

A black and white photograph of a door handle, likely a pull handle, mounted on a door. The handle is ornate and metallic, featuring a central ring and a rectangular plate above it. The background is a textured door surface. The text "Real Estate" is overlaid in a large, white, sans-serif font in the upper left quadrant.

# Real Estate

## 6.1. Real Estate investment market in Poland

At the outset, development of Polish commercial investment market trailed behind the rest of the real estate market. Investors were few and yields were in the double digits. It was not until 2004 and the advent of EU membership that the situation improved. That year marked the beginning of an intensive four year period of foreign investment in the Polish market. Over this period, the volume of transactions averaged just under EUR 4 billion a year; with a record-breaking volume of over EUR 4.4 billion in 2006; a far cry from 2001 when foreign investments were more or less limited to the Warsaw office market. Furthermore, the early years saw the commercial investment market plagued with a lack of available investment schemes, or mismanaged and overrented properties with high vacancy rates. The increasing number of transactions has not only stabilized investments, but completely changed the structure of yields (downward) and prices (upward).

Year 2009 obviously marked a historical low as less than EUR 500 m of transactional volume has been recorded. However, from 2010 onwards the market has substantially improved and in 2011-2014 total investors' activity bounced back to an average under EUR 3 billion per year.

Thanks to low interest rates and stable macroeconomic situation in 2015 the total volume of investment transactions in Poland went up to EUR 4 billion - a 31% increase compared to 2014. In 2016 the total volume of investment transactions was even higher - amounted to EUR 4.5 billion and was the second best in transaction history following 2006.

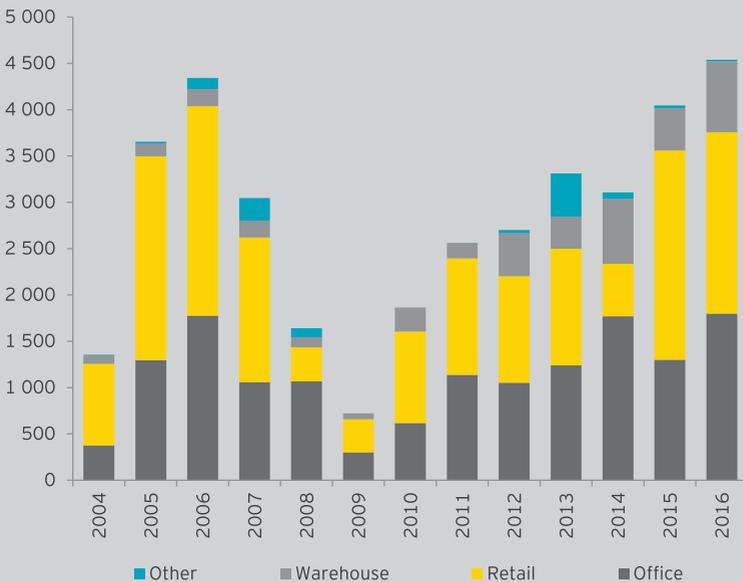
Warsaw remains a very important transaction market in Poland perceived by many investors as core, however, since 2015 this dominant position was overtaken by regional cities: Kraków, Wrocław, Poznań and Tricity have been targeted more and more frequently by international and domestic investors.

The second year in a row major investment activity was recorded in retail sector which outpaced office and logistics in terms of transaction volume.

Over the past several years, economic development has played a key role in the increase of transactions, noting such factors as: EU membership, falling PLN interest rates; population factors.

## Total investment volume in all sectors 2000-2016

(EUR '000)



## Major investors

The main players on the real estate investment market are foreign investment funds, and to a limited extent insurance companies, banks and wealthy foreign individuals.

Prior to 2005 the investment market was dominated by German, American, and Austrian players. After EU accession Poland witnessed an initial influx of Irish investors, later accompanied by Spanish and British investors. By 2009 the trend seemed

to have reversed; German funds have emerged well intact while the Irish, and even more so the Spanish investors, appear to be hampered by their own markets back home.

Currently, the majority of players on the Polish real estate investment market are foreign entities mostly from Germany, Austria, Netherlands and the UK, USA, Mauritius and South Africa. The main reason were good quality assets and still attractive yields in Poland.

Less than 10% of investment volume in Poland came from Polish capital, represented by dynamically developing investment fund Reino Partners and Polish asset manager PHN. Also the insurance company PZU TFI still holds the position of a major player in Poland, with a large prime properties' portfolio.

The minority share of Polish entities comes from the legal regulations as Polish law does not allow local pension funds with substantial accumulated capital to invest directly in the real estate. Instead, their portfolios are based on stocks and corporate bonds.

The ongoing plans concerning adjustment of tax regime to Real Estate Investment Trusts (REITs) structures might influence

the structure of invested capital in the future with more domestic individuals benefiting from returns on large-scale commercial real estate assets.

The most active real estate funds in Poland in 2016 were: Redefine Properties, Rockcastle Global RE, Invesco RE, Echo Polska Properties, CBRE Global Investors, Union Investment, EPF, Savills Investment Mgmt, Hines.

Newcomers in 2016 included Redefine Properties, HB Reavis, MVP Logistics and Bouwfonds European Residential Fund. Also Asian investors are interested in buying real estate assets in Poland.

Capitalization rates generally appear to be around 5,5% - 6% for prime office, 5.0% - 7% for retail schemes and 6.5% - 7% for modern warehouse properties.



## 6.2. Acquisition of real estate by foreigners

As a rule, under current regulations (the Act on the Acquisition of Real Estate by Foreigners), foreign nationals (individuals and entities) wishing to purchase real estate in Poland must obtain a permit from the Minister of Internal Affairs and Administration.

Under the pertinent act, foreign investors must also obtain a permit from the Minister of Internal Affairs and Administration if they wish to purchase shares in a commercial company that has its registered office in Poland or execute any other legal transaction involving such shares, if a company that is the owner or perpetual usufructuary of real estate in Poland becomes, as the result of the purchase or other transaction, a “controlled” company. A permit is also required to purchase or subscribe for shares in an already controlled commercial company with its registered office in Poland if the company is the owner or perpetual usufructuary of real estate in Poland and the shares are purchased/ subscribed for by a foreign investor that is not a shareholder in that company.

There are, however, numerous exceptions to the above rule, the most important one concerning citizens and entrepreneurs (including companies) of EEA countries (EU countries together with Iceland, Liechtenstein and Norway) and Switzerland.

These citizens and entrepreneurs do not have to obtain a permit to acquire real estate.

The citizens and entrepreneurs (including companies) of EEA countries and Switzerland do not have to obtain a permit to acquire shares in companies which are owners or perpetual usufructuaries of real estate.

Consequently, the requirement to obtain a Minister of Internal Affairs and Administration permit to acquire real estate or shares in a company that is the owner or perpetual usufructuary of real estate currently applies mainly to foreigners from outside the EEA and Switzerland.

Real estate is defined in the Polish Civil Code as “land which constitutes a separate object of ownership and buildings permanently attached to the land or their parts if under special provisions they constitute an object of ownership separate from the land”.

In the above act, a foreigner is defined as:

- ▶ A person who is not a Polish citizen, or
- ▶ A legal person with its registered office outside Poland, or
- ▶ A partnership with its registered office abroad, established in accordance with the law of the relevant foreign country, or

- ▶ A company or a legal person with its registered office in Poland controlled directly or indirectly by the companies or person(s) mentioned in the items above.

A commercial company is deemed to be “controlled” if a foreigner or foreigners have directly or indirectly over 50% of votes at the general meeting of shareholders, also as a pledge, usufructuary or on the basis of agreements with other parties, or if foreigners constitute “dominant entities” in this company as defined in Article 4 § 1 point 4 (b), (c) or (e) of the Code of Commercial Companies.

The definition of a “dominant entity” in Article 4 § 1 point 4 (b), (c) or (e) of the Code of Commercial Companies covers the following:

- ▶ The entity is entitled to appoint and remove the majority of the members of the management board or supervisory board of another entity (dependent entity), also on the basis of agreements with third parties
- ▶ The entity has directly or indirectly a majority of votes in a dependent partnership or at the general meeting of a dependent cooperative, also on the basis of agreements with third parties.

A permit is issued on a foreigner’s application if:

- ▶ The acquisition of real estate by the foreigner does not pose a threat to national defense, safety or public order, and does not contravene social and health policy

- ▶ The foreigner can prove that he/she has links with Poland (e.g. Polish nationality, Polish origin, marriage to a Polish national, has a permit to temporarily reside in Poland, a permanent residence permit or a EU long-term residence permit, is a member of a managing authority of a controlled company in Poland, or conducts business or agricultural activity in Poland).

The area of real estate acquired by a foreign citizen (outside the EEA and Switzerland) for residential purposes cannot exceed 0.5 ha. If real estate is acquired by a foreigner conducting business operations in Poland, the area should be sufficient to meet the needs of that business.

Applications are currently reviewed within 3-5 months (including the time needed for consultations with the Minister of National Defence and the Minister of Agriculture) but the procedure sometimes takes longer. It also takes a few weeks to compile all the documents required before an application can be filed.

If the foreign investor intends to acquire real estate in Poland, for the purpose of securing its interests, it can submit an application and obtain a permit promise. This promise is subject to the relevant regulations on such permits. A permit promise is valid for one year from the issue date. During this period, the Minister cannot refuse to grant a permit unless there is a change in the material facts of the case.

In addition to the general exemptions available to EEA and Swiss citizens and entrepreneurs, a permit is not required, *inter alia*, in the following cases:

- ▶ Purchase of a self-contained apartment
- ▶ Purchase of a self-contained garage if connected with meeting the housing needs of the purchaser/owner of real estate or a self-contained apartment
- ▶ Purchase of real estate by a foreign citizen that has resided in Poland for at least 5 years (from the date a permanent residence permit or an EU long-term residence permit was obtained)
- ▶ Acquisition by a foreign citizen whose spouse is a Polish citizen, provided that the foreign citizen has resided in Poland for at least 2 years since obtaining a permanent residence permit or an EU long-term residence permit, of real estate which will become part of the spouses' joint marital property
- ▶ Purchase of real estate by a foreign citizen if on the date of purchase the foreign citizen is the statutory heir of the real estate seller, and if the seller has been the owner or perpetual usufructuary thereof for at least 5 years
- ▶ Purchase for business purposes by legal persons and partnerships which are not legal entities controlled directly or indirectly by foreigners of undeveloped real estate located within city limits whose area, together with the area of other real estate already owned in Poland by the same foreigner, does not exceed 0.4 ha

- ▶ Acquisition of real estate by a bank holding a mortgage as a result of an unsuccessful auction sale
- ▶ Acquisition (by purchase or otherwise) by a bank controlled directly or indirectly by foreign investors of shares or interests in a company or partnership which is the owner or perpetual usufructuary of real estate, if the acquisition involves enforcement of bank claims arising from its banking business
- ▶ Acquisition of shares in companies that are listed on a stock exchange or an OTC (over-the-counter) market
- ▶ Acquisition of shares in companies that are owners/perpetual usufructuaries of real estate the acquisition of which is exempt from the permit requirement. The above exemptions do not apply if the real estate is located in a border zone or constitutes agricultural land of over 1 ha.

Stamp duty of PLN 1,570 is payable on a permit (PLN 98 with respect to the promise).





### 6.3. Perpetual usufruct

Perpetual usufruct is a right of a nature similar to ownership, although it is established for a limited time. It is governed by the provisions of the Civil Code and the Real Estate Management Act. A perpetual usufruct right may be established on land owned by the state or by local municipal authorities.

Perpetual usufruct right, as a rule, is established for 99 years. In rare cases for a shorter period, however not less than 40 years. When this term ends, the perpetual usufruct right may be extended for another period of up to 99 years (further extensions are also possible). Extension can only be refused if important public interests are at stake.

In principle, a perpetual usufruct right is established by way of a contract drawn up in the form of a notarial deed (it must also be entered in the land and mortgage register). This contract will also cover the transfer of ownership of buildings (or other constructions) to the usufructuary.

Charges for the transfer of land in perpetual usufruct comprise a one-off fee on hand-over and annual fees thereafter. The initial fee is payable in a lump sum not later than on the perpetual usufruct contract execution date.

Annual fees are paid throughout the contract term (by 31 March each year) starting from the year following that

in which the perpetual usufruct was established. The initial fee amounts to 15%-25% of the value of the land, while the annual fees, as a rule, vary from 0.3% to 3% of the value depending on the purpose for which the land is taken in perpetual usufruct.

Buildings (or other structures) erected by the usufructuary on the land held in perpetual usufruct constitute the property of the usufructuary, while the general rule is that any buildings standing on the owner's land usually are the property of the owner of the land. Accordingly, the ownership of existing buildings must be transferred together with transfer of the perpetual usufruct right.

A usufructuary can freely dispose of its right, meaning that it can encumber its right or sell it. In such case, the provisions governing transfer of ownership apply.

At the end of the perpetual usufruct term, the usufructuary is entitled to compensation for any buildings (and other constructions) erected unless they were erected in breach of the perpetual usufruct contract. The amount of the compensation constitutes the market value of the buildings (or other constructions) on the usufruct expiry date.

There are, however, possibilities provided under Polish law which, upon fulfilment of certain conditions, allow the perpetual usufructuary to transform its right into an ownership right. There are two legal acts that provide for such possibility.

Act on transformation of the right of perpetual usufruct into an ownership right provides for regulations that enable the perpetual usufructuaries meeting requirements determined under this act to make a claim to have its right of perpetual usufruct transformed into an ownership right. Consent of the current

owner of the real estate in question is in such case not required. This possibility was granted to, above all, individual persons, housing cooperatives and persons having reprivatisation claims. As of 2011, this right was also granted to companies and entrepreneurs. However, due to the judgment of the Polish Constitutional Tribunal (of 10 March 2015, effective as of 17 March 2015), companies and entrepreneurs have been excluded from the scope of entitled entities.

Another possibility of transforming the right of perpetual usufruct into an ownership right is granted under the Act on Real Estate Management, which allows for the land held in perpetual usufruct to be sold to the current perpetual usufructuary, including companies and entrepreneurs. In this case however, the consent of an owner is required.

At the end of 2016, Polish government published a draft of an act on the transformation of perpetual usufruct of developed land for residential purposes into the ownership right. The draft act envisages that the perpetual usufruct right to the land developed with residential buildings will be transformed automatically, without a necessity to file any applications, by virtue of law, into the ownership right. The owners of the premises in buildings developed on the land held under perpetual usufruct right will become a co-owners of the land, instead of holding shares in perpetual usufruct right. The owners of premises will pay, up to 20 years, a special fee for transformation, in the amount of the last annual fee for perpetual usufruct. According to the newest statements of the government, it is planned that this conversion of perpetual usufruct into ownership will become applicable on 1 July 2017.



## 6.4. Leases

Polish and foreign legal entities and individuals may lease real estate without having to obtain a permit from the Minister of Internal Affairs and Administration. Polish law recognises two types of lease contract: *umowa najmu* and *umowa dzierżawy*. Under *umowa najmu* the lessee may only use the property, while under *umowa dzierżawy* the lessee may use the property and collect benefits therefrom. Both types of contract may be executed for a fixed or non-fixed term.

An example of a standard lease agreement (*umowa najmu*) would be the short-term lease of an apartment or office. A lease agreement (*umowa dzierżawy*), on the other hand, would typically be used for the lease of farmland or a site for development. Such categorization is however, subject to exceptions. As a rule, foreign investors willing to establish windfarms within the territory of Poland tend to conclude lease agreements for this purpose. According to a judgment of the Supreme Court, since the wind cannot be considered as a natural benefit, land on which windfarms are to be located should be used under the agreement of unnamed type, concluded in accordance with freedom of contract principle, to which (to the extent not provided under the agreement), respective provisions of the Civil Code on the lease agreement (*umowa dzierżawy*) should apply.

Any lease for a period of more than one year should be executed in writing. Both Polish and foreign entities can also use real estate under various leasing schemes (particularly on the basis of so-called “sale and lease back” transactions).

However, not required for the validity of concluded standard lease or lease agreements, it is advisable to conclude such contracts with date certain (certification by a public notary or administrative body). This is particularly recommended if the

foreign entrepreneur intends to make substantial investments within the leased area and agrees with the landlord on very narrow scope of termination possibilities. If the leased area is purchased by a third party and the respective agreement was not concluded with date certain, the new owner will be entitled to terminate the lease agreement with statutory notice periods, also when the lease agreement did not allow for earlier termination.

## 6.5. Real estate purchase agreements

Real estate can be acquired under a sale, donation, exchange or alienation agreement, or by way of inheritance. According to the Civil Code, a real estate purchase contract must be executed in the form of a notarial deed before a Polish notary. A contract in any other form will be null and void.

In case of agreements concluded with foreign investors, where the permit of the Minister of Internal Affairs and Administration referred to above is required, prior to obtaining such permit, a preliminary

agreement can be executed in which the seller undertakes to sell a specific real estate to the purchaser and the purchaser undertakes to pay the price for the real estate to the seller on a specific date or under a specific condition, such as obtaining of a said permit. After the Minister issues the permit, the agreement to transfer the ownership title to the real estate or the perpetual usufruct right should be executed in the form of a notarial deed, otherwise considered null and void.

## 6.6. Land and mortgage register

Once the final agreement to transfer the ownership title to the real estate or the perpetual usufruct right has been executed, the new owner or usufructuary should be entered in the land and mortgage register maintained by the appropriate court.

According to Article 5 of the Land and Mortgage Register Act in case of discrepancy between the real estate’s legal status disclosed in a land and mortgage register and

its actual legal status, the transfer of right to the real estate is effective, if the seller was disclosed in a land and mortgage register as the owner or perpetual usufructuary (principle of public warranty of a land and mortgage register) and the acquirer was acting in a good faith. The above principle protects the buyer of the land acting in good faith. The pertinent principle will however not be applicable in case of a share deal transaction.

## 6.7. Reprivatisation

After the Second World War, the Polish government nationalised considerable number of lands belonging to private owners. To date, Poland has not enacted any reprivatisation legislation. Thus, the only way to regain ownership is to prove in court or in the course of administrative proceedings that the land was nationalised in violation of the relevant provisions. There have been many cases where this was successfully achieved, however, in case there have already been irreversible legal consequences (usually meaning that the real estate has been disposed of in favour of third parties acting in good faith), the original owner will usually be entitled to compensation, instead of recovering the real estate itself.

Accordingly, before purchasing real estate (particularly from the state or a local government authority), care must be taken to ensure that no reprivatisation claims have been filed by former owners.

There are still ongoing disputes regarding the need to adopt an act, regulating in a comprehensive way the issues related to reprivatisation claims. However, until now

there are no draft regulations proposed within the aforementioned scope that could in fact be adopted.

Furthermore, after the judgement of the Constitutional Tribunal dated 19 July 2016, the so-called "Small Reprivatisation Act" came into force on 17 September 2016. This act provides limitations of restitution of ownership of real estate nationalized under the Warsaw Decree of 1945 or transferring claims for reestablishing the rights for such. According to the new act, in case when the real estate in Warsaw is e.g. assigned or used for public purposes, the Capital City of Warsaw may refuse to establish the right of perpetual usufruct to a previous owner of this real estate. A new provision is granting the State Treasury and the Capital City of Warsaw 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.



## 6.8. Investment process

Assuming that the land has been designated for a certain type of investment, a construction permit is required before the commencement of a building process.

The above can be issued:

- ▶ Directly based on the provisions of the local spatial development plan
- ▶ If there is no such plan for the respective area, a zoning decision (WZ) will be required. The investor, having obtained this decision and made other arrangements, can then apply for a construction permit.

At the end of the planning and construction process, the investor usually is required to obtain a use permit.

Unfortunately, on 1 January 2004 most of old local development plans (adopted before 1 January 1995) in Poland expired.

Therefore, until new plans are adopted (this process is time-consuming and requires substantial investments, which most municipalities cannot afford, therefore most areas are not covered by any plans), investors will have to apply for a land zoning decision. There are certain investments, that can be constructed solely based on the adopted local spatial development plan, including above all shopping malls and other large-scale commercial facilities, the trade area of which exceeds 2,000 m<sup>2</sup>.

From a legal perspective the development process is complicated and attempts to make local authorities adopt development plans have been ineffective. Thus in recent years, several reforms have been proposed to development regulations though none have to date been successfully passed.

## 6.9. Acquisition of agricultural land

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

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.

The new law provides for major restrictions in sale of agricultural land, such as:

- ▶ 5 years moratorium on sale of agricultural land owned by the State Treasury (Agricultural Property Agency); the moratorium does not pertain i.a. to agricultural land of the area below 2 ha or lands designated for other purposes in the zoning decision, local spatial development plan or study, lands in special economic zones; the land may also be sold upon obtaining Ministry of Agriculture permit
- ▶ 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
- ▶ Obligation to obtain a permit of the Chairman of the Agricultural Property Agency for sale / acquisition of an agricultural land to / by persons other than individual farmers, including companies, under pain of invalidity
- ▶ General prohibition on sale or transferring possession (e.g. under lease agreement) of an agricultural land acquired under Chairman of the Agricultural Property Agency consent within 10 years from its purchase. In case a sale or transfer of possession is necessary due to misfortune reasons being beyond the buyer's control, a common court is entitled to allow for the conclusion of the relevant agreement
- ▶ Agricultural Property Agency possess a pre-emption right to agricultural land regardless of the area (previously this right applied only to areas of at least 5ha)
- ▶ Agricultural Property Agency possess a buyout right in case other acquisitions that acquisitions under sale agreement e.g. in-kind contribution, merger, division or transformation of a current owner (perpetual usufructuary) of the land
- ▶ Agricultural Property Agency's right to buy of an agricultural land in case of partners change in partnerships
- ▶ Agricultural Property Agency was given a pre-emption and buyout right to purchase shares in companies owning an agricultural land, e.g. in case of share swap (excluding shares in public listed companies).

