The Real Estate Law Review

Sixth Edition

Editor
John Nevin

Law Business Research

The Real Estate Law Review

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EDITOR'S PREFACE

Real estate is a truly global industry. The worldwide impact of events of the preceding 12 months has confirmed that it is no longer possible to look at domestic markets in isolation. It is hoped that *The Real Estate Law Review* reflects this position. An evolving awareness of the global real estate market and an understanding of the practices, requirements and concerns of overseas investors is essential if practitioners and their clients are to take full advantage of investment trends as they develop.

The *Review* seeks to provide an overview of the state of the global real estate market. The theme this year has been one of uncertainty. First we had Brexit, as the UK voted to leave the EU, and then the result of the US election. It is probably fair to say that neither was expected, and while the significance of Brexit diminishes in a global context, the same cannot be said of Donald Trump's victory. It will be very interesting to see how the global real estate market evolves over the coming months. While there will undoubtedly be risks, there will also be opportunities. Investors and their professional advisers will need to develop an appropriate strategy to ensure that risks are assessed and opportunities are taken. By and large, markets do not like uncertainty and some of the positive outlook reflected in last year's edition has undoubtedly diminished.

The continued success of the *Review* is a true testament to its validity in the global real estate market. The sixth edition covers 37 jurisdictions, and we are delighted to welcome new contributions from around the world. Each contributor is a distinguished practitioner in his or her own jurisdiction and has provided invaluable insight into the issues pertinent to that jurisdiction in a global context.

Once again, I wish to express my deep and sincere gratitude to all my distinguished colleagues who have contributed to this edition of the *Review*. I would also like to thank Gideon Roberton and his publishing team for coordinating the contributions and compiling the sixth edition.

John Nevin
Slaughter and May
London
February 2017

Chapter 25

POLAND

Janusz Siekański and Radosław Waszkiewicz[1]

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Title to real estate

Polish law provides for two forms of title to real estate: ownership and perpetual usufruct. The ownership form is unlimited in time, while the perpetual usufruct is limited in time.

The ownership right provides the entitled entity with the broadest scope of authority over real estate. It allows the owner to, *inter alia*, use the real estate exclusively, develop it and collect profits from it. The owner is limited in its right only by law and principles consistent with public policy, and should exercise its right in accordance with the social and economic purpose of a given real estate. The owner may freely dispose of its real estate. The ownership right to real estate extends to the spaces over and under its surface, and also to buildings or any other installations or structures erected on the land that are firmly attached thereto (*superficies solo cedit* principle).

The perpetual usufruct right is akin to the ownership right, but is limited by time and the purpose for which it has been established. Moreover, it may only be established on real estate owned by public entities (the State Treasury or local governments). The entitlements of the perpetual usufructuary are similar to those associated with an ownership right; however, an agreement on the establishment of the pertinent right may impose specific limitations. In particular, a perpetual usufructuary is allowed sole use of the real estate and may dispose of its title. The key right of the perpetual usufructuary is the right to erect buildings on the real estate. Such buildings and structures are then held in ownership by the perpetual usufructuary, and such ownership is separate from the ownership of the land (this is one of few exceptions to the rule of ownership of the land extending to structures firmly attached

1 Janusz Siekański is a senior partner and Radosław Waszkiewicz is a partner at Sołtysiński Kawecki & Szlęzak. This chapter constitutes an updated version of the chapter from 2015, which was co-authored by Agnieszka Piskorska, a former senior counsel at Sołtysiński Kawecki & Szlęzak.

thereto). A perpetual usufruct right is usually established for 99 years; a shorter term (however, not less than 40 years) is possible if the economic aim does not require that the pertinent right be established for the maximum period. The right is also subject to renewal (the perpetual usufructuary needs to submit such a request not later than five years prior to the lapse of the original term). A perpetual usufruct right is subject to two types of fees that are not applicable in the case of an ownership right. The first fee constitutes a one-off payment to be made upon establishment of the perpetual usufruct, and usually varies from 15 to 25 per cent of the land's value. The second fee is an annual fee in an amount varying from 0.3 to 3 per cent of the market value of the land. The rate depends mainly on the purpose for which the land and the structures erected thereon are actually used. In addition, upon fulfilment of certain conditions, entities that were holders of perpetual usufruct rights on 13 October 2005 may apply to have their perpetual usufruct converted into an ownership right upon payment of an additional fee; however, in March 2015 this right was limited only to natural persons (to the exclusion of entities) by the Constitutional Tribunal.

The Polish system also recognises co-ownership (i.e., joint ownership by more than one entity) and joint perpetual usufruct rights.

When certain technical and formal requirements are fulfilled, it is possible to establish separate ownership of premises. This right is most commonly used in housing developments where owners of separate apartments constitute a compulsory commonwealth holding the land on which a given multi-apartment building is located in co-ownership or joint perpetual usufruct. However, such a right is also frequently applied to commercial premises in big commercial complexes, where the ownership of premises is held by different entities that are co-owners of the land on which such a commercial complex is located.

The Civil Code also provides for additional types of rights with respect to real estate (i.e., limited rights *in rem*). These rights include usufruct, easements, mortgages and cooperative types of ownership of separate premises. Usufruct is a narrower right than ownership, but is broader and stronger than a lease. Easements in general either increase the usefulness or possibilities of the development of land, or secure access to roads or infrastructure. A mortgage is a standard security instrument. Cooperative ownership of premises applies to houses and apartments built and owned by cooperatives, and is a way of granting the cooperative members rights to either houses or apartments within premises.

ii System of registration

With certain exceptions, any real estate is registered in the relevant land and mortgage register maintained by the competent district court. This register, divided into five sections, contains information on the location of real estate, its ownership status, possible encumbrances and claims of third parties, as well as mortgages. While the actual ownership and legal status of the real estate may in practice differ from the disclosure in the land and mortgage register, the entries in the register regarding title and encumbrances on the real estate enjoy a legal presumption of correctness, generally benefiting purchasers with the presumption of their having acted in good faith. However, if there is an 'annotation' (also called a 'remark') in a relevant land and mortgage register indicating that legal proceedings concerning a change of the corresponding information disclosed therein are pending, the above privilege of *bona fide* purchasers is waived. A description of the factual status of the land contained in the land and mortgage register, such as its borders, plot numbers and area, does not enjoy a legal presumption of correctness.

The contents of the land and mortgage registers with respect to the entries made are available to the public, both in the form of an excerpt obtained from the relevant court and online. However, this public access principle does not pertain to the actual files of source documents held by the district court (in particular, the documents that constituted the basis for making the respective entries, such as notarial deeds regarding transfers of title or establishment of encumbrances): such documents are available solely to entities holding title to the corresponding real property or entities that can demonstrate a justified legal interest in gaining access to pertinent files.

As a prevailing rule, entries in the land and mortgage register are not required for the effectiveness of transactions undertaken with respect to real estate, as they do not have constitutive character (i.e., they are only declaratory). The most typical exemptions from this rule are entries regarding the establishment or transfer of a perpetual usufruct right or mortgage, where the relevant entry is necessary for a given action to be fully effective.

Survey information about real estate, their locality, borders, area, plot numbers, type of soil and a description of the manner of actual use, is contained in the land and building survey. This is a register maintained by local municipal authorities, and the data from that register constitutes the basis for relevant entries in the first section of the land and mortgage register.

iii Choice of law

Although as a general rule parties to a contract are allowed to choose the applicable law, agreements concerning ownership rights or other rights *in rem* over real property, in accordance with the *lex rei sitae* principle, are mandatorily governed by Polish law. Additionally, an agreement transferring or merely creating an obligation to transfer the ownership of real estate should be executed in the form of a notarial deed, where the Polish notary public plays a significant role with respect to the conducting of the transaction and its later registration in the land and mortgage register.

II OVERVIEW OF REAL ESTATE ACTIVITY

After the second best year for Polish real estate market in history (with an annual volume of investment transactions that exceeded €4 billion), it was predicted that in 2016 the annual transaction volume will be similar. Although the numbers for 2016 are not available yet, the results for the first two quarters suggest those predictions were correct – the volume of investment transactions in the first six months amounted to approximately €2 billion. Of that, €1 billion was investment in the commercial real estate sector, €800 million in office real estate and €250 million in warehouse real estate.

Capitalisation rates for Warsaw office real estate stayed at 5.5 per cent with the vacancies rate reaching 15.4 per cent. Sixteen new office investment projects received a use permit (a 30 per cent increase compared to the previous year). The warehouse real estate market grew because of demand from logistics firms and chain stores. The vacancies rate in the warehouse real estate stayed around 5.7 per cent. The vacancies rate for commercial real estate in the 18 largest regional markets was at a low 3 per cent.

III FOREIGN INVESTMENT

Foreign acquisition of ownership rights or perpetual usufruct rights to real property is subject to restrictions provided for under the Act on the Acquisition of Real Estate by Foreigners, under which a foreigner is required to obtain a permit to be able to acquire real estate located on the territory of Poland. The term 'foreigner' is understood to be both a natural person that is not a Polish citizen and a legal person seated abroad; it covers also legal persons or entities seated in Poland but controlled (directly or indirectly) by foreigners. The permit is issued by the Minister of the Interior, provided that no objection is raised by the Minister of National Defence (and additionally, in the case of agricultural and forest real estate, by the Minister of Agricultural Development). Moreover, such a permit may also be required in the case of indirect acquisition of any of the above-mentioned titles to real estate (i.e., where a foreigner acquires shares in a company that owns or is a perpetual usufructuary of real estate within the territory of Poland).

Citizens or entrepreneurs from countries belonging to the European Economic Area are exempt from the obligation to obtain such a permit. The remaining restriction regarding agricultural real estate was eliminated as of 1 May 2016. However, new legislation that came into force at the end of April 2016 introduced further obstacles in acquiring and selling agricultural land for both foreign and domestic entities, including a ban on the sale of agricultural land by the state during the next five years and restrictions regarding entities that may acquire agricultural land. Because of the new legislation that largely limited the possibility of acquiring land for commercial purposes as well as the statutory right of first refusal enjoyed by the State Agricultural Land Agency, any transactions pertaining to agricultural real estate will require a higher level of due diligence and proper planning.

Tenants of agricultural real properties generally enjoy the right of first refusal in cases of sales of such properties, provided that the tenancy lasts at least three years.

IV STRUCTURING THE INVESTMENT

Similarly to other jurisdictions, real estate transactions in Poland are typically either structured as asset deals or share deals. In an asset deal, the real estate is acquired directly from its owner (being either an individual or a legal entity). In a share deal, the transaction encompasses shares in an entity that owns real estate. The decision as to which type of transaction to carry out will depend on the business needs of the parties to the contemplated transaction, and will vary on a case-by-case basis. Some of the most important factors to take into account would be the timeline of the transaction, its tax implications and the scope of due diligence to be conducted.

For tax reasons, two types of special purpose vehicles are most common on the Polish market as holders of real estates: limited liability companies and limited partnerships. These are considered as not causing obstacles with regard to their operation, and they are especially popular among investors (including foreign funds) as they are not subject to special regulatory restrictions with respect to the form in which the investment process shall be conducted. The income of limited liability companies is subject to corporate income tax, and in cases where dividends are payable or paid to the shareholders, income tax must further be paid thereon. A limited partnership is composed of one or more general partners and one or more limited partners. A limited partnership is an entity that forms an organisational unit with no legal personality; however, it may acquire real estate in its own name. Limited partners bear no

management authority and are solely liable for debts incurred by the partnership to the extent of their registered investment. Therefore, general partners carry more liability in cases of financial loss. Very often, the general partner is a limited liability company. A limited partnership is not subject to taxation of income at the partnership level (corporate income tax or personal income tax), and only the partners are considered as taxpayers with respect to their income. Such tax benefits are the main reason why investors most commonly decide to form a limited partnership as a special purpose vehicle for carrying out commercial real estate projects.

V REAL ESTATE OWNERSHIP

i Planning

The rules governing zoning and the general development of land are mainly determined at local municipal level; however, certain more general issues are resolved and determined at province and central government level. These matters are regulated by the Act on Spatial Planning and Development. Municipal zoning plans (adopted by way of a resolution of a given municipal council) are regulations specifying designation of land, and the manner of and restrictions on the development and use of land. Zoning plans outline the spatial policy of a given municipality and at the same time constitute binding local laws. If a local zoning plan is not adopted for a given area, then a party interested in developing the land needs to obtain either an individual decision on land development or (in the case of public interest investments) a decision on the localisation of the public interest investment. The process of preparation and adoption of local zoning plans includes consultations with the respective authorities, as well as the general public. Each entity may submit its observations regarding the plan under preparation, which may (but do not have to) be introduced into the draft of the plan. In accordance with the Property Management Act, municipalities enjoy a statutory pre-emptive right in cases of sale of real estate or perpetual usufruct rights thereto if the pertinent real estate is located within an area allocated in the zoning plan for public purposes or if a decision on the localisation of the public purpose investment has been issued. Such real estate may also be subject to expropriation.

The construction process and obligations of the owners of buildings and structures are regulated in the Construction Law. Generally, it is necessary to obtain a construction permit for most (if not all) larger commercial, industrial or housing investments. If a planned investment is in accordance with the provisions of the zoning plan (or, if a zoning plan does not exist, if the basic parameters and designation of the investment are confirmed in the individual zoning decision), a complete construction design is prepared and neighbours that are within 'impact zones' of the planned investment do not raise serious and justified objections, the planned investment can be approved.

On 9 October 2015 the Polish parliament adopted a law on revitalisation that regulates the principles and procedures for restoration of 'degraded' areas (i.e., areas where a concentration of negative social phenomena occurs, such as unemployment, poverty, crime, poor education or where the environmental quality standards have been exceeded). The decision on whether an area is considered degraded or earmarked for revitalisation is taken by a competent municipal council via a resolution constituting a local law deed. The resolution empowers the municipal council to grant the pre-emptive right to all of the real properties located in the revitalisation area to the municipality competent for the venue. Furthermore, under the new legislation, it will be possible to establish 'special revitalisation zones' in the

areas subject to revitalisation, for a maximum period of 10 years, within which administrative procedures will be facilitated, subsidies for renovation works will be possible and exemptions from tender procedures on the sale of real properties will be in place. In these zones, *inter alia*, rental housing is to be developed. These activities will result in a substantial improvement in the quality of life of the inhabitants.

ii Environment

There are two regimes of liability for soil contamination, depending upon the period in which the contamination originates. Soil contamination that occurred prior to 30 April 2007 or that may be attributed to activity completed prior to that date is regulated by the Environmental Law. Pursuant thereto, the current holder of land (the person disclosed in the land register – usually the owner of the land or its perpetual usufructuary) should comply with the soil contamination standards defined in the implementing legislation. If the soil contamination exceeds statutory limits, the holder of the land right is obligated to reduce the contamination to acceptable standards, unless such an entity proves that the soil contamination was caused by a third party after the acquisition of the right to the land by the current holder of the land. Consequently, liability for 'historical' contamination will usually rest exclusively with the current holder of the land. Contamination that occurred after 30 April 2007 (or that could be attributed to an activity completed after that date) is subject to the Act on Prevention and Remediation of Environmental Damage of 2007, which imposes a strict duty to undertake preventive or remedial actions with respect to contamination of soil, in particular contamination that may constitute danger to human health. The duty pertains in particular to preventive or remedial actions with respect to an imminent threat of environmental damage or to environmental damage caused by activities that 'pose a risk to environment'. If the preventive actions do not eliminate the imminent threat to the environment or the environmental damage has already occurred, the operator should immediately notify such a fact to the competent authority. Subsequently, the terms and conditions of remedial actions should be negotiated and agreed upon between the operator and the authority. Failure to implement remedial action gives the competent authority the power to order the operator unilaterally to take appropriate remedial actions or to cover the cost of remediation effected by the authority. The provisions of the pertinent Act refer solely to the operator without further specifying its legal title to the land.

iii Tax

As a rule, transactions involving the sale of real estate between entrepreneurs are subject to VAT. There are two main exceptions under which the sale of the real estate is exempt from VAT, although the purchaser will be obliged to pay a tax on civil law transactions (PCC) amounting to 2 per cent of the market value of the real estate constituting the subject of the transaction. This may be applicable in either of the following situations: if the seller is not a VAT taxpayer, or if the subject of the sale is a specific type of land that is undeveloped and is not designated for development (this mainly pertains to agricultural and forest areas). Moreover, in the case of an acquisition of an enterprise as a going concern, if such a transaction also covers the purchase of real estate, it shall be subject to 2 per cent PCC. Sales of real estate are generally also subject to capital gains tax.

An owner of real estate is also obligated to pay real property tax annually, which is a municipal tax calculated based on the area of real estate owned, the area of the buildings located thereon and the percentage of the initial book value of other structures.

Additionally, as mentioned above, agreements on transfers of real estate must be executed in front of a notary public in the form of a notarial deed; otherwise they will be considered null and void. The notarial fees are calculated on the basis of the value of the subject of the transaction; however, they cannot exceed 10,000 zlotys (the fees are customarily covered by the entity acquiring the real estate). In addition, there are registration fees relating to disclosure of the newly acquired rights in the relevant registers (i.e., the land and mortgage register and the land and building survey).

iv Finance and security

Transactions covering transfers of title to real estate are typically financed either through the buyer's own resources (corporate funding) or from bank credits (project financing), with project financing being used more frequently. To secure claims of a bank or any other financing institution or entity, a mortgage is most commonly established over the real estate, which is also considered as one of the most certain types of security. An additional advantage of the mortgage is that the debtor is not prevented from using the pertinent real estate. A mortgage is a limited right *in rem* that encumbers real estate (or perpetual usufruct right), enabling the creditor to satisfy its claims from the real estate regardless of the current owner thereof. A mortgage may be established by way of agreement between the parties or by way of a statement of a landowner executed in the form of a notarial deed that must be recorded in the relevant land and mortgage register (constitutive entry). The notarisation requirement does not apply to mortgages established in favour of banks seated within the territory of Poland as, in accordance with the Bank Law, a written statement stamped with the bank's stamp is sufficient for establishment of the mortgage and its entry into the land and mortgage register.

Other types of security in favour of banks crediting acquisitions of real estate are:

a a voluntary submission to enforcement (a statement by the debtor made in the form of a notarial deed allowing court proceedings to be bypassed and to proceed directly to enforcement of the debt);

b a pledge over the shares of the debtor (if it is a legal entity);

c an assignment of rights to collect profits from the real estate (most common in acquisitions of commercial or office buildings);

d third-person guarantees; and

e promissory notes (used less and less frequently).

VI LEASES OF BUSINESS PREMISES

The fundamental principles with respect to leases are regulated by the provisions of the Civil Code. However, since they allow the parties to the relevant agreement broad (but not unlimited) scope to determine their rights and obligations, leases of business premises concluded between entrepreneurs usually include a number of clauses specific to such types of lease. Above all, these refer to the below-mentioned areas.

i Term and termination

Lease agreements may be concluded for a definite or indefinite period, but the longest definite term in lease agreements between entrepreneurs is 30 years. After that time, a lease agreement is deemed to be concluded for an indefinite period. A lease concluded for an indefinite period can be terminated by either party upon the pertinent notice period being

given. Since the commencement of activity in the premises is usually connected with certain investments made by the tenant, the most common solution in business leases is to conclude an agreement for a definite period, with possible extension options. Leases concluded for a definite period cannot be terminated unless for reasons stipulated in the applicable law or in the lease agreement. The main statutory reasons for termination by the landlord are as follows: failure of the tenant to pay rent, or use of the premises that is contrary to the agreed purpose. The main statutory reasons for termination by the tenant are as follows: in the case of defects to the premises that pose a threat to health or life, or that significantly hinder the use of the premises, and that are not removed by the landlord. To be effective, the termination triggers agreed by the parties in the agreement need to be rather specific and precise, and they usually relate to specifics of the business (e.g., for termination by the landlord: if an anchor tenant in a commercial centre stops its operations or changes its business profile; or for termination by the tenant: if certain key services are not provided to the premises by the landlord).

If a title to real estate encumbered with a lease is transferred to another entity, the new owner assumes the position of landlord and becomes party to the respective lease agreements by operation of law. In this context, it is recommended that lease agreements made for a specified period are certified by a notary public or are recorded in the pertinent land and mortgage register; otherwise, after assuming the position of landlord, the new owner of the real estate could be entitled to terminate the lease upon statutory notice.

ii Rent and service charges

Commercial leases are usually structured as 'triple net leases'. The tenants are obligated to pay the rent, cover the costs of utilities and pay service charges covering the costs of various services provided to the building by the landlord. Such services include tasks related to the maintenance of and repairs to the building, cleaning, media delivery, building systems operation, security and insurance. In the case of premises or facilities located in stand-alone buildings where the tenant is the only user of services, the parties may decide that all obligations related to the upkeep and maintenance of the building are vested with the tenant, and that only rent will be paid to the landlord. Rents are usually expressed in flat rates subject to annual indexation (pegged either to Polish or EU retail prices statistical indices, depending on the currency of the rent). In some commercial leases, rents are calculated as a percentage of the tenant's turnover.

iii Taxes

The rent normally constitutes income and tax-deductible costs within the context of income tax; as a service, it is subject to VAT on a regular basis.

iv Security

As a rule, in the case of leases of business premises, the tenant is usually obligated to provide the landlord security covering its obligations under the lease, and in particular the obligation to pay the rent and service charges. Typical security instruments used are cash deposits, bank guarantees, *in blanco* promissory notes and notarial deeds including a statement on voluntary submission to enforcement. Sometimes parent companies guarantees are accepted, but this depends mainly on the financial standing of the tenant and that of the whole group that stands behind it.

v Subletting

With respect to premises, general provisions of the Civil Code do not allow the tenant to sublease the premises or allow either the whole or part of the premises to be used by third parties without the consent of the landlord. This provision is most commonly retained by parties to commercial leases, where sublease or similar instruments are allowed only upon the consent of the landlord. Certain characteristics of an accepted assignee are sometimes defined (usually by reference to the credit rating of such a potential new tenant, a profile of its business and its financial standing).

vi Expenditures

Unless otherwise agreed in the lease agreement, in the event that the agreement is terminated, the landlord may either retain any improvements to the premises against payment of a sum corresponding to their value at the time of return, or demand that the previous condition of the premises be restored. However, the general rules are in most cases modified by the parties in the contract. The regulations on mutual settlements between parties and the state in which the premises should be left by the tenant after the termination of the lease are adapted to specific circumstances that depend on the scope of any improvements and their specifics. Tenants of smaller premises of more standard parameters need to accept that they may have to leave the premises without any compensation for the value of their investment. Large and anchor tenants are able to negotiate much better terms, including the landlord's participation in such an investment, at the beginning of the lease.

VII DEVELOPMENTS IN PRACTICE

Because of the recent change to the ruling party, bringing the prospect of an ambitious and far-reaching programme of reform, it is difficult at present to envisage changes to the legislation relating to real estate in the coming year. The workings of the parliament are very dynamic at present and changes should be monitored as they develop. In particular a new comprehensive bill concerning construction law and spatial planning that was introduced in September 2016 should be closely monitored as its adoption will have a significant impact on the investment process.

VIII OUTLOOK AND CONCLUSIONS

As indicated above, the Polish real estate office market has grown over the past couple of years. Investors in the business services sector and in research and development frequently choose Poland for their office location, and Poland now ranks as the third most popular destination worldwide in this regard.

Although the limitations on transfers of agricultural land that currently apply to EU entrepreneurs in Poland have expired, new legislation concerning purchasing of agricultural land was introduced and limited the possibility of acquiring such land for commercial purposes and should be taken into account in investment process.

Poland suffered greatly during the Second World War and under the subsequent communist regime, as a result of which the historical ownership status of real property may frequently be very complicated. A lot of land has been subject to nationalisation or similar measures in the past, and restitution claims of the heirs of previous owners are very frequent.

Poland has not adopted a general restitution law to date, which can also make the ownership situation very complicated. Special due diligence is often recommended to look at historical claims before purchasing real estate in Poland. On the other hand, in the absence of a general restitution law, previous owners must undergo very complicated and lengthy administrative and court procedures to pursue their historical claims to property, which in itself may provide investors with the opportunity of a bargain.

Appendix 1

ABOUT THE AUTHORS

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Janusz Siekański heads the firm's real estate practice. He is primarily engaged in conducting complex cases concerning real property-related litigation, as well as arbitration, administrative and administrative judicial disputes. These include disputes among co-owners, heirs and interest holders, disputes on ownership, including usucaption and reprivatisation, and compensation cases.

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Radosław specialises in commercial real estate, real estate transactions and development. He advises Polish and international institutional clients, developers, investors, retail chains, logistic operators and occupiers. Radosław has also been involved in a number of large, industrial greenfield projects in special economic zones.

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