
SECURING COMPANIES IN SPECIFIC CASES OF REAL ESTATE ACQUISITION

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Abstract. The article presents the fundamental principles of purchasing real estate by capital companies as part of business transactions (based on civil law contracts) and the purchase of real estate by a capital company from a member of its management board. The acquisition of immovable property by a capital company is indisputably one of the relevant events for every company, so in principle, it requires, to be valid, a resolution of the general meeting of shareholders of the company and, therefore, a resolution of the company's 'ownership' body, which is competent to decide on the most important matters for the capital company, unless the articles of association or articles of association expressly provide otherwise. In each case of purchasing real estate by a company, it should be recommended first to conduct a survey of the condition of the property and prepare a due diligence report regarding the property, which will allow showing the real image of the property to the shareholders of the company but will also be an expression of due diligence duty by the management board of the company purchasing the property.

Keywords: Polish law; Polish company law; capital companies; member of the management board of a capital company; real estate; due diligence report

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1. Introduction

Transactions involving members of the management board of any institution require attention (Világi, Konečný, Ruschak, 2022). Acquisition of real estate from a board member is a particular case which has to be prudently weighted and regulated to secure the interests of stakeholders (Dobrovolskienė, Pozniak, 2021; Krulický, Machová, Dvorák, 2022; Teivāns-Treinovskis et al., 2022).

Commercial law companies under Polish law are professional legal entities (entrepreneurs within the meaning of Article 431 of Polish Civil Code) with legal capacity and capacity to perform legal acts. Polish commercial law companies are divided into partnerships and capital companies. Partnerships are organizational units referred to in Article 33 § 1 of Polish Civil Code (Brzeszczyńska, 2023). Capital companies are entities with legal personality. The legal person of all commercial companies, and even more so the legal person of capital companies, implies the ability to acquire rights and incur liabilities. In other words, commercial law companies can conclude civil law contracts and perform other legal acts based on which they will acquire real estate under, as a rule, any legal title.

Commercial companies may conclude, inter alia, contracts for the sale of immovable property and acquire ownership based on them. The key principles of purchasing real estate by capital companies as part of business transactions (based on civil law contracts) and purchasing real estate by a capital company from a member of

its management board are presented below.

2. Grounds for the acquisition of immovable property by a capital company

Commercial law companies may acquire (ownership) of real estate based on various legal acts and titles. In the case of capital companies, the most common legal transaction in trading, based on which they acquire real estate ownership, is a sales agreement within the meaning of Art. 535 et seq. of Polish Civil Code. Capital companies can acquire ownership or other legal title to real estate based on other legal events (Brzeszczyńska, 2023). Transactions in the process of transformation of companies *sensu largo* are often encountered in practice (sometimes called transformations, restructurings, transformation processes or restructuring processes of commercial companies), i.e. mergers or divisions of companies, based on which it is possible, *inter alia* to create a new capital company or to take over an existing company by another existing company and thus acquire by a capital company real estate to which title was previously held by another company (e.g. the company being acquired). In trading practice, there are also transformations of entrepreneurs who are natural persons conducting the so-called sole proprietorship, who transform into a single-member capital company (Art. 551 § 5 of Polish Commercial Companies Code). Transformed companies, i.e. those created as a result of the transformation of such an entrepreneur, each time obtain the title to the real estate to which the transformed entrepreneur was entitled – on a continuation basis (Art. 553 of the CCC). Another legal act frequently encountered in practice (more and more often referred to in trading practice simply as a “transaction”) is the sale of an enterprise in the material sense, which includes real estate (Art. 55¹(2) of Polish Civil Code). It is impossible to forget about the possibility of bringing real estate ownership to a capital company as an in-kind contribution and, therefore, a contribution in kind to cover shares or stocks. In addition to the ownership right to real estate, the subject of the in-kind contribution may also be a share in the ownership right of real estate, the right of perpetual usufruct of land and cooperative ownership right to a flat or a single-family house. Ability to contribute in kind in the case of a limited liability company and a joint-stock company¹ was generally established by the legislator in the provisions of Art. 14 of the CCC, common to all capital companies, and Art. 311–312 of the CCC specified the principles for examining in-kind contributions in a joint-stock company

In trading practice, due to the understandable need to reduce the risk associated with the purchase of real estate based on contracts or as a result of transformation processes of companies before the purchase of real estate by the company, *inter alia*, a professional due diligence report is prepared showing the condition of the purchased property and the possible risk (risk categories) of the buyer associated with it. It can be an in-depth, full report from the so-called full due diligence report, or the so-called limited due diligence report (also known as red flag report or high-level due diligence report). In practice, reports on the audit of the legal status of real estate are prepared by legal advisors, tax advisors or advisors with the status of a property appraiser (reports on the technical condition of real estate are also prepared, which may affect future contractual provisions). This type of report also usually indicates, in addition to possible risk categories related to the examined property, recommended contractual provisions (or “clauses”) that should become part of the future agreement under which the property will be acquired. Only sometimes, in practice, it is, as indicated, a contract for selling real estate. Due diligence reports are commonly prepared for acquisitions of enterprises or their organized part and mergers and divisions of companies. Depending on the type of planned transaction and the examined property, their length ranges from several to several hundred pages. In practice, this part of the due diligence report concerning the property covered by the planned transaction is crucial for the purchaser.

The acquisition (as well as disposal) of real estate, perpetual usufruct and interest in real estate has been duly “recognized” by the Polish legislator as a legal event of particular importance for capital companies. Polish legislator expressed this by prejudging in Art. 228(4) and Art. 393(4) of the CCC that the acquisition and sale of real estate, perpetual usufruct or interest in real estate requires a resolution (and thus consent) of the shareholders’ meeting, i.e. the shareholders’ meeting of sp. z o.o. or the general meeting of a joint-stock company,

¹ For further considerations, it is appropriate to omit a simple joint-stock company (in Polish: *prosta spółka akcyjna*) due to its insignificant practical significance and the programmatically liberal principles of its creation and functioning in trading, significantly distinguishing it from other capital companies in Poland

respectively, unless the articles of association or articles of association provide otherwise. The literature on the subject rightly indicates that Art. 393(4) of the CCC allows for the possibility of excluding the obligation to obtain the consent of the general meeting for the acquisition or sale of real estate, perpetual usufruct or interest in real estate within the statutory matter of a joint-stock company. Competence in this respect may be transferred to the supervisory board. Alternatively, only the obligation to obtain the consent of the general meeting may be waived without introducing in its place the responsibility to obtain any other approvals of the company's organs. In the performance of a legal transaction having the effects mentioned above on real estate, the company will be represented, following the rules and regulations governing its representation and, therefore, as a rule, by members of its management (Bieniak et al., 2022). These conclusions should also be applied to a limited liability company (i.e. spółka z o.o.). In other words, the principle is to obtain the "approval" of the shareholders' meeting in the cases mentioned above, and trading practice shows that company constitutions rarely take away this competence from shareholders' meetings. Failure to resolve the shareholders' meeting required for the acquisition of real estate entails the invalidity of the legal acquisition transaction, pursuant to Art. 17 §1 of the CCC. Pursuant to Art. 17 §2 of the CCC, the consent of the shareholders' meeting may be expressed before the company submits the statement (e.g. before the conclusion of a real estate sale agreement) or after its submission but no later than within two months from the date of submission of the statement by the company (e.g. from the date of conclusion of the real estate sale agreement). Confirmation subsequently expressed by the shareholders' meeting within the period mentioned above, i.e. up to two months after the company's declaration (e.g. after the conclusion of a real estate sale agreement), has retroactive effect from the time of such a legal transaction.

Concerning partnerships, the legislator did not introduce a similar regulation regarding the requirement of a shareholders' resolution for a company's purchase of real estate. In the case of limited joint-stock partnerships, however, Art. 393 in conjunction with Art. 126 §1(2) applies to CCC; therefore, as a rule, a resolution of the general meeting regarding the acquisition of real estate by the company is required. Concerning other partnerships and general partners of limited joint-stock partnerships, the general regulation of Art. 43 of the CCC will apply, because the act of acquiring real estate by a company is usually an act exceeding the scope of ordinary management, and at least should be considered as such in most cases (Uliasz, 2002). As such, it will therefore require, in principle, unless otherwise provided in the articles of association, the consent of all partners.

It should be emphasized that any change in the status of the company as the owner or perpetual usufructuary of real estate requires, in the cases specified in the regulations, notification to the registry court, except – of course – the land and mortgage register court in the prescribed procedure, related to the maintenance of land and mortgage registers, which is of a general nature. In accordance with Art. 19c of the Act of 20 August 1997 on the National Court Register (*Journal of Law*, 2023), in the application for entry in the register of entrepreneurs or change of entry involving the acquisition or subscription of shares, stocks or all rights and obligations, and in the case of submitting documents to the registration files pursuant to Art. 9(2) of this Act, containing information on changes in the company's shareholders, the applicant shall include a statement whether he is a foreigner within the meaning of the Polish act of 24 March 1920 on the acquisition of real estate by foreigners (*Journal of Law*, 2017). On the other hand, in the case of having the status of a foreigner within the meaning of the Act on the acquisition of real estate by foreigners, the applicant in the application referred to above also includes a statement about whether he is the owner or perpetual usufructuary of real estate located on the territory of the Republic of Poland. Such a declaration shall be signed following the rules of representation of the applicant company. It should be pointed out that current forms in registration proceedings before the National Court Register (i.e. made available through the prs-ekrs.ms.gov.pl portal) are structured in such a way that each application for a change in the entry requires at the initial stage of filling in the e-form the submission by the applicant of a statement regarding the status of a foreigner within the meaning of the Act on the acquisition of real estate by foreigners. If the applicant submits a statement on the applicant's possession of such status (i.e. if the answer "YES" is marked on the e-form), a column with a statement regarding the status of the applicant-company as the owner or perpetual usufructuary of real estate located in the territory of the Republic of Poland appears in the form (tick "YES" or "NO", depending on whether the company is the owner or perpetual usufructuary of real estate located in Poland, or not). The provisions of Polish Commercial Companies Code

do not impose objective or subjective restrictions on commercial law companies' acquisition of real estate. The only restriction of the Code is, in principle, the requirement to obtain consent (*verba legis*: adoption of a resolution) regarding the acquisition of real estate by the company by the shareholders' meeting. As indicated, this regulation of the CCC is dispositive in that it may be modified in the articles of association of a company. Restrictions on the acquisition of real estate are provided for in the provisions of the Act on the acquisition of real estate by foreigners for entities having the status of a foreigner, including companies under Polish law with their registered office in the territory of the Republic of Poland. Under Article 1(2) of that Act, a foreigner within the meaning of that law is:

- (1) a natural person who does not have Polish citizenship,
- (2) a legal person established (incorporated) abroad,
- (3) a company without the legal personality of the persons referred to in points 1 or 2 above, having its registered seat abroad, established in accordance with the legislation of foreign countries;
- (4) a legal person and a commercial company without legal personality having its registered seat in the territory of the Republic of Poland, controlled directly or indirectly by the persons or companies listed in points 1, 2 and 3 above.

It should be emphasized that in the case of a commercial company, a company in which a foreigner or foreigners hold, directly or indirectly, more than 50% of votes at the shareholders' meeting or the general meeting, also as a pledgee, user or based on agreements with other persons, or have a dominant position within the meaning of Art. 4 § 1 point 4 letter (b) or (c), is considered to be controlled within the meaning of Art. 4 § 1 point 4 letter (b) or (c), or (e) of the CCC. An example of a capital company with the status of a foreigner in this sense is a single-member capital company whose sole shareholder is another capital company with its registered office in another Member State of the European Union or a country outside the European Union. The acquisition of real estate by such foreign companies is subject to restrictions specified in the Act on acquiring real estate by foreigners. Pursuant to Art. 1(1) of that Act, acquiring real estate by a foreigner (including a commercial law company) requires a permit. The permit is issued, by way of an administrative decision, by the minister competent for internal affairs if no objection is raised by the Minister of National Defense in Poland, and the case of agricultural real estate, if the minister competent for rural development also does not object.

Moreover, as a rule, pursuant to Art. 3a(1) and (2) of the Act on the acquisition of real estate by foreigners, the mere acquisition or subscription by a foreigner of shares in a commercial company with its registered seat in the territory of the Republic of Poland, as well as any other legal act concerning shares or stocks, require the permission of the minister competent for internal affairs if as a result of them, the company being the owner or perpetual usufructuary of real estate in the territory of the Republic of Poland will become a controlled company. The acquisition or subscription by a foreigner of shares in a commercial company with its registered seat in the territory of the Republic of Poland, being the owner or perpetual usufructuary of real estate in the territory of the Republic of Poland, requires the permission of the minister competent for internal affairs, if the company is controlled. The shares are acquired or taken up by a foreigner who is not a company shareholder. The requirements for obtaining such permits do not apply to cases where the company's shares are admitted to trading on a regulated market or the company is the owner or perpetual usufructuary of real estate specified in Art. 8(1)(1), (1a) and (5), subject to Art. 8(3) of the Act on the acquisition of real estate by foreigners. It should be emphasized that for the Act mentioned above, in accordance with Art. 1(4) of the Act on the acquisition of real estate by foreigners, there is the acquisition of ownership of real estate or the right of perpetual usufruct based on any legal event.

Capital companies (incorporated) under Polish law with their registered seats in the territory of the Republic of Poland may acquire real estate located in other countries on the principles set out in the relevant provisions of local law.

3. Admissibility of acquisition of real estate by a capital company from a member of its management board in the light of Polish company law

As a rule, Polish legislator does not prohibit transactions between a member of the management board and the company, including concluding contracts in such a subjective configuration. However, the law introduces certain restrictions in this respect, the key of which should be reduced to the transaction's compliance with the company's interest. A company management board member is, after all, every manager of the company's interest (Opalski, 2008). Therefore, an agreement concluded by a member of the management board with a company cannot lead to the interest of a member of the management board being favoured over the interest of the company, which is to be followed by a member of the management board as an official of the company.

Therefore, a capital company may purchase real estate from a member of its management board, following this directional principle. Performing such a legal transaction, regardless of its type, requires, in principle, pursuant to Art. 228(4) and Art. 393(4) of the CCC, a resolution of the shareholders' meeting, unless the articles of association or articles of association provide otherwise. Moreover, pursuant to Art. 210 §1 and Art. 379 §1 of the CCC, in agreements between the company and a management board member, the company is represented by the supervisory board or a proxy appointed by a resolution of the shareholders' meeting. In single-member companies in which the sole shareholder is also the sole member of the management board, a legal transaction between the company and that member of the management board requires the form of a notarial deed, pursuant to Art. 210 §2 and Art. 379 §2 of the CCC. Of course, this does not change the general requirement expressed in Art. 158 of Polish Civil Code to maintain the special form of a notarial deed for the conclusion of an agreement obliging the transfer of real estate ownership and an agreement transferring ownership that is concluded to perform a previously existing obligation to transfer ownership of real estate. The resolution above of the shareholders' meeting of a capital company consenting to the acquisition of a real estate by the company should be attached to the agreement regarding the purchase of real estate by the company (or submitted in the manner prescribed to perform another legal transaction the subject of which is the purchase of the real estate by the company). An exception to this rule applies if the articles of association clearly indicate that a resolution of the shareholders' meeting is not required for the company's real estate acquisition. However, suppose the articles of association require the consent of another body (e.g. the supervisory board) to perform such an action. In that case, an appropriate resolution in this respect should be attached to the legal transaction concerning the acquisition of real estate by the company. Failure to observe the corporate rules of representation when agreeing with the company and a member of its management board implies the contract's invalidity. Failure to obtain the consent of the shareholders' meeting for the acquisition by the company of real estate from a management board member may be cured on the terms set out in Art. 17 § 2 of the CCC.

Concerning a limited liability company, one should also bear in mind the regulation of Art. 229 of the CCC, according to which an agreement on the purchase of real estate or a share in real estate or fixed assets for a company for a price exceeding one-quarter of the share capital, but not lower than PLN 50,000, concluded before the lapse of two years from the date of registration of the company, requires a resolution of the shareholders, unless the articles of association were provided for in the articles of association. As part of the regulations of a joint-stock company (in Polish: spółka akcyjna), Polish legislator provides in Art. 394 §1 of the CCC that agreements for the purchase of any property for a company, for a price exceeding one-tenth of the paid-up share capital, from the founder or shareholder or for a company or cooperative dependent on the founder or shareholder of the company, concluded before the lapse of two years from the date of registration of the company, require a resolution of the general meeting, adopted by a two-thirds majority. *Lege non distinguente*, therefore, the norm expressed in this provision will also apply to the acquisition by a company of real estate from a member of the management board based on a contract. Moreover, pursuant to Art. 230 of the CCC, disposing of a right or incurring an obligation to provide a value twice as high as the share capital requires a resolution of the shareholders unless the articles of association provide otherwise, and in this context, Art. 17 §1 of the CCC does not apply.

Although such a requirement does not result directly from the regulations, before the company purchases real estate from a management board member, a thorough examination of the legal status of the property (due diligence audit) should be carried out. This will be an expression of due diligence on the part of the company and the member of the management board himself (herself) as the seller and will allow at least to prove that he did not act in violation of the company's interest, e.g. by selling defective real estate or at an inflated price. In the interest of the company, such a report should, in particular, be submitted to the shareholders' meeting, which will adopt a resolution on the acquisition of real estate by the company, pursuant to Art. 228(4) and Art. 393(4) of the CCC. The meeting of shareholders of the company, as its emanation, in most cases, will be able to assess whether the planned purchase of real estate from a member of its management board will in any way not violate the interest of the company and, therefore, i.e. will not expose it to harm.

4. Summary and conclusions

Trading practice in Poland shows and proves that capital companies can acquire real estate, i.e. ownership or other titles to real estate, based on various legal events. The acquisition of immovable property by a capital company is indisputably one of the relevant events for every company, so in principle, it requires, to be valid, a resolution of the general meeting of shareholders of the company and, therefore, a resolution of the company's "ownership" body, which is competent to decide on the most critical matters for the capital company, unless the articles of association expressly provide otherwise. A capital company may purchase real estate from a member or members of its management board, after meeting all the conditions specified in the provisions of Polish Commercial Companies Code (as well as in the company's articles of association if such were specified in these corporate documents) and in compliance with the requirements regarding corporate consents and the form of the legal transaction. In each case of purchasing real estate by a company, it should be recommended first to conduct a survey of the condition of the property and prepare a due diligence report regarding the property, which will allow showing the image of the property to the shareholders of the company, but will also be an expression of due diligence by the management board of the company purchasing the property. It will only be pointless or simply impossible to prepare such a report in a few cases. Conducting due diligence (audit) and preparing a report thereon should be recommended in every case in which a capital company acquires real estate from a member of its management board (or intends to acquire) because such acquisition must be consistent with the interest of the company, which the company's officer is obliged to follow when performing a corporate function. The company should be well informed about the condition of the property acquired from a management board member, especially where, following the company's articles of association, a resolution of the meeting of its shareholders is not required to carry out the real estate purchase transaction.

References

- Act of 23 April 1964 – Civil Code* (Journal of Laws of 2022, item 1360, as amended)
- Act of 15 September 2000 – Code of Commercial Companies* (Journal of Laws of 2022, item 1467, as amended); the CCC
- Act of 20 August 1997 on the National Court Register* (Journal of Laws of 2023, item 685, as amended)
- Act of 24 March 1920 on the acquisition of real estate by foreigners* (Journal of Laws of 2017, item 2278, as amended)
- Bieniak, J., Wawer, M., Nita-Jagielski, G., Oplustil, K. et al. (2022) *Kodeks spółek handlowych. Komentarz [Code of Commercial Companies. Comment]*, Legalis, Warszawa.
- Brzeszczyńska, S. (2023). *Umowy w obrocie nieruchomościami. Aspekty podatkowe i cywilnoprawne [Real estate contracts. Tax and civil law aspects]*, C. H. Beck, Warszawa.
- Dobrovolskienė, N., Pozniak, A. (2021). Simple Additive Weighting versus Technique for Order Preference by Similarity to an Ideal Solution: which method is better suited for assessing the sustainability of a real estate project. *Entrepreneurship and Sustainability Issues*, 8(4), 180-196. [http://doi.org/10.9770/jesi.2021.8.4\(10\)](http://doi.org/10.9770/jesi.2021.8.4(10))
- Krulichý, T., Machová, V., Dvorák, O. (2022). Actual paid cost of equity in construction. *Entrepreneurship and Sustainability Issues*, 10(1), 408-419. [http://doi.org/10.9770/jesi.2022.10.1\(22\)](http://doi.org/10.9770/jesi.2022.10.1(22))

Opalski, A. (2008). O pojęciu interesu spółki handlowej [On the concept of the interest of a commercial company]. *Przegląd Prawa Handlowego*, 11, 16-23.

Teivāns-Treinovskis, J., Jefimovs, N., Velika, R., Kriviņš, A. (2022). Conditions for application of criminal liability to the board of a company in the legal system of the Republic of Latvia. *Entrepreneurship and Sustainability Issues*, 9(4), 45-55. [http://doi.org/10.9770/jesi.2022.9.4\(2\)](http://doi.org/10.9770/jesi.2022.9.4(2))

Uliasz, M. (2002). Czynności przekraczające zakres zwykłego zarządu, cz. I [Activities exceeding the scope of ordinary management, part I], *Monitor Prawniczy*, 18, 825-831.

Világi, R., Konečný, M., Ruschak, M. (2022). Impact of selected financial indicators on a company's reputation. *Entrepreneurship and Sustainability Issues*, 10(2), 408-417. [http://doi.org/10.9770/jesi.2022.10.2\(25\)](http://doi.org/10.9770/jesi.2022.10.2(25))

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