Center may be exercised only if the total area of agricultural land owned by the company constitute at least 5 ha.

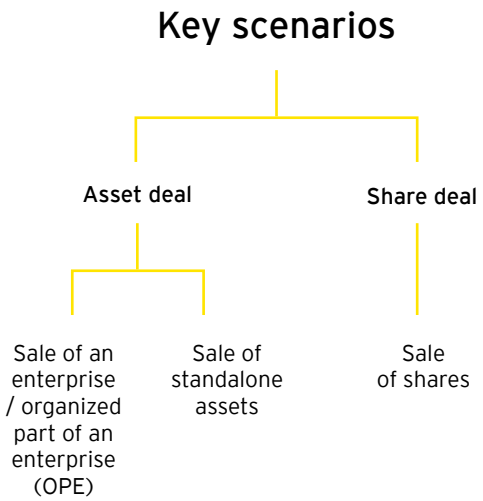
E. Acquisition of real estate from public entities

In Poland, real estate is often acquired from the State or local authorities. Such type of acquisition is considered to be safe and an attractive alternative to acquisition of real estate from private owners. Nevertheless, in practice, acquisition of real estate from public entities is subject to additional specific requirements such as an obligation to dispose the land via public tenders.

An investor interested in acquiring real estate from the State or local authorities should ask the authorities for information on the contemplated property to be acquired. Unfortunately, it is not possible to purchase such real estate on the spot, as there is a special procedure of selling real estate held in public entities' possession. With only a few exceptions provided by law (e.g. real estate being sold to its perpetual usufructuary), real estate held by the State or local authorities may be disposed by way of public tender, after a lengthy procedure is completed.

2.4.3. Tax implications

As mentioned above, real estate can be sold either through a direct sale of the property (an asset deal) or indirectly through a sale of the shares in the company owning the property (a share deal). These two types of transactions are afforded different treatment by the Polish tax regulations.



	Asset deal		Share deal
	Enterprise / OPE	Standalone asset	
Corporate income tax	Step-up allowed Goodwill may arise for tax purposes	Step-up allowed	No step-up allowed No goodwill for tax purposes
Transaction taxes	Out of scope of VAT 1%/2% civil law activities tax ("CLAT") (pol. PCC) on gross value of enterprise / OPE payable by the buyer (non-recoverable)	23% VAT (for commercial property), subject to VAT recovery under general rules VAT exemption may apply (exemption may be either obligatory or an option) If VAT exempt – 2% CLAT (pol. PCC) on the FMV of asset payable by the buyer (non-recoverable) For further comments on VAT see next pages	Out of scope of VAT 1% CLAT (pol. PCC) on the FMV of shares payable by the buyer (non-recoverable)
Contingent tax liability	In general joint and several tax liability (up to the value of the purchased enterprise/ OPE's assets) Possibility to limit the contingent tax liability via pre-transaction tax certificates	No contingent tax liability for the events occurring prior to the transaction	Unlimited tax liability (up to the value of the investment)

	Asset deal		Share deal
	Enterprise / OPE	Standalone asset	
Reclassification risk	Reclassification into a transfer of standalone assets may lead to VAT arrears for the seller (additional penalties may apply)	Reclassification into a transfer of an enterprise / OPE may lead to challenging the buyer's right to recover input VAT charged by the seller and may result in CLAT arrears (additional penalties may apply) For further comments on the risk see next pages	
Other advantages	Tax assets of the seller (e.g. tax losses) remain with the seller and can be used to offset sale proceeds	Tax assets of the seller (e.g. tax losses) remain with the seller and can be used to offset sale proceeds	Less time-consuming and more straightforward legal wise Possibility to deduct historical tax losses of the acquired company (no forfeiture rules)
Other disadvantages	Timing and legal complexity Buyer cannot use historical tax losses of the seller Interest on any acquisition debt should generally be tax deductible and offset against revenue from general business activities	Timing and legal complexity (less complex than enterprise / OPE, but more than share deal) Buyer cannot use historical tax losses of the seller Interest on any acquisition debt should generally be tax deductible and offset against revenue from general business activities	Interest on any acquisition debt may not be tax effective (no debt push down possible)

Asset deal

The revenues generated on the sale of real estate are subject to the standard taxation rules of Polish corporate income tax. Taxable revenues are reduced by the net book value of the property. Effectively, only the gain is taxed at the rate of 19% (possibly 9% if the yearly revenue of the company does not exceed €2m). The revenue from the sale of real estate must be valued at the price set in the sale contract. However, if the price differs substantially and without a justified reason from the market value of the real estate, the revenue may be assessed by the tax authorities according to the market value. This transaction price adjustment may be applied to transactions between related and unrelated entities. Adjustments trigger not only a higher tax burden but also penalty interest.

Costs incurred by the buyer for the acquisition of real estate: purchase price, transaction costs including advisory, civil law transaction tax - if applicable, financial costs accrued till the purchase, etc., form the initial value of the real estate and are recognized as tax deductible costs through depreciation write-offs or upon sale. As the value of the land is not subject to depreciation, it is then important to determine the value of the land and the value of any buildings or structure separately.

VAT on the acquisition of real estate

The supply of buildings, infrastructure, or parts of buildings or infrastructure is generally VAT exempt, except for:

- The supply of a building, infrastructure or part of a building or infrastructure in the course of its first occupation or prior to it and
- The supply of a building, infrastructure or part of a building or infrastructure made within two years of the first occupation

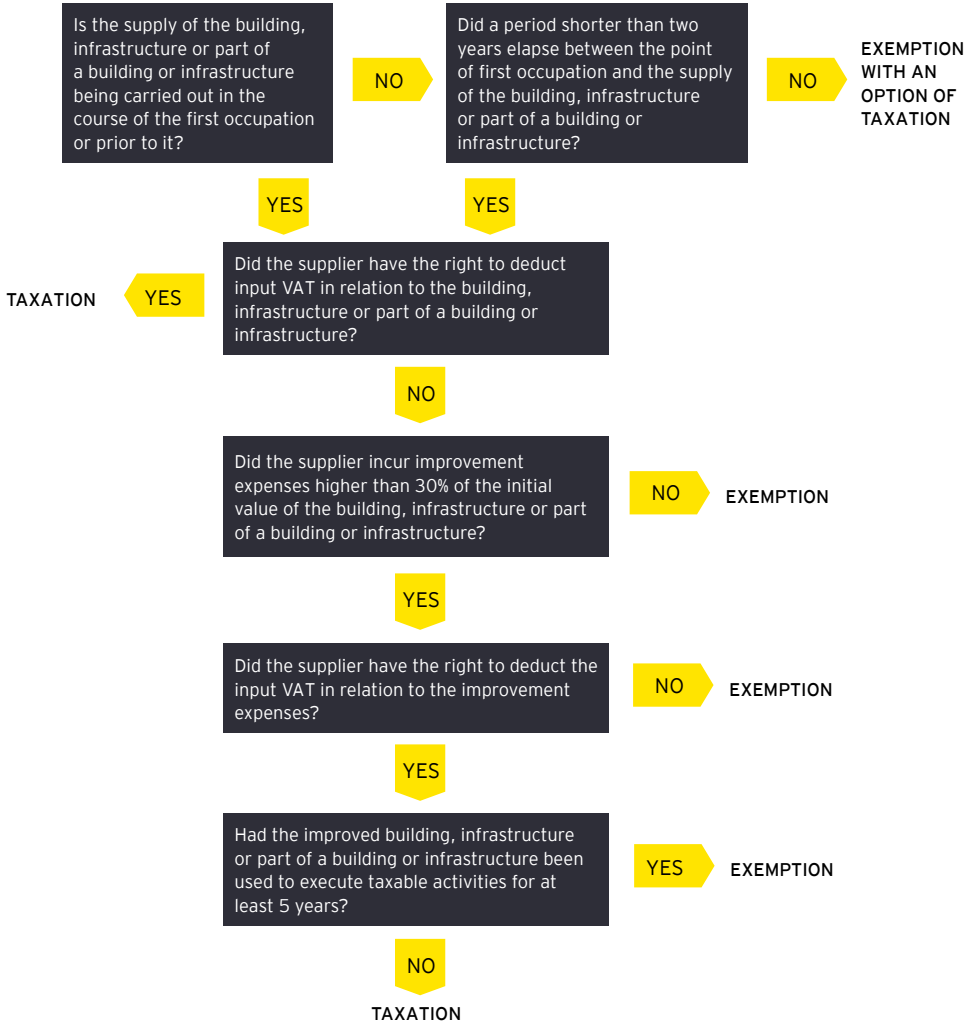
In which cases the supply of buildings, infrastructure or parts of buildings or infrastructure are generally subject to VAT.

According to new definition introduced in VAT regulations as of 1 September 2019 "First occupation" means release for use to the first acquirer or first user or commencing use for the own purposes of buildings, constructions or their parts, after their:

- Initial completion

or

- Improvement (if the expenses incurred for the improvement constituted at least 30% of the initial value) of that building, infrastructure or part of a building or infrastructure.


Is the supply of the building, infrastructure or part of a building or infrastructure being carried out in the course of the first occupation or prior to it?
NO
Did a period shorter than two years elapse between the point of first occupation and the supply of the building, infrastructure or part of a building or infrastructure?
NO
EXEMPTION WITH AN OPTION OF TAXATION
YES
YES
Did the supplier have the right to deduct input VAT in relation to the building, infrastructure or part of a building or infrastructure?
YES
TAXATION
NO
Did the supplier incur improvement expenses higher than 30% of the initial value of the building, infrastructure or part of a building or infrastructure?
NO
EXEMPTION
YES
Did the supplier have the right to deduct the input VAT in relation to the improvement expenses?
NO
EXEMPTION
YES
Had the improved building, infrastructure or part of a building or infrastructure been used to execute taxable activities for at least 5 years?
YES
EXEMPTION
NO
TAXATION

According to the adopted definition, use of a building, infrastructure or part of a building or infrastructure for the own business purpose of the owner should be considered as first occupation (provided that the owner performed VAT-able activities).

Taxpayers may choose not to apply the exemption and charge VAT if:

- Both buyer and seller are VAT registered and
- Before the day of supply they submit the appropriate joint statement to the tax office of the purchaser.

The supply of buildings, infrastructure or parts of buildings or infrastructure which could not be subject to the above exemption (i.e. supply in the course of first occupation or within two years of the first occupation) must be VAT exempt (no option to tax allowed) if:

- The seller was not entitled to deduct input VAT and
- The seller did not incur improvement expenses on which he had right to deduct VAT, or such expenses did not exceed 30% of the initial value of the building, infrastructure or part of a building or infrastructure (unless the improved real estate was used for taxable activities for no less than 5 years).

The diagram outlines VAT rules on the taxation of the supply of buildings, infrastructure or parts of buildings or infrastructure.

Generally, the VAT treatment of ownership title to land or a perpetual usufruct (RPU) over land follows the VAT treatment of the buildings and infrastructure developed on the land.

The supply of ownership title / RPU to undeveloped land qualified as land for development purposes under a local spatial development plan or in a zoning decision is subject to 23% VAT (supply of other types of undeveloped land is as a rule exempt from VAT).

If subject to VAT, the supply of real estate is mostly taxed with 23% VAT. However, the supply of residential buildings and separate apartments is subject to a reduced 8% VAT, except for part of residential buildings whose usable floor space exceeds 300 m^2 and apartments whose usable

floor space exceeds 150 m^2. In such a case only the part of residential building and/ or apartment which fits within the above limits benefits from the 8% VAT rate, whereas the part exceeding the thresholds is subject to a standard 23% VAT rate. Depending on the legal case underlying the transaction, sale of a parking space sold jointly with the apartment but constituting a separate legal property, can be subject to a standard 23% VAT.

As a rule, VAT tax point arises at the moment of delivery of goods, i.e. on the day of signing of the sale agreement. The invoice should be issued by the seller no later than until the 15th day of the month following the month in which the VAT point arose.

If the supply of real estate is VAT exempt, it is subject to civil law transaction tax payable by the buyer. The applicable rate is 2% of the market value of the real estate.

If the business of the Polish company or part of its business is sold as a going concern, the transaction falls outside the scope of VAT. The assets of the business or part thereof will be subject to civil law transaction tax payable by the buyer at the rate appropriate for a particular item (2% for land, buildings and other tangible property, 1% for intangibles, including any goodwill that would crystallize on such transfer). Civil law transaction tax constitutes an additional cost of the transaction and is non- recoverable.

Although the Polish Ministry of Finance has issued a set of guidelines with respect to VAT / CLAT treatment of real estate asset deal transactions, a detailed analysis of each particular transaction is still recommended with this respect, as the guidelines are of rather general nature. Application for a tax ruling is still advisable.

Recoverability of input VAT

Input VAT is recoverable if the company uses or intends to use the purchased real estate for the purpose of activities which are subject to VAT (e.g. lease of the commercial real estate). Input VAT will not be recoverable if the company uses or intends to use the purchased real estate for the purpose of activities which are VAT exempt. If this is the case, the input VAT will increase the initial tax basis of the real estate.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If the buyer uses the real estate partly for the purpose of exempt activities, the recovery of any input VAT should be effected in line with the proportion of the net value of the taxed supplies to the total value of all supplies (a so called pro rata recovery). During a calendar year, the proportion is calculated based on the volume of supplies made in the previous year. At the year end, the amount of deductions is adjusted to the actual percentage calculated for the whole year. In the case of tangible or intangible assets subject to depreciation for tax calculation purposes, the percentage of input VAT which may be deducted is subject to adjustments over the period of 5 or even 10 years (in the case of real estate).

Calculation of the percentage of input VAT to be deducted is necessary only if it is not possible to match input VAT with taxed activities or exempt activities directly.

Taxpayers also need to take into account so called preliminary pro-rata that limits input VAT recovery on purchases, if linked both with the economic activity of the taxpayer and other activities not related with business operations.

The recovered input VAT also has to be adjusted if the liability resulting from the invoice documenting the expense incurred is not settled within the specified deadlines (as a rule 90 days counting from the payment due date). Additional sanctions may apply if no adjustment is made (i.e. additional tax liability up to 30% of tax resulting from the not settled invoices, which has not been accordingly adjusted).

Date of input VAT recovery

The right to recover input VAT arises in the period when - with respect to the acquired goods or services - the tax point arose (i.e. in the period in which the services were rendered to, or the goods were acquired by the purchaser). It cannot be, however, recovered earlier than in the period in which the taxpayer receives the respective invoice. In case of prepayment invoices, they must be paid in order for input VAT to be reclaimable.

Direct refund of input VAT

A direct refund of any surplus input VAT should be made within 60 days of the submission of the application for the refund (the VAT return) on condition that the taxpayer performed VAT-able supply in the period for which the refund is claimed.

It is possible to get a refund of input VAT even if VAT-able supplies are not made in the period for which the refund is claimed. However, in such a case the period for the refund is extended to 180 days, unless a form of security, e.g. a bank guarantee is provided (in which case the refund should be made within 60 days).

Mandatory split payment

As of 1 November 2019 mandatory split payment mechanism has been introduced to the Polish VAT law.

At this stage VAT split payment is applicable to B2B transactions. Buyers are obliged to pay the VAT amount into a dedicated bank account.

It is mandatory for certain goods and services (150 groups of goods and services classified according to the Polish Classification on Goods and Services (PKWiU) codes listed in the appendix 15 to the Polish VAT Act), among others, payment for broadly understood construction services – regardless of the supplier's status e.g. construction work on residential buildings (works on the construction of new buildings, reconstruction or renovation of existing buildings).

Mandatory split payment applies to invoices, documenting selected transactions, which gross value exceeds PLN 15,000. Referring to other transactions split payment still can be applied on a voluntary basis.

The invoices documenting transactions subjected to mandatory split payment should include the annotation "mechanizm podzielonej płatności / split payment mechanism" and the seller and purchaser need to possess bank account in a Polish bank.

From the 1 January 2020 additional sanctions for not being compliant with the split payment provisions for seller and purchaser has been introduced e.g. **penalty equal to 30% of the VAT resulting from the invoice, no right to treat the expense as tax deductible cost for CIT and PIT purposes, penal fiscal sanctions.**

The white list of taxpayers

The provisions introducing the so called "white list of VAT taxpayers" entered into force on 1 September 2019. However, the sanctions for not compliance therewith are applicable only as of 1 January 2020.

The white list of VAT taxpayers is a record of entities for VAT purposes that is held by the head of the National Revenue Administration and includes information on entities:

- registered as VAT payers;
- that have been refused VAT registration or were deregistered by the tax authorities; and
- whose VAT registration has been restored.

The white list is available online free of charge and is meant to allow taxable persons to verify data related to VAT registration of other taxable persons (up to 5 years back).

The register discloses (Polish) bank accounts reported by the taxpayers.

Generally all payments regarding transactions above PLN 15,000 should be made only to the taxpayer's bank account indicated in the white list. Otherwise, the taxpayer:

- Will not be entitled to include the expenses incurred as tax deductible costs
- Will be jointly and severally liable for the supplier's tax arrears - in the part of VAT attributable to a given transaction.

In such a case sanctions could be avoided only by:

- Sending notification to the head of the tax office about transfer to the off-list bank account within 7 days of the transfer being made
- Making payment using the split payment mechanism (but then only VAT sanction will be avoided).

In practice white list of taxpayers may consequently oblige taxpayers to verify each time whether a bank account provided by a contractor for the purpose of making a payment appears on the white list.

The new SAF-T

The new SAF-T is obligatory for entrepreneurs as of October 2020 VAT settlements.

VAT payers no longer have to file VAT returns and SAF-T separately, but submit only one file - the new SAF-T_V7M / SAF-T_V7K.

The new SAF-T contains information that is presented both in the VAT return and current SAF-T.

Moreover, some additional information needs to be included in SAF-T (i.a. a new code system of goods and service groups, indication of selected sales and purchase documents).

The new law provides also for new penalties for errors in SAF_V7M/ V7K (a fine of PLN 500 for each error which makes electronic cross-check more difficult or impossible for tax office).

Share deal

A capital gain on the sale of shares is subject to Polish corporate income tax at the standard rate of 19%. Any capital gain from the sale of shares should be allocated to the capital gain basket and hence could not be offset against costs allocated to revenue from general business activities basket (see diagram listing the items allocated to capital gains).

Income from capital gains shall include, among others:

- Income from sharing in profits of legal persons or other companies, including e.g. dividends, income from investment funds, income from redemption of shares, payments received as a result of a merger or demerger, interest on participation loans, etc.
- Income arising from in-kind contributions
- Other income from participation in legal persons or other companies, including income from the sale of shares, redemption or gains from a share-for-share exchange
- Income from the sale of certain receivables
- Income earned from property rights (e.g. royalties, know- how, copyrights), securities and financial derivative instruments, etc.

Requirement to keep accounting records specifying revenues and costs for tax purposes, broken down by two types of sources (capital gains and other sources).

If the selling party is a foreign shareholder, the applicable tax treaty influences the tax implications of such a transaction. Significant part of Polish tax treaties (e.g. with Spain, France, Denmark, Sweden, Germany, Luxembourg etc. provide that a sale of shares in a company holding mainly real estate assets should be regarded as a sale of real estate. Consequently, income earned on the sale of shares in the Polish company will be taxed in Poland (the so called Real Estate Clause).

Poland has implemented Multilateral Instrument Convention (MLI) on the basis of which most of tax treaties concluded by Poland may be equipped with Real Estate Clause and Principal Purpose Test. Verification of the current status of implementation of each such amendment under MLI is highly recommended.

The status of implementation of MLI may be monitored using OECD tool (currently beta version) on OECD website (link: https://www.oecd.org/tax/treaties/mli-matching-database.htm).

The sale of shares in the Polish company is subject to a 1% civil law transaction tax (on the fair market value of shares) payable by the buyer. This is irrespective of where the transaction takes place or where the parties to the transaction are resident for tax purposes. A share transaction is generally not subject to Polish VAT.

Costs which must be incurred in order to acquire shares (e.g. purchase price and notary public fees) may be recognized as tax deductible costs upon the sale of shares.

So far, other costs indirectly connected with acquisition of shares such as financing costs were in practice recognized as tax deductible costs when incurred. Due to the introduction of income baskets, the financing costs related to the acquisition of shares should in principle be allocated to capital gain basket and as a result, would not provide a tax shield against the taxation of operating profits.

CFC Rules

CFC is defined as:

1. A foreign entity (including i.a. company, partnership, tax capital group, trust, foundation, branch) seated in a tax heaven (as officially blacklisted by the Polish Ministry of Finance) or
2. A foreign company (including i.a. company, partnership, tax capital group, trust, foundation, branch) having its seat or place of management in the country other than mentioned in point 1), with which:
   a) Poland has not concluded an international agreement, in particular double tax treaty, or
   b) EU has not concluded an international agreement being a basis for requesting tax information from tax authorities of that country, or
3. A foreign company which jointly fulfills the following conditions:
   a) the Polish taxpayer has on its own or together with other related entities directly or indirectly over 50% of shareholding or over 50% of votes in managerial, governing or supervising bodies of the CFC or over 50% stake in profits of CFC.
   b) at least 33% of annual revenues of the CFC consist of a passive income, i.e.:
      - Dividends and other income from sharing profits of legal persons
      - Disposal of shares, receivables
      - Interest or benefits from all types of loans, securities or guarantees
      - Interest part of leasing rates
      - Copyrights or intellectual property rights - including disposal of such rights

- Disposal or exercise of rights from derivatives
- Insurance, banking or other financial activity
- Transactions with related parties if the company does not create value added in economic terms or such value is marginal;

c) tax actually paid by the CFC is lower that the difference between the tax that would be due if the company was a Polish resident and the tax actually paid by the company in its country of residence; whereas tax actually paid means tax that should not be refunded or credited in any way.

CFC provisions should not apply in the case where the CFC, which is subject to taxation on its total income in one of the EU / EEA Member States, carries out actual significant business operations in this state. The Polish companies are obliged to hold registers of the CFC companies.

MDR

Since 1 January 2019 Poland has **adopted mandatory disclosure regime (MDR) rules based on which taxpayers are obliged to report certain types of transactions to the Polish tax authorities.**

Tax arrangements commencing after 1 January 2019 are reportable within 30 days (in some cases 5 days) after the day when the scheme is: (i) available for the client, (ii) ready for implementation, or (iii) started, whichever is sooner. Based on the clarifications passed by the Polish Ministry of Finance, as transactions subject to reporting obligation would be counted especially transactions related to transfer of enterprise or share deals in case the taxpayers exceeds certain thresholds. Certain COVID-19 measures may impact reporting deadlines.

The Polish legislation extends the scope of the reporting required under the Directive to include:

- An extended definition of reportable tax arrangements to comprise not only cross-border but also domestic tax arrangements. The Polish regulations also contain an extended catalogue of hallmarks in comparison to required by the Directive
- A wider definition of covered taxes including VAT (with respect to the domestic tax arrangements).

Like the Directive, reporting applies to cross-border arrangements where the first step of implementation takes place after 25 June 2018. Additionally, reporting applies to the domestic tax arrangements where the first step of implementation occurs after 1 November 2018

Additionally, each individual/company/entity implementing/using reportable tax arrangement or obtaining a tax benefit resulting from this arrangement might be potentially required to report this fact to the tax authorities.

MDR-3 reporting

Taxpayers who during the tax period (in case of VAT it will usually be a month) performed any action, being a part of a tax arrangement, or obtained a tax benefit as a result of such tax arrangement, must fulfil the reporting obligation by providing information on the utilization of a tax arrangements – MDR-3 form – to the tax authorities. MDR information regarding implemented/used reportable tax arrangement or obtained tax benefit resulting from this arrangement must be signed by each member of the Management Board of the reporting entity.

MDR penalties

Intermediary entities or those employing intermediaries or actually paying them remuneration, whose revenues or costs exceeded in the year preceding the financial year the equivalent of PLN8m [approx. €1.76m] are obliged to introduce and use an "internal procedure" for MDR. In the event of failure to meet the above obligation, the tax authorities may impose a financial penalty in the amount not exceeding PLN2m [approx. €440k].

Monetary penalties in specific situations (for not complying with MDR obligations) can amount up to PLN10m [approx. €2.3m], in particular in the cases stipulated in the Polish Fiscal Code.

With respect to intermediaries and taxpayers, in specific cases which relate to failure to comply with the reporting obligation or delayed complying, the additional substantive monetary penalties amounting up to approx. PLN27m [€5.9m] can apply.

In the case of conviction of fiscal offenses related to not complying with the reporting obligations, the court may additionally prohibit the conducting of specific business.

2.5 Development and construction

2.5.1 Legal aspects

2.5.1.1 Land development issues

Land development issues are important for real estate investors, as they determine the possible method of investing in a given area. Regulations on land development may influence the shape of the planned building, but sometimes they also prevent the investor from the investment.

Legal background

Currently only a part of the territory of Poland is covered with local spatial development plans, mostly within the boundaries of bigger cities.

The two main spatial planning and development acts determining land development within a given municipality (commune) are the spatial development conditions and directions study and the local spatial development plan. However, from investors' perspective, the local spatial development plan is of higher importance, as it determines their rights and obligations, while the spatial development conditions and directions study binds the local authorities only. In the case where no local spatial development plan has been adopted for a given area, the investor may apply for a decision on land development and management conditions (hereinafter referred to as the zoning decision). Where a building permit is required for an investment, either a local spatial development plan or a zoning decision are required to start the development of the real property, since, as a rule, no building permit may be issued without them.

The procedure for adopting a local spatial development plan is rather complex and time consuming as the draft local spatial development plan is subject to „public consultation" with the parties concerned, as well as opinions issued by the relevant administrative bodies.

The provisions of the local spatial development plan are crucial for investors, as the planned development of the plots covered by such a plan must comply with its provisions, in particular, regarding the distance of a building from the plot's border or the height of a building. Sometimes the provisions of a local spatial development plan may render the development of the given plot impossible. Moreover, in certain cases the legal provisions provide that selected investments are implemented solely based on local spatial development plans. This relates to i.a. large retail units or windfarms. It is currently planned by the government to extend the catalogue by introducing all investments substantially affecting the environment as requiring local spatial development plan in order to be proceeded with.

Therefore, to be able to implement their investment plans, sometimes investors start a procedure of amending the local spatial development plan, which may prove to be rather time consuming.

Zoning decision

In the case where no local spatial development plan has been adopted for the given area, an investor may apply for a zoning decision, which sets out all the required conditions for the development of that area. Before the building process is started on the given plot under a building permit, the plot must be covered either by a local spatial development plan or by a zoning decision (therefore, it can be said that a zoning decision substitutes a local spatial development plan for an investor).

A zoning decision is issued by the governing authority of the commune. The procedure for issuing zoning decisions includes performance of a zoning analysis by the local authority's architecture department and it may, therefore, take even up to several months.

If a local spatial development plan is being adopted for a real property, zoning decisions related to this area expire if the provisions of the local spatial development plan differ from those of the zoning decision. However, this shall not happen if a final building permit has already been issued for the real property in question. Therefore, in the case where there is no local spatial development plan for a given real property, prior to investment planning the investor should monitor the stage of works related to the local spatial development plan and should learn if it is possible to acquire a final building permit before the local spatial development plan is adopted.

An application for a zoning decision may be filed with the relevant authority even when the applicant does not hold any title to the land in question. A zoning decision may be transferred to third parties.

This means that investors may use a decision issued for the seller of a real property, as they do not have to apply for the decision once again after acquiring the real property (the investor only applies for the transfer of such a decision to himself). Investors may also apply themselves for such a decision before deciding on the investment.

Building permit

A building permit is an administrative decision issued by a local authority (starosta or mayor in bigger cities) which allows an investor to start the development process on the site.

The documents attached by the investor to the application for a building permit should include, in particular, a declaration of having legal title to use the real property for construction purposes. Moreover, the application must also enclose approvals of the local authorities responsible for local infrastructure, in particular utilities, roads, environmental protection and sewage treatment. The building permit will only be granted if the construction design is consistent with the assumptions of the local spatial development plan or zoning decision as well as with the regulations governing technical conditions for the development.

As a general rule, a building permit expires either if construction works have not been started within three years of the date on which the permit became final or if construction works have been discontinued for more than three years.

Not all construction works require a building permit. Construction of certain structures which are listed in the Building Law of 7 July 1994 (hereinafter referred to as the Building Law) may be commenced upon a notification sent to the relevant authorities if no objections have been raised by them within 21 days of the notification date.

The notification procedure pertains however generally to minor construction works or developing some of residential (single family) buildings.

Usage of the building

Depending on the individual case, the use of a building or structure after its completion requires either notifying the construction supervisory authorities that construction works have been completed or acquiring a permit for use.

In the case where only a notification is required, under the general rule the investor may occupy and use the building or structure if no objection has been raised by the authorities within 14 days of the date of notification.

In cases where a permit for use is required, the building may be occupied only after the decision granting the permit for use is granted. The granting of a permit for use is preceded by a technical inspection of the building or structure to confirm that all construction works have been performed in compliance with the terms and conditions of the building permit as well as technical requirements.

Occupying a building in breach of the above¬mentioned regulations may result in a fine.

Environmental issues

The building process has many environmental aspects that must be taken into account. The Polish law provides that an environmental decision must be obtained prior to obtaining a zoning decision and a building permit for the given project. Pursuant to the Polish law, from the environmental law point of view, the investments are divided into two groups:

- Projects that always have significant impact on the environment
- Projects that may have significant impact on the environment.

Environmental decision must be preceded by the environmental impact assessment proceeding (which includes preparation of environmental impact assessment report) in case of projects that always have significant impact on the environment (i.a. parking lots, buildings of a particular size etc.). However, the environmental impact assessment proceeding may be also ordered by the authority issuing the environmental decision in relation to projects that may have significant impact on the environment.

Despite of the fact that environmental impact assessment is carried out at the stage of issuing the environmental decision, it may also be repeated (in certain circumstances) at the stage of issuing a building permit.

Environmental impact assessment is a legal instrument that allows to determine the effect of the planned investment on the environment (i.e. water, land and air quality as well as impact on flora and fauna). Environmental impact assessment proceeding, beyond the identification of specific impacts that the proposed project may have on the environment, concentrates on the ways to prevent and minimize the effects of the planned project.

Pursuant to the Polish law, authorities must inform the general public about the environmental impact assessment proceeding and allow the general public to submit comments and recommendations to the proceeding.

Moreover, Polish law in certain circumstances allows a broad access to the environmental impact assessment proceeding to non-governmental environmental protection organizations.

Environmental decision may be transferred (as well as the building permit issued on the basis of a zoning decision).

Energy efficiency

The EU regulations within energy efficiency of buildings, are ambitious, so is the polish legislation keeping up with the newest directions.

Starting January 2017, the real estate market is challenged with a new values of EP energy ratio for newly built buildings and some of the coefficient U factors for thermal transmittance of external walls of buildings. The new law, incorporated back in 2014 is entering into force gradually in order to make polish legal system compliant with the European Directive on the energy performance of buildings, according to which, until 31 December 2020 each and every newly built building shall be nearly zero-energy. Starting from 1 January 2019, nearly zero-energy performance requirement applies to all buildings owned or occupied by the public authorities.

2.5.1.2 Construction issues

Legal framework for construction works contracts

The Civil Code includes provisions which establish the legal framework for construction works contracts. Most of those provisions are general in nature and enable contracting parties to structure the construction works contracts in a way that addresses their particular business needs. Such a flexible legal framework allows the parties very often to use international standards for construction works contracts, including the popular FIDIC forms. However, not all the provisions of international standards for construction works contracts comply with the requirements of the Civil Code and the Building Law.

In particular, a more detailed analysis should be performed with respect to contractual clauses regarding statutory warranty periods, contracts with and liability towards subcontractors as well as contractor's payment guarantees. Below we present the key legal regulations in this areas.

Statutory warranty periods

Under the Polish law, the statutory warranty period for acquired real estates, including buildings is five years from the property's hand-over date. The above mentioned statutory warranty period of five years applies also in the construction works contracts.

Liability towards subcontractors

Based on Civil Code provisions, the investor is severally liable with the general contractor for the payment of remuneration due to the subcontractor for the construction works performed by the latter, the detailed description of which was notified to the investor prior to the commencement of such works. The liability of the investor does not occur if, within 30 days from the date of such notification, the investor objects to such works.

Such notification will not be required in case the investor and the contractor determine the scope of works to be performed by the designated subcontractor in the written agreement.

Thus, the investor is liable for payment for only such works, which were duly notified to him prior to their commencement.

Additional security for the investor constitutes the fact that the said notification must be made in writing (accordingly, such form is also required for the investor's objection).

Moreover, the said liability of the investor towards the subcontractor will be limited to the amount due to the subcontractor under his agreement with the general contractor, unless such amount exceeds

the remuneration due to the general contractor for the works included in the notification.

Contractor's payment guarantee

One of the inconveniences for investors signing construction works contracts is the obligation to grant a payment guarantee to the general contractor.

Under this obligation a general contractor is entitled to a statutory claim against the investor for a payment guarantee up to the maximum amount of the contract value. The investor may satisfy the general contractor's claim by issuing a payment guarantee in the form of a bank guarantee, an insurance guarantee, a letter of credit or a bank's suretyship. The statutory claim for a payment guarantee may be raised at any time and can be extended to include the value of any additional works agreed in writing during the term of the construction works contract.

Construction design contracts

One of the key elements of the building process is drawing up a construction design. A construction design is a formal requirement for obtaining a building permit for most of building investments. Under the Polish law a construction design must be drawn up and signed by a certified architect, who takes responsibility for the technical aspects of the construction. The architect should prepare a design under a contract for architectural services which, depending on its scope, may either transfer the copyright to the construction design to the investor or provide the investor with the right to use the construction design for the purposes of the relevant investment.

It is worth mentioning that a contract for architectural services may include various restrictions with regard to the copyright or the use of the design. Such restrictions may be crucial for the investment development

process, in particular when they regard the possibility of entering modifications to the construction design or transferring the copyright to other entities.

Public procurement contracts

General overview

Thanks to a number of EU funding programs every year Polish authorities have billions of euros at their disposal to be spent on development. A considerable part of this funding will be designated for infrastructural projects, in particular road and railway infrastructure, which is still not very well developed in Poland. For this reason, many of the infrastructural investments developed on the Polish market will be carried out under public contracts.

Poland, as one of the EU Member States, was obliged to implement regulations governing public procurement proceedings. The provisions of EU directives on public procurement were implemented to the Public Procurement Law, which constitutes the legal framework for this matter in Poland. The Public Procurement Law is supplemented by additional legal acts which relate in particular to public-private partnership and licenses for construction works and services.

The main goal of public procurement regulations is to establish clear and competitive rules and procedures for awarding public contracts to the suppliers of works and services as well as to provide measures for supervision over the public authorities awarding public contracts. The key objective of the Public Procurement Act is to ensure that public contracts are awarded while applying equal treatment to all entities taking part in tender proceedings as well as to ensure impartiality and objectivity of the final decision.

Procedure

Under the Polish public procurement regulations there are numerous different procedures for awarding public contracts. The ones that are most commonly applied are open tendering and limited tendering. Both procedures must be followed by a public notice. Notice on contract performs the aim of providing proper implementation of the rule of equal treatment in the very beginning of the procedure. The obligation of publishing a notice also provides non-confidentiality and transparency of the applied public contract systems.

In general, open tendering is a simple procedure, meaning that entities familiarize themselves with the information in the notice and in SETC and, if they are interested in submitting tenders in such procedure, they submit a tender which shall then be evaluated by ranking.

Under limited tendering procedure, entities interested in being awarded a public contract submit requests for participating in the tender and the awarding party decides which bidders may submit their proposals. Other public procurement procedures such as competitive dialogue, negotiated procedure with publication, negotiated procedure without publication, single source procurement, request for quotations, innovative partnership or electronic auction can only be applied under specific circumstances stipulated in the binding law.

A similar course of action should be applied to the above main types of the public procurement procedure. Each of them is comprised of pre-qualification, submission of proposals and selection of the winning tenderer phases. In the pre-qualification phase the awarding party sets out the requirements / criteria to be met by the tenderers. Based on the specific requirements / criteria, tenderers draft their proposals and submit them to the awarding party. In the proposal each tenderer demonstrates its compliance with tender requirements by referring to its competencies, such as experience, knowledge and financial capacity to perform the contracted work. After reviewing all submitted proposals

the awarding party selects the best tenderer with whom the public contract is to be signed.

However, this is not necessarily the end of the public procurement process as there is a possibility of appealing against the decision of the awarding party. In practice, the appeal procedure is quite commonly used by the tenderers who lost a public contract, which often results in delays in the completion of the investment project concerned.

2.5.2. Tax implications

Tax treatment of the construction costs

Costs related to construction process and accrued prior to putting the assets into use form the initial value of the real estate and are recognized as tax deductible cost through depreciation write-offs or upon sale.

Costs related to future operation / exploitation of the assets should be recognized for tax purposes based on general rules.

VAT and the construction process

During the construction process, the most important tax to be considered is VAT. The standard rate of VAT in Poland is 23%. A reduced VAT rate of 8% applies to the construction of residential houses/ apartments except for part of residential buildings where the usable floor space exceeds 300 m^2 and apartments where the usable floor space exceeds 150 m^2. In such cases only construction of the part of the residential building and/or apartment, which falls within the above limits, benefits from 8% VAT rate, whereas construction of the part exceeding the thresholds is subject to standard 23% VAT rate.

Purchases the investor needs to make during construction will typically include Polish VAT. This input VAT could be deducted from the output VAT that the investor has to pay to the tax authorities as a result of his business activities. As the construction process usually takes a considerable period of time and requires the availability of substantial financial resources, it is essential that the input VAT paid is recovered during this process. Rules of VAT recovery and refunds are presented in section 2.4.3. However, during the construction process the typical situation is that the company has to cover high input VAT (resulting from purchase invoices), but no output VAT is recorded. Therefore, specific rules need to be observed to ensure the recoverability of input VAT paid during the construction process.

Also, it is worth mentioning that from 1 November 2019 the reverse charge mechanism is no longer applicable regarding construction services provided by subcontractors being Polish VAT payers.

Certain construction services (listed in the VAT Act) are now subject to mandatory split payment mechanism (see the part "Mandatory split payment").

Services of foreign contractors

The place of the supply of services (i.e. the place in which services are deemed to be rendered and should be taxed accordingly) depends on the nature of a particular service. Under the general rule, services rendered to a VAT taxpayer (or a legal person not being a VAT taxpayer) occur where the service recipient is located. However, services connected with real estate are generally taxed where the real estate is located, i.e. in Poland. Services connected with real estate include construction works, services of architects and firms providing on-site supervision and the services of real estate agents and property appraisers.

If the place of supply of a particular service is Poland, it is possible for a foreign construction company to register in Poland as a VAT-payer.

This implies that the foreign company generally will itself be liable for Polish VAT. The recipient of the services can recover the VAT paid to the service provider as input VAT under the general rules.

If services are deemed to be rendered in Poland and the foreign service supplier does not register and account for Polish VAT on his invoice, the Polish recipient (in this case the real estate company) must self-assess the VAT due under the reverse charge mechanism. This VAT can then be declared by the recipient as input VAT and be deducted from the output VAT. Such a deduction may be made in the same period in which the output VAT on importation of services was recognized provided that the acquirer includes the amount of output VAT in a VAT return, in which he is obliged to settle the tax, within the specified deadline (which means that the company should as a rule not suffer adverse cash flow effect).

Taxes due on imported goods

Imported goods are always subject to import VAT when they cross the EU border (or in the EU destination country when the goods are transported under a special customs procedure). This VAT is calculated based on the customs value of the goods increased by the custom duties. It is possible to offset this input VAT against output VAT in accordance with the general VAT rules. Typically, the VAT rate is 23%.

Import VAT can be settled without the need for an upfront cash payment (i.e. through the VAT return rather than being paid directly to the customs office) and thereafter reclaimed this mechanism is sometimes referred to as „postponed accounting for VAT". This rule applies only to importers using the simplified customs procedure.

The regulations concerning imports do not apply if goods are transported from another EU Member State. Such a transaction is classified as an intra-Community acquisition and is subject to VAT accordingly. The company is obliged to self-assess VAT on the acquired goods at the rate appropriate for them (usually 23%). At the same time

self- assessed tax is treated as input VAT and deducted (under general input VAT deduction rules) from output VAT in the same month in which it has been incurred, provided that the acquirer is in possession of a purchase invoice and includes the amount of output VAT in a VAT return, in which he is obliged to settle the tax, within the specified deadline.

No excise tax is due on typical construction equipment and materials.

Taxation of a foreign construction company

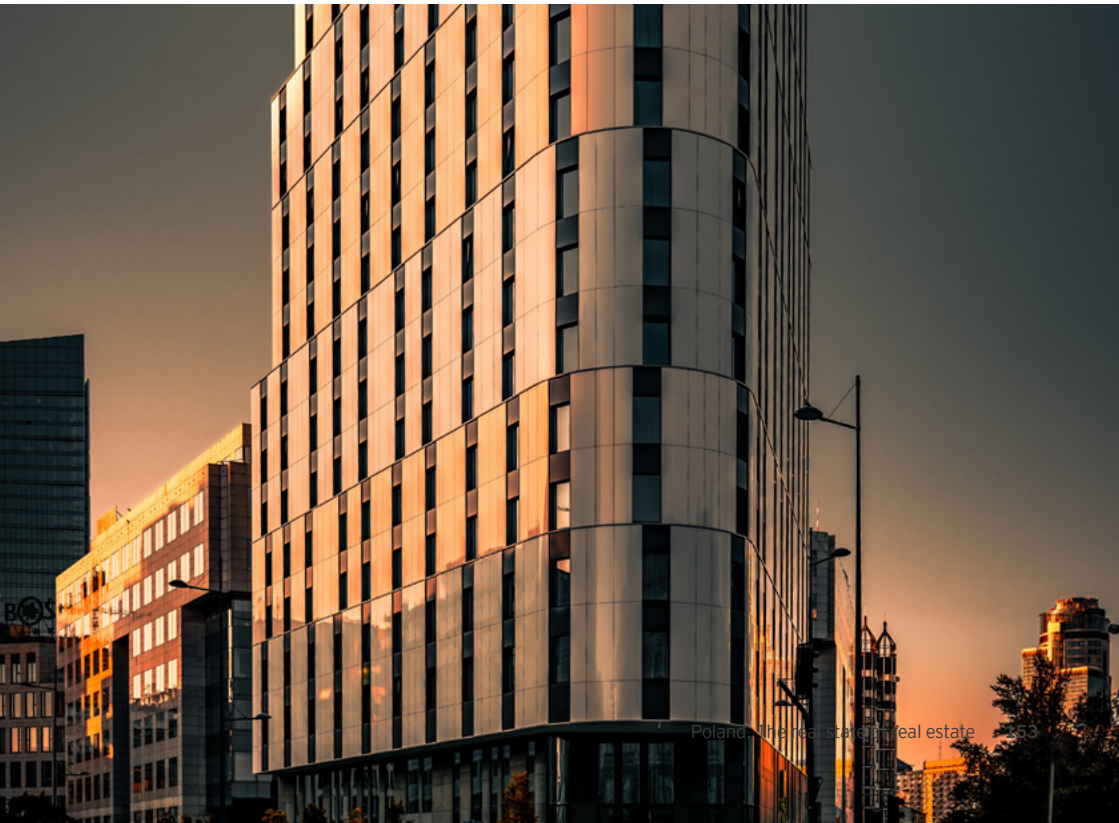
In some cases it is not necessary for a foreign construction company to do business through a Polish company. The construction work can be performed in Poland directly by the foreign entity. In this case the question arises as to whether the foreign company is subject to Polish income tax on the revenues generated from the construction work. Poland is indeed allowed to tax this income at a rate of 19% (or 9% if the company's yearly income is less than €2m) if the activities of the foreign company constitute a permanent establishment in Poland.

Whether or not the given foreign construction company has a permanent establishment is determined by the relevant tax treaty which Poland has concluded with the country in which the foreign company is based. In general, a construction site becomes a permanent establishment once the duration of the construction works exceeds a certain period of time. Usually this period is 12 months (unless provided otherwise under a relevant tax treaty). If the work is finished within 12 months, then no permanent establishment has been created. If the construction period takes longer, then a permanent establishment is recognized and the income derived from the work is subject to Polish income tax. It should be remembered that in such cases the permanent establishment is deemed to exist from the start of the construction activities in Poland. Standard rates and tax rules are applicable to determine the tax due.

If the activities of a foreign company in Poland extend significantly beyond a single contract, the company may be required to set up a branch. Setting up a branch will most likely lead to the creation of a permanent establishment in Poland.

Under the Multilateral Instrument Convention (MLI) which was signed by Poland, Poland excluded the changes to the articles related to permanent establishment though, including e.g. provisions directly addressing cases where the construction works are artificially split into various stages to avoid permanent establishment status. Further developments in this respect should be closely monitored.

The status of implementation of MLI may be monitored using OECD tool (currently beta version) on OECD website (link: https://www.oecd.org/tax/treaties/mli-matching-database.htm).



2.6 Operation and exploitation

2.6.1. Legal aspects

2.6.1.1. Introduction

According to the Civil Code, parties of the contract may benefit from the principle of freedom of contracts, which gives them an opportunity to modify the statutory types and provisions of the civil contract. However, there are some mandatory provisions and limitations, which have to be considered by the parties. Among all types of property exploitation agreements, the below are the most common for the Polish real estate sector.

2.6.1.2. Lease agreement (najem)

Under the lease agreement the lessor grants to the lessee the right to occupy premises (office, residential etc.) in exchange for the payment of rent. In general, everything that can be subject to the ownership right, may be also subject to this agreement, nevertheless in case of real estate, the more strict provisions may apply.

Duration

The duration of a lease agreement may be definite or indefinite. As a general rule, commercial agreements are concluded for definite terms of 5 to 10 years, with the prolongation option.

The duration of a lease agreement may be freely fixed by the parties, however, there are certain restrictions. The lease agreement concluded for a period longer than ten years, is, after this period, deemed to

have been concluded for an indefinite period of time. The rule above is different for the lease agreements concluded between entrepreneurs. In this case the lease agreement concluded for a period longer than thirty years is deemed to have been concluded for an indefinite period of time after the thirty years' period has passed.

Rent

Paying rent is the principal obligation of the lessee. The lessee is obliged to pay rent within the agreed time.

Special clauses in the lease agreements:

Security	Money deposit	Promissory note	Bank guarantee

Maintenance and expenditures settlement

The lessor should hand over the property to the lessee in a condition fit for the agreed use. It should be maintained by the lessor in this condition throughout the lease term. Minor repairs connected with the normal use of the property should be fixed by the lessee, unless the lease agreement provides for otherwise. If the subject of lease is destroyed due to circumstances for which the lessor is not responsible, he is not obliged to restore it. If, during the lease period, the property requires repairs which encumber the lessor, the lessee may set the lessor an appropriate time for repair.

Subletting and disposal of the leased property

The general rule is that the lessee may hand over the property or part of it to a third party for free of charge use or sublet it, if the lease agreement does not forbid it. However, when the subject of lease constitutes premises or retail areas, hand over the property or part of it to a third party for free of charge use or sublet it requires the lessor's consent.

The leased property can be disposed of during the lease period. In this case the acquirer becomes a party to the lease agreement as a lessor in place of the seller. The approval of the lessee is not required. The new owner may terminate the lease agreement retaining statutory notice periods. However, the new owner does not have a right to terminate the lease agreement if it is concluded for a definite period of time, in written form with an authenticated date (data pewna) and the subject of lease has been delivered to the lessee. If, as a result of the lease agreement being terminated by the acquirer of the leased property, the lessee is forced to return the leased property earlier than he would have been obliged to under the lease agreement, he may demand compensation from the seller.

Security

Lessors often use the special clauses in the lease agreements to secure their potential claims to lessees such as money deposit, promissory note, surety and bank guarantee.

- Money deposit - it is a sum of money submitted by the lessee in order to secure the lessor's potential claims in case of non-fulfillment of the lease agreement or damages caused by the lessee
- Promissory note - promissory note issued by the lessee is an effective way to protect the lessor's potential claims

- Surety - in the contract of surety, the guarantor undertakes to perform certain obligation of the lessee towards the lessor if the lessee does not perform them, mostly this refers to the payment of due amounts. The liability of the guarantor is equivalent, not subsidiary.

  This means that the lessor may request a payment from both the lessee and the guarantor.

- Bank guarantee - it is a unilateral obligation of the guarantor's bank, according to which the bank will provide funds to the beneficiary of the guarantee - the lessor, if the lessee does not fulfill its obligation. The parties of the lease agreement typically determine a period that has to elapse from the payment due date and after which the lessor has the right to execute a bank guarantee.

Termination

A lease agreement concluded for an indefinite period of time may be terminated by any party with a prior notice of termination (its length is in practice defined in the lease agreement). The statutory period of notice of termination for the lease agreement concluded for an indefinite period of time is as follows:

- If the rent is due for a period longer than a month - three-month notice applies
- If the rent is due every month - one- month notice applies
- If the rent is due for a period shorter than a month - three-day notice is sufficient
- If the rent is due for one day - the contract can be terminated one day in advance.

The lease agreement concluded for a definite period of time may be terminated only in cases specified in the contract.

However, the Civil Code stipulates that the parties can terminate the lease agreement immediately if certain conditions defined by the above Code occur. This applies to contracts concluded for both definite and indefinite period of time:

- If the subject of lease has defects that make it impossible to use it in the way defined in the lease agreement at the time of handover of premises, or if the defects occur later and the lessor does not, despite receiving a notice, remove them in an appropriate time, or if the defects cannot be removed. In such case the lessee may terminate the lease agreement without notice
- If the lessee does not pay rent for longer than two full payment periods. In such case the lessor may terminate the lease agreement without notice (in case of lease of premises or retail areas, before termination, the lessor is obliged to warn the lessee in writing by giving him an additional one-month period to pay the overdue rent)
- If the lessee uses the leased premises contrary to the terms of the agreement or their purpose and, despite a warning, does not cease to do so, or if a lessee neglects it to such an extent that the leased premises are likely to be damaged - the lessor may terminate the lease contract without notice.

2.6.1.3. Agreement for the lease with the right to collect profits (dzierżawa)

By a lease with the right to collect profits agreement, the lessor commits to hand over a subject of lease to the lessee's use and collection of profits for a fixed or a non-fixed term. In exchange, the lessee commits to pay the agreed rent. Such agreement gives not only the right to use the property but also to collect benefits from it, which is why the lease with the right to collect profits agreement usually concerns land.

The duration of an agreement may be definite or indefinite. However, the agreement for a period longer than one year should be concluded in writing, otherwise it is considered to be concluded for an indefinite term. Agreement executed for a longer period than thirty years is deemed to be concluded for a non-fixed term, after this period passes.

Under the Civil Code, if the rent payment period is not specified in the contract, rent is payable in arrears on the date customarily accepted, and in the absence of such custom, semiannually in arrears. If the lessee defaults in payment of rent for at least two full payment periods and, in the case of rent paid annually, he defaults in payment for over three months, the lessor may terminate the lease with the right to collect profits without notice. However, the lessor should warn the lessee by giving the lessee an additional three- month period to pay the overdue rent.

The lessee is responsible for the costs of all repairs to the extent necessary to keep the subject of lease with the right to collect profits in the same condition. However, the parties are able to modify this rule in the lease with the right to collect profits agreement. There are also some differences between a lease agreement and a lease with the right to collect profits agreement in the field of subletting a property. The lessee cannot sublet the property without the lessor's consent. If the above obligation is violated, the lessor may terminate the lease with the right to collect profits agreement without notice.

2.6.2. Tax implications

Income subject to tax

Taxable income comprises the entire income generated from business activities (trade or services). Taxable income is calculated on the basis of accounting records prepared in accordance with Polish accounting standards after significant adjustments relating to the tax base. Taxable income is as a rule recognized for tax purposes on an accrual basis. The applicable tax rate is 19% (or 9% for "small taxpayers" whose annual revenue does not exceed €2m).

Calculation of taxable income

Taxable revenues minus tax deductible costs constitute the tax assessment base.

Polish tax law provides for separate income basket for capital gains and disallowing the offsetting of capital gains or losses against other sources of income. This mean that any qualifying capital gain could be offset only against costs allocated to capital gain basket. It will be required to keep accounting records specifying revenues and costs for tax purposes, broken down by two types of sources (capital gains and other sources). If it is not possible to assign expenses to a particular source of income, expenses are divided proportionately.

The costs are deductible if they were incurred for the purpose of revenue earning or maintaining/securing the source of revenue. For the exploitation of real estate, the most important costs, such as interest payments, the costs of exploitation and maintenance and depreciation write-offs are considered tax deductible. Polish tax rules specifically exclude certain expenses from tax deductible costs. For example, doubtful receivables can only be deducted under very strict conditions. Also business entertainment expenses (e.g. the costs of representation) are non- deductible.

Minimum levy

If the taxpayer rents a building (part of a building) a minimum levy may apply which is calculated based on the initial value of all rented real properties (including residential properties) reduced by the tax allowance of PLN 10m per taxpayer. The tax rate amounts to 0.035% per month (approx. 0.42% annually).In a situation, where only part of a building is rented, the minimum levy will be calculated with respect to the rented part proportionally. The tax is creditable against CIT. The taxpayers may apply for a refund of the excess of minimum levy over CIT after a year end. Before the refund is granted, the tax authorities

could start tax inspection, focused especially on settlement with related parties. The tax authorities may question solutions used by the taxpayer aimed at avoiding payment of the tax and applied without a legitimate economic reason based on specific anti-avoidance rule.

Limitations in deductibility of intangible service costs

Fees for certain intangible services and royalties exceeding in total 5% of the adjusted tax base (tax EBITDA) are not tax deductible (with a safe harbor of PLN 3m).

The limit applies to such services as: advisory, market research, advertising, management, data processing, insurance, providing guarantees and other similar services as well as payments for the use of licenses, trademarks and certain other rights made directly or indirectly to related parties.

There are exceptions for payments being direct costs of goods/services sold as well for the re-invoiced expenses.

The regulations provide for a carry forward mechanism of 5 years for non-deducted costs. i.e. such costs may be potentially deducted for the next 5 years within the applicable EBITDA limits.

Note that the above restrictions would not apply to transactions for which a taxpayer obtains an APA with the Polish Ministry of Finance.

Loss carry forward rules

Polish legislation provides for carrying forward tax losses over five consecutive tax years following the year when the loss was incurred.

Starting from 2019 taxpayers are allowed to utilize up to PLN 5m of a tax loss incurred in a given tax year based on a one-off basis (in the five year period).

Excess amount over PLN 5m can be utilized in any of these five years, however it cannot exceed 50% of the total loss.

Tax losses cannot be carried forward following certain legal transactions involving the company (e.g. mergers where the losses pertain to entities which no longer exist after the merger). There is no tax loss carry back. Except for carry back of losses for 2020 that could be available to certain taxpayers under specific conditions as provided by the anti-Covid regulations.

Additionally, starting from 1 January 2021, there is a new limitation in utilization of tax losses in cases where the taxpayer has taken over another entity or acquired an enterprise or an organized part of an enterprise or has received a cash contribution for which it acquired an enterprise or an organized part of an enterprise. In abovementioned cases, utilization of tax losses by the taxpayer should be prohibited if:

- The subject of the primary business activity carried out by the taxpayer after the takeover or acquisition will be wholly or partially different from the subject of its primary business activity actually carried out before the takeover or acquisition, or
- At least 25% of shares or similar rights in the taxpayer are held by an entity or entities which did not own such rights as at the last day of the tax year in which the taxpayer incurred the loss. In practice, such regulations may prohibit the utilization of the past

tax losses in case of mergers, demergers, carve-outs and other restructuring activities.

Depreciation rate for real estate

The standard depreciation rate for most new buildings for tax purposes is 2.5% per year. Hence, the costs of real estate investment are generally deducted over a period of 40 years. Newly acquired buildings, used previously by a former owner, can be depreciated for tax purposes during the period equal to the difference between 40 years and the number of years that have passed since the building was put into use for the first time (that period cannot be shorter than 10 years). Land is not subject to tax depreciation.

If residential buildings constitute fixed assets used for business purposes (e.g. if they are leased) they are depreciated at a rate of 1.5% per year.

Under certain circumstances it may be worth carrying out a cost split analysis of investment expenditures prior to putting a building into use. This is because some machinery may - under specific regulations - be excluded from the value of the building and be treated as separate fixed assets depreciated at higher rates (4.5% - 20% per year). This could lead to significant tax savings as the costs incurred could be deducted over a shorter period of time. A cost split analysis should be also possible in case of the purchase of an already developed building.

Calculation of the depreciation base

The depreciation base consists of all costs incurred in making the investment: construction costs, building materials, designs, interest and foreign exchange differences accrued during the construction period, commission and potentially non-recoverable input VAT related to the building incurred before it was put into use. As the value of the land is not subject to depreciation, it is then important to determine the value of the land and the value of the building separately.

VAT implications of renting out real estate

Rental income is subject to 23% VAT. This VAT is added to the rent due and is payable by the lessee to the lessor. If the lessee is a regular VAT payer, he can deduct the VAT paid in the rent invoice from his output VAT liability resulting from taxable activities.

If the lessee performs VAT exempt business activities, the input VAT on the rent is irrecoverable. For example, the activities of banks, financial institutions and insurance companies are exempt from VAT.

If the lessee performs VAT exempt activities, as well as taxable activities, then the input VAT on the rent (if connected to both types of activities) can be deducted proportionately on the pro rata basis computed for a given year.

Beginning of 1 January 2016 preliminary pro rata must also be taken into account, which might result in limited recovery of input VAT related both to economic activity and non-business activities.

Rental of residential units for housing (but not the rental of residential units for the purposes other than housing) is VAT exempt.

Sale of commercial real estate - guideline from the Ministry of Finance

For the last few years tax classification of asset deals on the real estate market in Poland became a real issue. Depending on the classification (sale of asset or sale of a going concern) resulting tax consequences for the seller and the buyer differed significantly (in particular, this would determine if the transaction is subject to non-deductible transfer tax or whether it would be subject to VAT that generally could be recovered by the purchaser).

In December 2019 Poland's Ministry of Finance published guideline on a proper classification of objects of asset transactions as either a property sold on a piecemeal basis or as a going concern (business).

The guidance sheds some light on the topic, but the current approach of closing asset deal transactions based on individual tax rulings is likely to continue notwithstanding the new guidance.

9% CIT rate for small taxpayers

A reduced 9% CIT rate on income other than income from capital gains was introduced in 2019.

Broadly, the reduced rate may apply on the condition that an entity is a small taxpayer (its revenues in a proceeding year do not exceed the equivalent of €2m) and its revenues in a current tax year do not exceed the equivalent of €2m.

The reduced rate is not available for entities created as a result of restructuring.

Notional interest deduction

Taxpayers are allowed to deduct deemed interest on certain parts of equity, amounting to the reference interest rate of the Polish National Bank as of the last banking day of the preceding tax year, increased by 1 basis points; however, no more than PLN 250k of interest ($70k) in a tax year.

Real estate tax

Real estate tax is charged to the owner (or in some cases the holder) of the land or buildings and infrastructure which are used for business activities. The local authorities set the real estate tax rates and collect the taxes. However, in 2021 local authorities are bound by the following maximum PLN annual tax rates:

- For land, PLN 0.99 per m^2 of land
- For buildings, PLN 24.84, per m^2 of the usable surface of a building
- For infrastructure (e.g. roads, pipelines), 2% of the value of the infrastructure calculated according to specific regulations (initial value determined for the purposes of tax depreciation).

Local authorities may differentiate between tax rates for different types of activities or locations and grant exemptions for certain types of real estate.

Tax penalties

Another change is introduction of sanctions in the form of an additional liability of 10%-30% of the tax liability assessed by the tax authorities based on the General Anti Avoidance Regulations (GAAR) or other anti- abuse clauses, transfer pricing settlements and withholding tax cases.

Tax rulings

Under the new regulations it is forbidden to apply for tax rulings regarding any provisions related to tax avoidance matters (i.e. both General Anti Avoidance Regulations (GAAR) as well as other existing abuse clauses). Any tax rulings regarding these areas obtained by the taxpayers in the past expired on 1 January 2019.

2.7

Exiting the investment

The investor's choice of exit strategy will be predominantly tax driven, and it is important at The outset of the investment process to have a clear idea of the possible exit mechanics.

The due diligence findings made during the acquisition phase are likely to bear relevance to the question of which exit strategy to choose, and should be given proper consideration, so that the investor's position on exit will be as strong as possible.

Generally, the exit may be structured as an asset or share deal. The legal and tax consequences of both are presented in section 2.4.

Exit tax

This change, that came into force on 1 January 2019, constitutes implementation of the EU Anti-Tax Avoidance Directive (ATAD) in Poland in the area of exit taxation.

A new tax, a so-called **tax on unrealized profits (hidden reserves)** that are embedded in a taxpayer's property and that are potentially transferred together with such property outside of Poland within transfers of the property within the same taxpayer (e.g. transfer by a Polish resident to its permanent establishment located abroad or transfer by a nonresident operating via Polish permanent establishment to its home country or to another country in which it operates) or upon change of the taxpayer's residence.

Exit tax on unrealized profits is calculated as the difference between the fair market value (FMV) of the property transferred (established based on separate rules) and its tax book value (that would have applied had the given property been disposed of) as of the date of the transfer.

Upon transfers into Poland, taxpayers may be allowed to credit the foreign equivalent tax (i.e., the tax due in a foreign country and which is equivalent to the tax on unrealized profits) up to certain limits.

2.8 Sale and lease back

Legal aspects

A sale and lease back transaction consists of two stages. The first stage assumes selling the target real property by the seller to the purchaser. In the next stage the seller concludes the agreement on the lease of the real property from the purchaser. As a result of the sale, the owner (or perpetual usufructuary) of the real estate changes. However, due to leasing the real property back, the real estate remains under the operational control of the original party (the seller).

From the legal perspective it is important to secure the sellers' interest already in the first stage of the transaction, i.e. to establish the obligation of the purchaser to lease the real property back in the agreement on the sale of the real property.

It is also important for both parties to agree details of the lease (duration, price, etc.) as soon as possible, especially if the seller and the purchaser do not belong to the same capital group.

The main advantage of such a sale and lease back operation is the release of the seller's capital as a consequence of the sale of the real property. This capital may be thereafter used e.g. for investment purposes. However, the decision on choosing such a solution shall be made on detailed calculation of all the costs related, including the lease costs.

Tax implications

If a sale and lease-back transaction is structured as an operational lease, the buyer / lessor is in most cases the owner, and will be able to depreciate the value of the investment at the standard depreciation rate of 2.5%. Accelerated depreciation for used buildings can be considered in some cases. Other costs related to the maintenance and exploitation of the building are tax- deductible for the lessor.

If, under a sale and lease-back contract, the real estate asset which is the subject of the contract is sold at a higher price than its net book value, a taxable capital gain will occur. Under Polish legislation, it is not possible to defer the taxation of such a capital gain in order to use it for reinvestment.

A sale and lease-back arrangement has an advantage for the seller / lessee that the lease payments are fully tax deductible as costs incurred for the purpose of earning revenue. By contrast, for the borrower party to a normal direct financing arrangement, only the interest payments made on the loan are tax- deductible.

The repayment of capital is not a tax- triggering event. Under a direct financing arrangement secured by a mortgage, the debtor would still be the owner of the real estate. As such, the debtor would be unable to depreciate the value of the land. Under a lease contract, the lease payments are partly a compensation for the use of the land. Therefore, payments for the use of the land are tax-deductible for the benefit of the lessee.

2.9. Due diligence as part of the acquisition process

2.9.1. Legal due diligence

The due diligence process is all about mitigating investment risks. In practice, the legal due diligence review consists in gathering information and should provide the potential investor with a comprehensive view of the legal issues regarding the real property he considers acquiring.

The main purpose of the due diligence process is to provide investors with a complex overview of the situation of the real estate being the subject of the acquisition from the legal, financial and tax perspective. Taking into account the specific status and features of a given real estate, a broader due diligence review, conducted by technical and environmental experts, may be recommended.

By the end of the due diligence process, the investor should have a fair idea of whether the real estate is worth investing time and money. In this regard, a due diligence should be as comprehensive as possible.

The scope of the legal due diligence will depend on the structure of the deal. In a share deal, the scope of the due diligence will generally be wider than that required for an asset deal, as it needs to cover all the aspects related to the activity of the company. In case of an asset deal mostly the legal status of the real estate should be taken into consideration and examined carefully.

Within the legal due diligence, the review bases mainly on data and information provided by the seller and on enquiries and discussions with the seller and/or the management of the target. Additionally, publicly available sources (such as data in court registers) are explored.

In practice, within the due diligence regarding the real estate the investor should:

Verify basic information on the real estate (location, area, construction, legal title etc.).
Examine compliance with laws and effectiveness of acquiring a legal title to the real estate.
Examine restrictions with the disposal of real estate.
Examine the necessity of acquiring third parties' / administrative bodies' corporate approvals for acquiring a real estate.
Examine the collaterals established on the real estate.
Examine the third-party rights to the real estate.
Verify the permissible use of the real estate.
Verify the construction of the real estate in order to obtain required permits and approvals.
Verify the access of the real estate to the public road.
Analyze the responsibility of the buyer for the pollution of the real state.
Verify the amount of public burdens related to the real estate and lack of arrears with this regards.
Examine the potential claims to the real estate.

Review of other aspects is usually agreed with the seller and strictly depends on the type of transaction (share or asset deal).

The aim of the legal due diligence review of the real estate is to identify areas of investment risks but also other specific legal aspects regarding performing of business activity on the real estate and its sale. Below we present certain issues that need to be analyzed during the due diligence process and which may influence the structure of the transaction, or even a decision on entering into the transaction.

Local Spatial Development Plan

Development of an investment on the real estate is possible provided that buildings, plants and other industrial facilities comply with the relevant local spatial development plan for a given area. Therefore, it is essential to establish during the due diligence process whether there is a local spatial development plan covering the area where the targeted real estate is located and if so, what are the conditions of this local spatial development plan in order to confirm whether it will be possible to perform the planned investment. Please refer to the section 2.5.1. for more detailed information regarding the local spatial development plan.

Within the review of the local spatial development plan, in particular, the issues of the conservation and historic preservation zones and agricultural land should be verified.

Conservations and historic preservation zone

The local spatial development plan may provide that the area where the real estate subject to the potential investor's interest is located falls within a conservation and historic preservation zone where some specific rules apply in order to protect the historical monuments located in the zone. Depending on the type of the real estate and its historical status there may be additional requirements and limitations established by the provisions of law.

Revitalization

The Revitalization Act entered into force at the end of 2015. Under the act, revitalization is the comprehensive process of rescuing degraded areas from crisis through integrated actions for the benefit of the local community, space and economy. A degraded area is a terrain in which there is a concentration of negative social phenomena as well as, for example, degradation of the technical condition of buildings, a low level of transit service, and poorly adapted urban planning solutions.

Under the Act, it is necessary for the commune authorities to pass local government law in the form of a resolution in establishing a revitalization zone or a special revitalization zone.

It should be noted that the Revitalization Act provides for cases, when a commune may exercise the right to pre-emption of real estate, i.e. in case of transactions the subject of which is a real estate located within a revitalization area or special revitalization zone. In case of considered acquisition of real estate located in one of those plans, an investor should bear in mind the pre-emption right of a commune.

Agricultural land

The local spatial development plan may provide that the real estate is assigned for agricultural activity. As a rule, the development of real estate designated for agricultural use requires a special procedure involving the modification of the local spatial development plan. Such a procedure may be time-consuming and is connected with the risk of third parties challenging the proposed changes to the plan. Additionally, real estate classified as agricultural land in the Land and Building Register, but not covered by the master plan, should be also excluded from agricultural production by obtaining an administrative decision from the relevant authority.

It should be noted that after exclusion of the area from agricultural activity an annual fee has to be paid for ten years (see comments below).

An investor considering acquisition of agricultural real estate should also bear in mind existing restrictions relating to purchase of an agricultural land. Regulations in force provide for many specific legal restrictions and limitations and recent legislation restrains entities other than individual farmers from purchasing an agricultural real estate (please see comments in section 2.4.2).

Restitutions claims

Under the nationalization laws passed in Poland after the Second World War, many real properties and functioning enterprises (including their real estate assets) were "nationalized" (or "communalized"). However, currently, there are no specific reprivatisation laws in force in Poland to deal with the restitution matters and claims. As a result, the legal status of nationalized properties is quite often subject to uncertainty. Under specific conditions, former owners or their successors may apply to civil courts and initiate proceedings aimed at the restitution of such real estate. As the current owner benefits from the land and mortgage register's public credibility warranty, the outcome of such claim will primarily depend on the apparent good faith of the current and previous owner at the time they acquired the property. Nevertheless, this issue needs to be subject to analysis during the due diligence.

In Warsaw, on the basis of the special "Warsaw decree" on land ownership of 1945, the City of Warsaw gained ownership rights to the major part of real estate in the city. However, subject to specific conditions, former owners of the real estate were granted the right to apply for obtaining usufruct rights to real estate or compensation. Currently, such applications which were not resolved or were resolved in contravention of the law may be the base for successful claims for reestablishing the rights of the previous owners or their successors. Nevertheless, provisions of law provide also for certain limitations of restitution of ownership of real estate nationalized under the Warsaw decree or transferring claims for reestablishing the rights for such.

Moreover, the Treasury and the Capital City of Warsaw have been equipped with a right of pre-emption in the event of the sale of rights and claims arising from the Warsaw decree and claims for the establishment of perpetual usufruct to the previous owner of real estate located in Warsaw. The pre-emption right also applies in case of sale of perpetual usufruct right established by the way of satisfying rights and claims arising from the Warsaw decree.

In consequence, it is essential during the due diligence to investigate carefully and thoroughly the restitution claims issue in order to avoid any title or investment risk upon completion of the acquisition of the real estate.

Fees - holding the real estate

Betterment levy

Betterment levy ("Opłata Adiacencka") is a charge which may occur with regard to the increase of the value of the real property resulting from:

- Projects
- Division of the property
- The construction of infrastructure with the use of public funds (placing water pipes, sewage pipes, heating systems, electricity gas and telecommunications facilities).

The amount of the fee depends on the amount of the increase in the property's value and is usually established based on an opinion of an independent expert determining how much the value of property has increased by.

The amount of fee shall not be higher than 50% (with respect to the division following a merger and the construction of infrastructure with the use of public funds) and not higher than 30% (with respect to a division) of the increase in value of the property.

Zoning fee

Additionally, adoption of the local spatial development plan may also lead to an increase in real estate market value, e.g. when a forestry land or an agricultural land is reclassified in the local spatial development plan into residential or commercial land, its value increases. In such cases the zoning fee ("Renta Planistyczna") may be established as a percentage (not higher than 30%) of the increase in value of the land calculated as at the date of the transfer of the given real estate.

The percentage for calculation of the zoning fee should be provided for in the local spatial development plan. The zoning fee is payable by the vendor in the case of a transfer of the property within 5 years from the day when the local spatial development plan came into force.

Exclusion from agricultural production fee

Entrepreneurs are often interested in changing the purpose of use of the agricultural and forest land in order to develop the land and realize an investment. Exclusion from agricultural production is subject to an initial fee and subsequent annual payments. The value of such payments depends on the:

- Area of the land subject to exclusion
- Quality of the land (class of soil)
- Market value of the land subject to exclusion.

It should be noted that if the land excluded from agricultural production is sold, the obligation to pay the annual fees passes to the purchaser.

Environmental issues

Introduction

Polish environmental law affects the conduct of economic activity for most business entities. One of the most important requirements imposed by the environmental law is the requirement to obtain permits related to the rules of having an impact upon the environment. It is usually examined during the due diligence whether the seller (or the target company) fulfills the environmental law requirements.

Permit requirements

Environmental permits can be basically divided into two groups. The first one includes permission obtained in the course of the investment process and the second group includes permission related to the use of the property.

In certain circumstances Polish environmental law imposes an obligation to obtain an integrated permit, which includes a number of permits governing the use of the environment. The obligation to obtain integrated permit relates to, inter alia, the following branches of industry: metallurgy and steel industry, the mineral industry and the chemical industry.

Besides, it is important to take into account the permissible level of noise. Permission is required only if the noise level exceeds the noise limits, which should be evaluated taking into account the provisions of the local plan.

Liability for contaminated land

Under the Polish law there are two regimes of liability for land (soil) contamination, depending on the period from which the contamination originates (with the border line being 30 April 2007). A current holder (in particular owner or perpetual usufructuary), revealed in the Land Register, is liable for soil contamination which occurred prior to 30 April 2007 or may be attributed to activity completed prior to that date, even if such holder did not actually cause the contamination.

Parties to the sale agreement cannot contractually exclude the above mentioned administrative liability of the purchaser for clean-up of contaminated land so when a potential investor intends to buy a property (especially one that was used for industrial purposes) a detailed study on pollution of the land is required.

To secure purchaser's interest, the seller of contaminated land may agree to reimburse the purchaser with expenditures borne for the clean-up.

The situation is different for "new" land contamination, i.e. any soil damage, which occurred after 30 April 2007 or could be attributed to an activity completed after that date. An entity using the environment (i.e. an entity who has relevant permits to operate and use the environment) is liable for any such damage.

Environmental impact assessment

According to the section 2.5.1 where the environmental decision and environmental impact assessment where described, in some cases - especially for large investments an environmental impact assessment proceeding may be required.

2.9.2. Financial due diligence

Not many investors perform due diligence when completing a real estate transaction. Often the investor's own internal procedures require due diligence to determine whether or not the transaction is in the best interest of the investor.

Although for transactions of a smaller scale this may not be a good way to evaluate a deal, most investors understand the value of expert outsourced financial due diligence services. This rings especially true when taking into account larger time¬sensitive transactions (auction processes for example).

Although some investors choose to forego due diligence when acquiring new assets, they should understand that financial due diligence can indicate how the acquired assets will affect metrics such as revenue and net operating income. In addition, due diligence is able to discover unforeseen problems such as discrepancies between the amount paid for rent as described in lease agreements vs. the actual amount being paid per the accounting books.

A buyer usually makes use of financial due diligence to assist in identifying major issues concerning a transaction:

- The value of the property's NOI taking into account the existing lease portfolio
- Any provisions in the lease that affect the NOI adversely (for example, discounts on rent for any given period of time or for improvements made by lessee)?
- Bookkeeping in use being adequate for the business, and how does it looks next to the investor's bookkeeping procedures
- Lessee ever being late with the rent, or it taking longer to collect rent
- Charges made by the lessee being enough to cover the costs of maintaining the building; and any service charges not settled for any reason.

Analyzing financial issues

The items listed below should be considered when seeking to resolve the previously mentioned issues concerning financial due diligence:

- The financial figures being viable: can the figures be traced back to its origin reliably
- Critical bookkeeping procedures being applied consistently and appropriately; the influence of the bookkeeping procedures on the financial figures

- Assuring that the creation and level of management information is accurate and adequate for the business being considered
- Evaluating the contractual obligations the business has and their influence on profitability and cash flow
- Evaluating critical problems influencing earnings position
- Recognition of the need for cost recharges incurred and focus on areas for improvement; recognizing the "normal" working capital and cash flow tides of the business and probable funding needs down the line
- Making sure constructions costs are properly reflected in the bookkeeping records
- Recognizing the net asset base for acquisition; addressing possible balance sheet valuation discrepancies; making sure everything has been adequately addressed in evaluating the underlying earnings
- Comparing the rent roll against the rental agreements and bookkeeping records
- Comparing the service charges incurred against the bookkeeping records and
- Going over rental agreements to identify balance sheet liabilities.

2.9.3. Tax due diligence

Tax due diligence, in general, focuses on assessing material tax risks pertaining to assets or shares by reviewing the tax position of the target company. By identifying tax risks during due diligence conducted before the transaction, the investor may seek protection or indemnification from the seller.

From a tax perspective, it is also important to ensure that the appropriate tax structure is used, which usually involves a pre-transaction study and the preparation of the transaction structure in accordance with the Polish and international tax regulations. In addition, it can also include an assessment of the tax implications of a future exit scenario.

Acquisition of assets

In the case of an asset deal deemed to be the acquisition of business as a going concern or a viable part of that business (organized part of an enterprise), the acquirer may be held liable for the outstanding tax liabilities of the seller. This liability should be excluded if the acquirer could not have become aware of the seller's tax arrears despite acting with due diligence in attempting to identify such tax arrears. Performing a tax due diligence review is thus a way to limit or exclude such liability.

This liability is in practice of a ‚subordinated' nature, as even if a formal decision declaring that the acquirer is liable for the seller's tax arrears is issued, the claim against the acquirer may crystallize only if the enforcement procedure against the seller is ineffective (and tax claims against the seller are not satisfied).

According to the tax regulations the acquirer (with the seller's consent) or the seller may submit to the tax authorities a formal request for a certificate which lists all the tax liabilities which are transferable to the acquirer. The acquirer is then liable only up to the value of the tax liabilities presented in the certificate.

In the case of a sale of single assets (not constituting a going concern or an organized part thereof), the acquirer should not be liable for the outstanding tax arrears of the seller. However, if the transaction is reclassified into a sale of a going concern, the buyer might then be held liable for the seller's undisclosed tax liabilities.

Acquisition of shares

In the case of a share deal, all the potential outstanding liabilities that are not statue barred remain with the acquired company. As a consequence, the acquirer faces the possibility of incurring an economic loss on the transaction if undisclosed tax liabilities become apparent afterwards. Tax due diligence is therefore conducted to allow the acquirer to assess and minimize this risk.

Generally, the period of limitation for tax liabilities is 5 tax years following the year in which the tax is payable. In practice this means that from the perspective of 2020 there is still a tax risk in relation specifically to a target's corporate income tax payments for 2014-2020, and to other tax liabilities, in general, for 2015-2020.

Tax issues analyzed

The scope of a tax due diligence review depends on the structure of the planned transaction.

In the case of an asset deal, the scope of due diligence depends on the subject of the transaction and the extent to which the acquirer may be liable for the seller's tax liabilities.

In the case of a share deal, as the acquirer faces the full impact of any tax liabilities assumed, full due diligence is usually conducted.

The tax due diligence in case of a share deal usually covers the following areas:

- Review of tax returns for periods previously filed and review of tax calculations for periods that are not yet filed with the tax authorities
- Review of the results of past tax audits to detect tax risks for periods that are still open for tax audits by the tax authorities
- Review of any obtained tax rulings

- Review of any losses carried forward, tax credits and special tax privileges to identify related tax risks for unaudited periods and to assess whether such tax benefits will be available post transaction
- Review of withholding tax procedures and exemptions available
- Review of significant historical reorganizations and one-off transactions and their impact on the tax accounts.

Review of intercompany transactions and present transfer pricing policy in the company as well as an examination of areas typical for a real estate company, such as:

- The existing debt financing structure (e.g. debt push down schemes), thin capitalization and other pending restrictions on the tax deductibility of interest payments on the debt
- Any large differences between book and tax basis of assets, analysis of the deferred tax calculations, in particular identification of any deferred tax liability, e.g. from accrued foreign exchange gains
- Rules for capital expenditure recognition and the impact of foreign exchange differences on the initial value of fixed assets for tax depreciation purposes
- Policies for the tax depreciation of assets, including a review of cost segregation schemes
- Cash incentives offered to lessees such as a rent free period or step-up rent and their impact on the tax accounts
- Treatment of the investment costs incurred by lessees (leasehold improvements) when the lease expires
- Tax recognition of management charges payable by special purpose vehicles to servicing companies within the group
- Any step-up in the value of the real estate performed; review of input VAT refunds in the investment phase
- Policies for real estate tax.

A review of the sale and purchase agreement (SPA) for the acquisition of a real estate target usually covers the following tax points:

- Review of the tax definitions in the SPA, and of the tax representations and warranties
- Review of the tax indemnity clauses in the SPA and
- Analysis of the SPA from the perspective of other protection available against tax exposures
- Review of clauses aiming to reduce or mitigate potential tax exposures resulted from the reclassification of an asset deal transaction.

2.9.4. The use of due diligence results when negotiating

After the whole process of due diligence, the investor gets a general financial and tax risk overview, which makes up the origin of the information for negotiations with the seller and assists in adjusting the financial model for valuation.

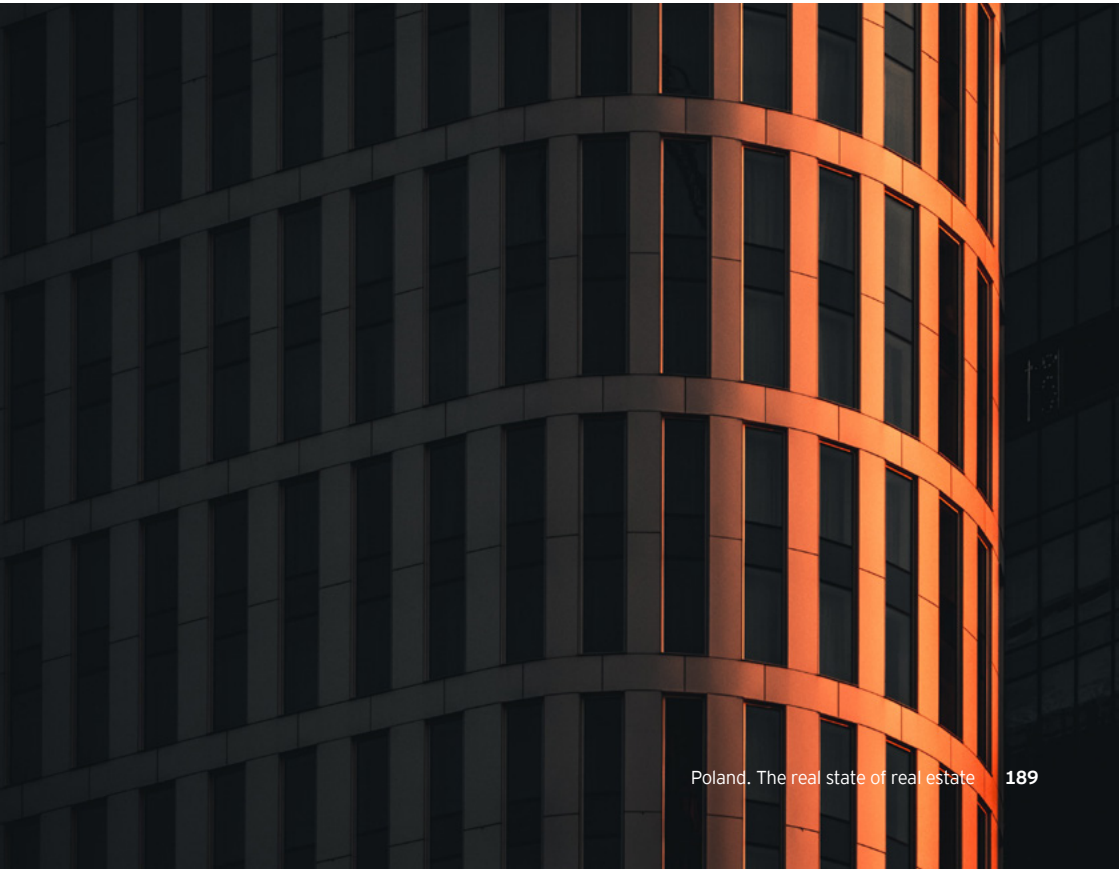
This can be used to get a decrease in price in order to alleviate possible tax liabilities and can be used when writing warranties and damages in the SPA.

The results may directly affect the structure of the transaction, for example, transforming an asset deal into a share deal or the other way round; they may also be used for post-acquisition tax planning.

Along with the tax and financial due diligence results, the legal due diligence review should assist the buyer in determining whether or not to complete the transaction, and if so, in what form. Due diligence investigations let the buyer's legal team construct the conditions of the

deal so that the buyer is afforded with an adequate amount of comfort and protection. The legal team will then be in a position to address specific problems by asking for further explanations and/or promises or warranties from the seller. The legal team can also evaluate whether or not such promises or warranties need to be covered by an indemnity clause or other legal language allowed under the Polish law.

When taken together, the financial, tax and legal due diligence results are a very strong tool which can very easily have an influence on the final result of negotiations, and, in particular, how much the buyer will ultimately pay.



Accounting and auditing

3.1 Introduction to the accounting framework in Poland

Polish accounting is regulated by the Accounting Act as of 29 September 1994 with subsequent amendments (the Accounting Act).
The Minister of Finance has also issued several regulations which cover specific accounting areas, such as: financial instruments, consolidation, accounting principles for banks, insurance companies, investment funds and pension funds, as well as recommendations recently issued by the Polish Accounting Standards Committee "Financial statements in the light of COVID-19 pandemic". Since 1994, the Accounting Act has undergone significant changes to bring Polish accounting regulations closer to the International Financial Reporting Standards (IFRS). However, the differences between the Accounting Act and IFRS, mainly following IFRS developments in recent years, continue to exist. The following information applies to financial statements prepared for the periods beginning on or after 1January 2021.

In order to help to implement the Accounting Act, the Polish Accounting Standards Committee ('the Committee') prepares and issues National Accounting Standards (KSR). As of 1 January 2021, thirteen National Accounting Standards had been issued on different topics including:

- Cash flow statement
- Income tax
- Construction works
- Developers' activity
- Management report
- Agreements on public-private partnership and concession contracts for construction works or services
- Property plant and equipment
- Changes in accounting policies, changes in estimates, correction of errors and subsequent events.

The Committee has also issued several position papers and recommendations (not referred to as standards) with respect to e.g. accounting for emission rights, inventory count, inventory valuation, green certificates, financial statements of housing cooperatives, selected aspects of bookkeeping and COVID-19 related implications. In the areas not regulated by the Accounting Act or National Accounting Standards, reference may be made to IFRSs. National Accounting Standards and the Committee's position papers are available on the website of the Ministry of Finance.

The Accounting Act permits or requires some Polish entities to apply IFRS, as adopted by the EU, as their primary basis of accounting, rather than applying the accounting principles of the Accounting Act. Those regulations are summarised in the following table:

	Standalone financial statements	Consolidated financial statements
1. Entities listed on a regulated market in Poland or other European Economic Area (EEA) country.	Choice	Required
2. Banks (other than those included in points 1, 3, 4 and 5).	Not permitted	Required
3. Entities planning to apply or applying for a permission to list on regulated market in Poland or other European Economic Area (EEA) country.	Choice	Choice
4. Entities that are part of a group where the parent prepares consolidated financial statements for statutory purposes in accordance with IFRS as adopted by EU.	Choice	Choice
5. Branches of a foreign entrepreneurs that prepare separate financial statements for statutory purposes in accordance with IFRS as adopted by EU.	Choice	n/a
6. Other entities	Not permitted	Not permitted

In 2018, the Accounting Act imposed a requirement to prepare the financial statements in an electronic format. Financial statements need to be signed with a qualified electronic signature, trusted signature or a personal signature by members of management board and the person responsible for bookkeeping. The electronic financial statements should also be filed electronically to the National Court Register.

3.2 Accounting records

The provisions of the Accounting Act and related regulations are applicable to, among others, companies and partnerships that have their registered office or place of management in Poland. For those entities that apply IFRS as the primary basis of accounting instead of Polish principles, the following sections of the Accounting Act still apply:

- Chapter 2 on bookkeeping
- Chapter 3 on inventory count
- Chapter 6A on report on payments made to government
- Chapter 7 on auditing, filing with the appropriate court register, providing access to and publication of financial statements
- Chapter 8 on data protection
- Chapter 9 on criminal liability
- Chapter 10 on special and interim provisions, and
- Article 49 in regard to directors' report.

Each entity is obliged to maintain its accounting books and other documentation which, in particular, comprises:

- A description of the entity's accounting principles
- Rules for keeping subsidiary ledgers and their link to general ledger accounts.

It should be noted that the violation of the Accounting Act requirements by a person responsible for drawing up the financial statements (usually the Management Board) may be recognised as a criminal offence, which is punishable by imprisonment for a term not exceeding two years, by a fine, or both.

Accounting records should be kept, and financial statements drawn up, in Polish language and presented in the Polish currency. Entity may outsource bookkeeping provided that:

01

Entrepreneur conducting business activity in this area is located in EEA country

02

Tax office was informed

In this case accounting records must also be kept in Polish language and Polish currency and entity should ensure access to tools of account to authorized external control or supervisory authorities.

The regulations, summarised in Chapters 3.3.- 3.5 below, apply to all entities in general. Certain types of entities such as banks, insurers, or investments funds might be governed by additional specific regulations.

3.3

Financial statements

Financial statements must be prepared in the Polish language and expressed in the Polish currency. Financial statements consist of:

- A balance sheet
- An income statement
- A statement of cash flows
- A statement of changes in equity
- Notes to the financial statements (split into an introduction and additional notes).
- A cash flow statement and a statement of changes in equity are only required by entities whose financial statements are subject to a statutory audit.

For some specialised types of entities additional exceptions or requirements might apply in relation to primary financial statements such as, for example, a summary of investments for the investment funds and alternative investment companies.

The format of the balance sheet, income statement, statement of cash flows, statement of changes in equity, and the contents of notes to the financial statements for entities preparing their financial statements in accordance with Polish GAAP are determined by the Accounting Act. Companies listed on the Warsaw Stock Exchange, when preparing the financial statements in accordance with Polish GAAP, are guided by specific regulations for public issuers. This includes reconciliation between the results reported in accordance with Polish accounting

principles and those that would have been met if IFRS, as adopted by the EU, had been applied.

Moreover, the Accounting Act provides some exemptions for entities meeting the definition of a small or micro company. They relate, among others, to the layout and content of financial statements, prudence principle, depreciation and amortization.

3.4 Financial reporting, publication and audit requirements

Financial reporting

All entities governed by the Accounting Act are obliged to prepare their standalone and consolidated financial statements (the latter ones only if certain criteria are met) for each financial year. The financial year does not have to be the calendar year. Listed companies are additionally obliged to publish semi-annual and quarterly reports. An entity must also prepare financial statements as of the date of the close of accounting records, and as a result of other events leading to the termination of the activities of an entity, for example, the close of business (liquidation date).

The standalone and consolidated financial statements should be prepared within three months after the balance sheet date and approved within six months after the balance sheet date.

Directors' report

Specific entities such as, for example, joint-stock companies, limited liability companies, selected partnerships, mutual insurance companies, co- operatives, state-owned companies, investment funds and investment companies prepare, in addition to the financial statements, a financial review by management - the management report (the Director's report). The scope of the report is defined in legal regulations and includes topics such as:

- Description of events that significantly impact upon the entity's performance and that occurred during the reported period and after its closing date, till the date the financial statements are approved
- Predicted development of the entity
- Major achievements in the research and development area
- Actual and planned financial situation, including financial ratios
- Details about transactions in own shares
- Information on branches (business units)
- Financial risk management objectives and methods
- Key financial and nonfinancial efficiency metrics in relations to operations, as well as information on employment and natural environment
- Information on the application of corporate governance rules (only public companies)
- Where there is a link between the values disclosed in the annual financial statement and the information included in the management report of the given entity, the management report should include references to the amounts disclosed in the financial statement, as well as additional explanations concerning those amounts.

A micro and small entities which are obliged to draw up a management report on the activities of the entity may not draw up such a report provided that in the additional information, the information relating to the acquisition of own shares will be disclosed.

Compensation report

Starting from 2020, the Supervisory Board members in listed entities are obliged to prepare an annual report on the remuneration of the management board and the supervisory board and then to pass it to the auditor's assessment. The first such annual report shall cover the period 2019-2020.

Statement of non-financial information

The listed entities that exceed the given thresholds are also required to present a statement and a consolidated statement of non-financial information. This statement includes among others:

- Description of the business model
- Key non-financial performance ratios
- Description of social, environment, human rights and anti-corruption policies, the associated risks and the effects of application of those policies

That statement may be published on the entity's web pages.

Publication requirements

Management is required to file the annual financial statements to the registration court together with the following documents:

- Auditor's report, if the statements were subject to an audit
- Shareholders' resolution on the approval of the financial statements and distribution of profit or coverage of loss
- Directors' report (if applicable)
- The report on payments to the public administration (if applicable).

Abovementioned documents should be filed with National Court Register (KRS) within 15 days after the approval.

If not approved within 6 months after balance sheet date, additional filling is required from the entities which have not managed to approve their financial statements in the prescribed dates.

Listed companies are also required to file their financial statements with the Polish Financial Supervision Authority including interim (quarterly and semi-annual) reporting.

Electronic format of financial statements

In 2018, the Accounting Act imposed a requirement to prepare the financial statements in an electronic format. Financial statements need to be signed with a qualified electronic signature, trusted signature or a personal signature, by all member of the Management Board and the person responsible for keeping the books. The electronic financial statements should also be filed electronically to the National Court Register.

In addition, financial statements (as of today - other than those prepared under IFRS) should conform to the logical structure published by the Ministry of Finance.

In relation to financial statements prepared under IFRS, for financial years beginning on or after 1 January 2020, all annual financial reports of entities listed on regulated stock market in European Union, must be prepared in XHTML format.

Additionally, primary financial statements in annual consolidated financial reports shall be labelled with XBRL "tags". Those "tags" will be obligatory also for consolidated explanatory notes in reports prepared for financial years beginning on or after 1 January 2022.

As of the time of writing of this Guide, the conclusion about the optional postponement of ESEF requirements by one year is reached in the European Union. Polish Ministry of Finance and Polish Financial Supervision Authority issued a statement that they opt for a postponement of ESEF requirements by one year but the implementation of this option into Polish law is not finalised.

Audit requirements

Polish statutory audit requirements apply to all annual consolidated financial statements and to the annual standalone financial statements of the following entities that operate as a going concern:

- Banks, insurance companies, reinsurance companies, pension funds, investment funds (including alternative, closed, open and specialized funds), investment fund management companies, joint-stock

companies and public companies, payment institutions, brokerage houses and firms

- Other entities that meet at least two of the following three thresholds in the financial year preceding the financial year for which the financial statements were drawn up:
  - Annual average employment (equivalent of 50 individuals employed full-time)
  - Total assets of at the end of the financial year (the PLN equivalent of €2.5 million or greater)
  - Net sales including financial income for the financial year (the PLN equivalent of €5 million or greater.

The statutory audit requirements also apply to entities after merger for the year when the merger occurred.

All statutory IFRS financial statements are subject to audit requirements.

There are also additional requirements in relation to audit or review of interim financial statements of public companies and investment funds.

Audits are governed by the relevant legal requirements in force which include:

- Chapter 7 of the Accounting Act
- Auditors Act
- International Standards on Auditing in the version adopted as the National Auditing Standards by the National Council of Statutory Auditors
- Regulation (EU) No 537/2014 of the European Parliament and the council on specific requirements regarding statutory audit of public-interest entities.

3.5

Consolidation

Consolidation requirements

A capital group is a group which comprises a holding company and its subsidiaries.

According to the Accounting Act, a holding company is a company that controls another entity.

A capital group draws up its consolidated financial statements on the basis of standalone financial statements of entities that belong to the group. Groups which, in the preceding and current financial years, did not exceed at least two out of three of the following thresholds before intragroup eliminations:

- Annual average employment - equivalent of 250 individuals employed in full time
- Total assets of all group entities - PLN38.4 million
- Net sales revenues from goods and services of all group entities - PLN76.8 million

or after intragroup eliminations:

- Annual average employment - equivalent of 250 individuals employed in full time
- Total assets of all group entities - PLN32 million
- Net sales revenues from goods and services of all group entities - PLN64 million are exempt from drawing up the consolidated financial statements.

A subsidiary is excluded from consolidation if:

- The shares in such entity were acquired, purchased or otherwise obtained for the sole purpose of subsequent resale within one year from the date of acquisition
- There are severe long term restrictions on the exercise of control over the entity which prevent free disposal of its assets, including net profit generated by this entity or which prevent exercise of control over the bodies managing the entity
- It is impossible to get the information necessary for preparation of a consolidated financial statement without delay incurring unreasonably high cost (applies in exceptional cases only).

A subsidiary does not have to be included in the consolidated financial statements if the amounts stated in that entity's financial statements are immaterial in relation to the holding company's financial statements.

Consolidated financial statements

Consolidated financial statements comprise:

- A consolidated balance sheet
- A consolidated income statement
- A consolidated statement of cash flows
- A consolidated statement of changes in equity
- Notes to the consolidated financial statements (split into an introduction and additional notes).

Consolidated financial statements should be accompanied by a Group Directors' report prepared by the Management Board of the holding company. Group Directors' report can be prepared together with a Directors' report of the holding entity as a single report.

Consolidated financial statements should be prepared at the same balance sheet date and for the same financial year as the financial statements of the holding company. If this date is not the same for all entities within the group, then consolidation may cover financial statements drawn up for a twelvemonth period different to the financial year, if the balance sheet date of those financial statements is earlier by no more than three months of the balance sheet date adopted by the group. Companies included in the consolidation should adopt consistent accounting policies and consistent methods of preparation of financial statements. If the accounting policies of consolidated entities differ from those applied for consolidation, then appropriate adjustments must be carried out at the consolidation level. According to the Accounting Act, separate financial statements may be published before consolidated financial statements.

Methods to include entities in consolidated financial statements

A subsidiary is consolidated using the full consolidation method. Joint ventures are consolidated using a proportional consolidation method or accounted for using an equity method. Associates are accounted for using the equity method. When the associate prepares its consolidated financial statements, the equity method applies to the net consolidated assets of the associate.

3.6 Hot topics in accounting with potential implications for the real estate industry

COVID-19 pandemic

The coronavirus pandemic has significantly impacted the economy and is still ongoing. Many countries have imposed travel bans and lockdowns on millions of people. Businesses are dealing with lost revenue and disrupted supply chains.

As a consequence, many aspects of accounting requirements should be considered by companies when addressing the financial effects of the coronavirus pandemic in the preparation of financial statements. The examples of financial reporting issues which should be taken into account by real estate industry are the following:

- → Going concern assessment
- → Fair value measurement of investment property
- → Granting rent concessions and recognition of rental income
- → Loan covenants and classification of liabilities as current or non-current
- → Renegotiation of debt agreements (eg. repayments deferral, etc.)
- → Government grants / government assistance
- → Expected credit losses on trade receivables
- → Impairment

Also, higher degree of uncertainty regarding estimates and assumptions used by the management leads to higher sensitivity of reported figures. As a result, companies should take into consideration the importance of providing sufficiently detailed disclosures in the financial statements. Disclosures should be clear, relevant and they have to depict the impact of the pandemic on an entity. They should also provide an explanation of the assumptions used for the preparation of financial statements. The significance of disclosures is emphasized both by regulators and standard setters (including European Securities and Markets Authority (ESMA) and Polish Ministry of Finance).

Moreover, stakeholders are increasingly concerned about the impact of the COVID-19 pandemic on entities' ability to continue as a going concern, given the significant economic downturn and, particularly, the reduction in entities' revenue, profitability and liquidity. This has increased the importance of going concern assessments and the related disclosures.

After the coronavirus outbreak, the Ministry of Finance issued several Q&A's which are dedicated to accounting and reporting in the light of COVID-19 pandemic. Q&As relate, among others, to: changes in reporting deadlines, accounting for government grants or inventory count. On Ministry of Finance's website, companies may find also specific guidelines focusing on the preparation and auditing of financial statements after the coronavirus outbreak.

Moreover, in December 2020, the Polish Accounting Standards Committee issued its recommendations "Financial statements in the light of COVID -19 pandemic". It addresses challenges with the application of the Accounting Act and related regulations in current unusual times. The considerations focus mainly on going concern assessment, presentation and disclosure of government grants, additional costs incurred as a result of the pandemic, fair value measurement and many others.

Limited partnerships becoming CIT taxpayers

Many real estate companies in Poland operate as limited partnerships.

Starting from 2021 changes in tax law (described in section 2.2.3) entered into force and limited partnerships became CIT taxpayers. The company had to choose whether it prefers to be a taxpayer starting from January 1, 2021 or starting from May 1, 2021.

The change in tax regulations will have its impact on recognition of deferred tax on temporary differences arising in limited partnership.

Before the change of the tax law, such company was tax transparent and its results were taxed at the level of an owner. As a consequence, abovementioned deferred tax was recognized by its owner (the parent). After the change in CIT law, limited partnership is required to recognize deferred tax in its accounting books.

IV

Contacts

Real Estate Advisory Group

Anna Kicińska

Anna.Kicinska@pl.ey.com

+48 505 107 010

Anna Kicińska is a Partner in Strategy and Transactions Department and Leader of the Real Estate Advisory Group. She has over twenty years of real estate experience in transaction support, valuations, market and feasibility analysis and strategic real estate management. She was leading major real estate asset and M&A transactions in the CEE region. Since 1997 she is a certified Polish appraiser and since 2001 a member of The Royal Institution of Chartered Surveyors (MRICS). She is also Certified Commercial Investment Member (CCIM) and Urban Land Institute Member (ULI).

Anna Andrzejewska

Anna.Andrzejewska@pl.ey.com

+ 48 660 440 137

Anna Andrzejewska is a Senior Manager in the Real Estate Advisory Group. She specializes in strategic advisory consultancy in the real estate sector, especially in corporate strategic advisory including portfolio & processes management, consolidations & relocations, optimal business locations. She graduated from the University of Łódź with Master's degree in Finance and Banking and specialization in Investments and Real Estate. She completed a post-graduate School of Real Estate Valuation at Warsaw School of Technology. She is a certified Polish real estate manager and a member of The Royal Institution of Chartered Surveyors (MRICS).

Dominik Wojdat

Dominik.Wojdat@pl.ey.com

+ 48 519 511 412

Dominik Wojdat is a Senior Manager in the Real Estate Advisory Group. He has broad experience in providing both developers and investors with market, highest & best use and feasibility studies for commercial as well as residential properties. Dominik also conducted valuations for accounting, investment and loan security purposes. He graduated from Faculty of Geography and Regional Studies at University of Warsaw. He completed a post-graduate property management studies at Warsaw University of Technology and became a certified property manager. Dominik is Certified Commercial Investment Member (CCIM) and member of the Royal Institution of Chartered Surveyors (RICS).

Paulina Marcinek

Paulina.Marcinek@pl.ey.com

+ 48 502 314 687

Paulina Marcinek is a Manager in the Real Estate Advisory Group. Paulina has over 10 years of real estate experience in providing real estate advisory services including market analysis, highest & best use and feasibility studies, valuation for accounting, investment and loan security purposes and transaction support. She graduated from the Warsaw School of Economics with Master's degree in Finance and Banking and specialization in Corporate Finance and International Financial Markets. She also completed a post-graduate real estate valuation studies at Warsaw University of Technology. She is a certified Polish appraiser and a member of The Royal Institution of Chartered Surveyors (MRICS).

Maciej Prokopowicz

Maciej.Prokopowicz@pl.ey.com

+ 48 512 147 615

Maciej Prokopowicz is a Manager in the Real Estate Advisory Group. He has broad experience in land, commercial and residential property valuations conducted in Poland and abroad, especially in CSE region including Czech Republic, Bulgaria, Moldova, Albania, Slovenia, Croatia and Serbia. Apart from providing property valuations of both single assets and portfolios he also gained experience in real estate advisory services including market analysis, highest & best use analysis and feasibility studies. He graduated from the Warsaw School of Economics with Master's degree in Finance and Accounting. He also completed a post-graduate real estate valuation studies at Warsaw University of Technology.

Assurance Services

Łukasz Jarzynka

Lukasz.Jarzynka@pl.ey.com

+ 48 510 201 290

Łukasz is an Associate Partner in Warsaw Office and Head of EY Real Estate Audit. Łukasz has over 15 years of experience in audit and is Polish Chartered Accountant. He gained extensive experience in auditing and advising both large and multinational groups, as well as smaller private clients, IPO/SPO transactions and audit of listed companies, with focus on the real estate market.

Mariusz Kędzierski

Mariusz.Kedzierski@pl.ey.com

+ 48 501 487 796

Mariusz is an Associate Partner in EY Assurance and member of the Real Estate Group at EY's Warsaw office. Mariusz is Polish Chartered Accountant and has over 13 years of experience in audit, including real estate companies. He specializes in audits of entities from real estate market (real estate groups / funds, listed residentials and real estate developers). He has also experience in IPO audits of reals estate groups.

Katarzyna Gołąb

Katarzyna.Golab@pl.ey.com

+ 48 519 511 437

Katarzyna is a Senior Manager in EY Assurance. She is Polish Certified Auditor and ACCA. Member of EY Poland Real Estate Group at EY's Warsaw office, with over 9 years of experience in audit. Katarzyna was involved in audits of the financial statements and reporting packages prepared both under International Financial Standards, Polish Accounting Standards and US GAAP, including publicly listed companies, as well as projects aiming to introduce or test SOX controls. She specializes in audits of entities from real estate market, including real estate groups, developers and constructions companies.

Agata Anszperger

Agata.Anszperger@pl.ey.com

+48 512 147 471

Agata is Senior Manager in Assurance Services of EY Warsaw. Member of EY Poland Real Estate Group at EY's Warsaw office, with over 12 years of experience in audit. She is experienced in all aspects of auditing single and consolidated financial statements according to Polish and International Financial Reporting Standards (IFRS). She has been responsible for auditing Polish private and publicly owned capital groups listed on domestic and foreign stock exchanges. She specializes mostly in Companies operating in development, construction, media & entertaiment, energy and manufacturing.

Roman Kostiak

Roman.Kostiak@pl.ey.com

+48 519 033 760

Roman is a Manager in EY Assurance. He has over 7 years of experience in audit, including Companies operating in Real Estate sector. Roman has a broad experience in audit of the financial statements and reporting packages prepared under Polish Accounting Standards as well as International Financial Reporting Standards. Roman is involved in other services e.g. internal audits, audits under ISA (special purpose financial statements) and reporting on effectiveness of internal control systems (SOX). He specializes in audits of entities from Real Estate market (including international groups and funds).

IFRS Desk

Anna Sirocka

Anna.Sirocka@pl.ey.com

+ 48 602 509 848

Anna is EY IFRS Desk Leader in Poland. She has over 20 years of professional experience as an auditor and accounting expert. She is Polish Chartered Accountant, Certified Internal Auditor, member of ACCA and member of Accounting Standards Committee in Poland (appointed by the Minister of Finance). She is involved as IFRS subject matter expert during audits of multinational groups, listed companies as well as smaller private clients operating on real estate market. She participated in numerous IPOs, mergers and acquisitions with accounting advisory services.

Małgorzata Matusewicz

Małgorzata.Matusewicz@pl.ey.com

+ 48 510 201 220

Małgorzata is an Associate Partner in the EY global IFRS Desk. She is Polish Chartered Accountant and member of ACCA. Małgorzata is responsible for assisting clients and EY teams by providing consultations on complex accounting issues and promoting consistent interpretation and application of IFRS. Malgorzata has also many years of experience in accounting advisory - accounting opinions, IFRS conversions and reorganisation of reporting processes.

Katarzyna Marzec

Katarzyna.Marzec@pl.ey.com

+ 48 505 171 632

Katarzyna is a Manager in the EY IFRS Desk in Poland.

She is Polish Chartered Accountant and member of ACCA.

Katarzyna is a part of a team assisting clients and EY teams by providing consultations on complex accounting issues and promoting consistent interpretation and application of IFRS. Katarzyna has participated in accounting advisory projects relating to IFRS conversions, implementation of new standards, etc.

TAX Services

Tomasz Ożdziński

Tomasz.Ozdzinski@pl.ey.com

+ 48 573 339 341

Tomasz Ożdziński is the head of the Tax Real Estate Group of EY in Poland and a member of EY's Transaction Tax (M&A) Team. He is a graduate of the Faculty of Law and Administration of the University of Adam Mickiewicz in Poznań and an Executive Programme in Real Estate at the Solvay Brussels School of Economics & Management at Université Libre de Bruxelles. Tomasz is a certified tax advisor and has over two decades of experience in managing large, complex projects, including in particular transaction services and restructurings, undertaken both locally and internationally.

Michał Sawicki

Michal.Sawicki@pl.ey.com

+ 48 510 201 301

Michal Sawicki is an Assiociate Partner in Tax Real Estate Group at EY's Warsaw office. He has been with EY since 2007. He is a certified tax advisor. His skills include advising on global restructurings, transaction support and structuring, tax accounting. He was involved in projects concerning tax issues in relation to the process of setting up, operating and restructuring of companies, tax assistance in establishing tax effective exit scenarios, international tax structuring. Michal is an author of various articles relating to tax aspects of investing on the real estate market and co-author of the book "Taxation of the Real Estate Market".

Michał Koper

Michal.Koper@pl.ey.com

+48 519 511 485

Michał Koper is an Associate Partner within International Taxation and Transaction Services and Real Estate Group of EY in Warsaw. He has been with EY since 2006. From 2013 to 2015 he held a position at Ernst & Young LLP's International Tax Services group based in New York where he led the Polish tax desk. He is a certified Polish tax advisor. His professional skills include advising on tax planning for international investments in Poland, tax effective ownership structures and financing schemes, global restructurings, providing tax advisory services on domestic tax law. He was involved in projects concerning tax aspects of setting up, operating and restructuring of companies, tax assistance in establishing tax effective exit scenarios. Michał is a co-author of the book "Taxation of the Real Estate Market" and author of various articles relating to tax issues.

Agnieszka Owsiak

Agnieszka.Owsiak@pl.ey.com

+48 512 147 446

Agnieszka Owsiak is a Manager within Indirect Taxation and Real Estate Group of EY in Warsaw. Agnieszka has 14 years of experience in advising companies and people running business. She is specialized in ongoing consultancy for national and foreign companies, mainly in the area of indirect taxation. Her professional skills include advising on tax planning for international investments in Poland, different types of restructuring, but also with qualifying of the transferred set of assets for the tax purposes.

Edyta Winnicka

Edyta.Winnicka @pl.ey.com

+ 48 573 339 215

Edyta Winnicka is a Manager within International Taxation and Transaction Services of EY in Warsaw. She has been with EY since 2016 and prior to joining EY she has gained valuable experience working in other Big Four law firm and independent law firm. She has extensive experience in tax advisory on international projects involving numerous jurisdictions. She has worked on a number of deals involving mergers & acquisitions, demerger, transformations, sales and part disposals, including multidisciplinary projects.

Michał Pacyga

Michal.Pacyga@pl.ey.com

+48 789 07 496

Michał Pacyga is a Manager within International Taxation and Transaction Services and Real Estate Group of EY in Warsaw. Michał is legal advisor and a member of The Regional Chamber of Legal Advisers in Warsaw. He is also a certified Polish tax advisor. Michał has comprehensive theoretical and practical M&A knowledge. He participated in numerous due diligence projects, tax structuring's, contract negotiations and post- merger integrations. He has extensive transaction support experience, as he advised in various complex restructuring operations, both as a tax and legal advisor. He is co-author of the book entitled "Real estate tax in practice" (2016) and an author of a number of tax related publications in professional press.

Maksym Jabłkiewicz

Maksym.Jablkiewicz@pl.ey.com

+48 508 018 431

Maksym Jabłkiewicz is a Manager within International Taxation and Transaction Services and Real Estate Group of EY in Warsaw. Maksym focuses on tax aspects of cross-border transactions and restructurings. He is a licensed tax advisor. He has experience in buy-side and sell-side transactions as well as multinational restructurings, including companies from real estate sector. His clients include private equity firms and strategic corporate investors.

Arkadiusz Kołłątaj

Arkadiusz.Kollataj@pl.ey.com

+ 48 573 339 010

Arkadiusz Kołłątaj is a Manager within International Taxation and Transaction Services of EY in Warsaw. He has been with EY since 2014.

He has broad experience in providing tax advisory services for domestic and international Clients including in particular the following areas: effective investment structures, reorganizations and structuring of financing flows, withholding tax as well as providing support related to the obligations connected with Mandatory Disclosure Rules (MDR).

Legal Services

Zuzanna Zakrzewska

Zuzanna.Zakrzewska@pl.ey.com

+ 48 602 789 839

Zuzanna is an advocate with almost twenty years of experience in legal advisory for domestic and international entities from different sectors. She has extensive experience in providing legal support and day to day legal advises to companies particularly from the real estate, financial services and energy sector. Zuzanna specializes in providing legal assistance related to the corporate law including restructuring processes and M&A transactions. She has advised in a numerous transactions involving the acquisition of companies and assets related to real estate both on the buyers and sellers side. Zuzanna also advised clients during processes of examination of legal status of the real estate as well as during negotiating of the lease agreements.

Katarzyna Kłaczyńska

Katarzyna.Klaczynska@pl.ey.com

+ 48 519 511 521

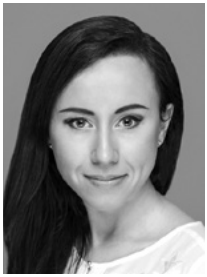
Katarzyna Kłaczyńska, LL.M., is an attorney specializing in energy and environmental matters. Each year since 2013 she has been recognized by Chambers & Partners ranking as one of leading environmental law attorneys in Poland. She has also been recommended by Who's Who Legal for her climate change law expertise. She has worked with clients representing variety of sectors, assisting them in pursuing their environmental, sustainability and resources efficiency objectives. Katarzyna is a member of the New York Bar. She graduated from Jagiellonian University in Poland, and Harvard Law School, where she was granted Gammon Fellowship for Academic Excellence.

Magdalena Kasiarz

Magdalena.Kasiarz@pl.ey.com

+48 519 404 979

Magdalena Kasiarz is an advocate and Associate Partner in EY Law with 15 years of experience in advising on the sale, reorganization and liquidation of companies with international capital (conducting M&A transactions and legal audits), advising on the restructuring of capital groups, including mergers, divisions and transformations of companies, as well as cross-border mergers. She advised in numerous transactions on shares and assets related to real estate both on the buyers and sellers side. She also specializes in providing the ongoing legal assistance in the scope of civil law and company law, including preparation and negotiation of lease and service agreements.



Anna Palczewska

Anna.Palczewska@pl.ey.com

+ 48 797 971 828

Anna is a Manager and attorney-at-law with experience in legal advisory for businesses in the real estate and development sectors. Anna provides legal advice to Polish and foreign real estate developers and investment funds in the field of acquiring and disposing of commercial real estate, as well as preparing and completing real estate investment projects. She was involved in many due diligence projects, asset deals and share deals for real estate, as well as projects concerning the preparation and completion of investment processes. Anna graduated from the Jagiellonian University. She is a CCIM candidate.

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EY, Rondo ONZ 1, 00-124 Warsaw

SCORE No. 00379-162

ey.com/pl

Real Estate
Strategy and Transactions Services

Anna Kicińska
e-mail: Anna.Kicinska@pl.ey.com
Phone +48 505 107 010

Tax Services

Tomasz Ożdziński
e-mail: Tomasz.Ozdzinski@pl.ey.com
Phone + 48 573 339 341

Assurance Services

Łukasz Jarzynka
e-mail: Lukasz.Jarzynka@pl.ey.com
Phone + 48 510 201 290

Legal Services

Magdalena Kasiarz
e-mail: Magdalena.Kasiarz@pl.ey.com
Phone +48 519 404 979