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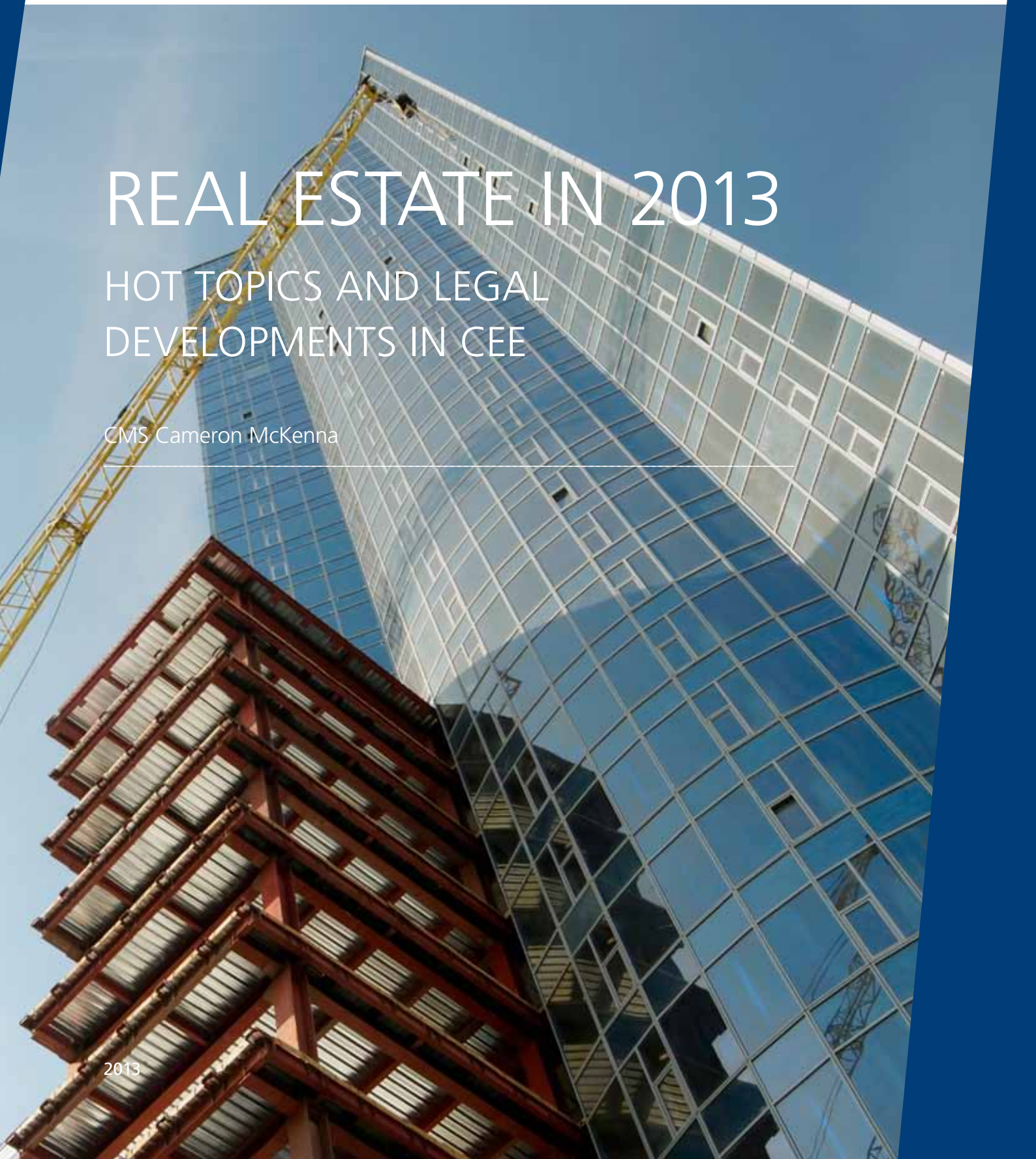

REAL ESTATE IN 2013

HOT TOPICS AND LEGAL DEVELOPMENTS IN CEE

CMS Cameron McKenna

2013

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Welcome

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I am pleased to welcome you to our publication ***Real Estate in 2013***. In the current Real Estate market and challenging conditions in many countries across Central and Eastern Europe, it is important to stay up to date with the latest legal developments affecting your business in the region.

Our CEE Real Estate & Construction team has put together an overview of the most important legal developments and hot topics for real estate in 2013 across the region, focusing on **Bulgaria, Czech Republic, Hungary, Poland, Romania, Russia, Slovakia** and **Ukraine**. Some of these changes may open up new business opportunities; others may make the business environment more regulated in favour of other interests.

2013 will be a **landmark year for the real estate law** especially in the Czech Republic, where the new regulation on Civil Code, to come into force in 2014, will be in the making. For the real estate sector the new Civil Code will introduce a number of new legal institutions, some of which are currently missing to those working in Western Europe, and in some other CEE jurisdictions. New Civil Code will also bring important changes in the real estate law in Hungary. In Romania, new provisions brought by the changes in Civil Code will now be introduced in the real estate law, as well.

Across the remaining countries, a lot is happening for individuals and investors in the region – we have looked at the current and upcoming hot topics with our sector specialists offering **a practical view on what to be aware of when driving your business forward in 2013.**

Pleasant reading!

Gábor Czike

Bulgaria

Recent amendments to the Spatial Development Act

On 10 October 2012, the Bulgarian Parliament adopted changes to the Spatial Development Act (SPA), which were aimed to implement the following:

— Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

— the Bulgarian State Plan for Administration Optimization in its part related to the administrative control on the spatial development and construction process, registration and monitoring of the landslide areas and

— a reform in the strategic spatial development planning through systematic organization of the legal regulation by a single act: the Regional Development Act.

The adopted changes concern the following:

— an elaboration of administrative procedures related to the spatial development, investment design, construction and commissioning of the projects

— differentiating and supplementing the rights, obligations and responsibilities of the administrative bodies and the participants in the construction process, as well as increasing the role of the municipal administration

— the replacement of the existing licensing regime with a simple registration scheme for the construction consultants involved in: (i) the compliance assessment of the projects; and (ii) the construction supervision

— recognition of the eligibility of international contractors working on construction sites under the NATO programme for investments in the security in Bulgaria without the need for local registration

— recognition of the professional insurances of the participants in the construction process, which originate from a Member State of the European Union or from another State which is a Contracting Party to the Agreement on the European Economic Area, when such insurances are concluded in a Member State of the European Union or in another State which is a Contracting Party to the Agreement on the European Economic Area and

— inclusion of car charging el. poles as part of the cities' temporary installations, with such placements not requiring a construction permit.

In addition to the above mentioned changes, the Parliament adopted a legal provision introducing the possibility for buildings, completed before 31 March 2001, to be legitimised by a Certificate of Tolerable Construction without the necessary permits. The certificate will be granted to all successful applicants by 25 November 2013 under a new procedure introduced by the amendments to the SPA. The buildings will only qualify for a certificate if they comply with the construction parameters imposed by law and with the zoning plans in force, either when they were built or when the application for legitimisation is submitted. Applications must be submitted by the person holding the title or right to build on the land where the illegal construction is located. Once a building receives a certificate, it can be subject to transfer property transactions.

A new provision of the SPA recognises parking spots in buildings to be separate real estate assets if: (i) they are provided in the construction investment design; (ii) they are constructed over a separate part of the construction (usually on the ground or underground level) or the owner of the parking spot has been granted the right of use on a divided part of a regulated land plot; and (iii) they are used for parking motor vehicles. Furthermore, a parking spot may be subject to a transfer property transaction if: (i) it is not part of a main unit in the building and the transaction is concluded with a person/entity who owns separate units in the same building; or (ii) the owner of the parking spot has offered it to the other unit's owners in the same building and the offer was not accepted.

Law: Bulgarian Spatial Development Act (amended on 10th of October 2012)

Czech Republic

Lease of Business Premises under the New Civil Code

The New Civil Code is slowly approaching its projected entry into force planned on 1 January 2014. Amongst all the innovations it is bringing, there are certain major changes with regard to the regulation of leases. As these changes shall apply also to lease agreements concluded and existing before the respective date of the New Civil Code's effectiveness, they are particularly important for all those currently in tenancy relationships.

Change of the owner of the leased property

The first major change that all landlords and tenants should be aware of is the new rule relating to the change of the owner of the leased property. In case the landlord transfers the ownership right to the property, the new owner is not bound by contractual obligations of the original lease agreement, unless he specifically knew about them. He is only bound by statutory regulation. This new provision clearly protects the purchaser against any disadvantageously agreed conditions of the original contract that he is not aware of, but it does not protect the tenant in these situations. This rule applies not only to the leases of business premises, but to all leases in general.

The change of the ownership of the leased property itself is not a sufficient reason for notice to be given. Only if the new owner reasonably believes that the purchased property is not leased does he have the right to terminate the lease. He has the right to terminate the lease within three months after he learned or should have learned that the property is leased and who is the tenant. The tenant's rights against the original landlord are not affected.

Termination of the lease of business premises

The New Civil Code sets out the circumstances under which a lease of business premises for a definite period of time can be terminated before the agreed date. The lease can be immediately terminated in the event of a gross violation of duties of a party when significant damage is caused to the other party. The tenant may also terminate a lease for a definite period of time when the circumstances under which the lease agreement was concluded have changed to the extent that the tenant can not reasonably be required to continue the lease.

The lease can also be further prematurely terminated subject to the termination notice when the activities for which the business premises are designated cannot be carried out. That can be either because the tenant lost the capability to perform such activities, or because the premises are no longer appropriate for accommodating the activities (i.e. after their reconstruction or removal by the landlord).

The question remains whether this provision will also automatically apply (after the date of the New Civil Code's effectiveness) to those current lease agreements, where the statutory provisions on terminating the contract set out in the current legislation have been excluded.

Objections to the notice of termination

The new law brings a significant change into the process of giving notice of termination (in Czech: *výpověď*") for leases of business premises. In these events, the party receiving the notice of termination is entitled to raise objections in writing against the notice within a period of one month from the date of its receipt. Without raising the objections on time, the party cannot seek judicial review of the legitimacy of the notice of termination.

Compensation for takeover of the customer base

The New Civil Code recognizes the value of the customer base (in Czech: '*Zákaznická základna*'). There are situations when, after the termination of a lease of business premises, the new tenant may benefit from the takeover of the customer base created by the former tenant. If the terminating party in this case is the landlord, the former tenant is then entitled to compensation for the benefit acquired by the Landlord or a new tenant upon the assumption of the customer base created by the outgoing tenant (based on the New Civil Code it is not clear who shall pay the compensation and how the compensation shall be determinate). Nevertheless, this rule does not apply when the tenant receives the notice of termination for gross violation of its obligations.

Transfer of the lease of business premises

Another new provision is the specific provision on transfers of a lease of business premises. Subject to prior approval of the landlord, the tenant may newly transfer the lease in connection with the transfer of his business activity for which the leased premises are used. Both the landlord's consent and the agreement on the transfer of the lease shall be in writing.

Recommendation
Since most of the New Civil Code's provisions are of a dispositive nature, it is recommended to conclude amendments to the current lease agreements avoiding application of those aforementioned new rules that are not convenient for the parties or which are ambiguous. It is also recommended to take into account the provisions of the New Civil Code in the negotiations of the new lease agreements. In this manner, the risks that may arise after 1 January 2014 can be eliminated.

Hungary

New Civil Code: Changing the rules for real estate in Hungary

On 26 September the Parliament began to debate the draft of the new Civil Code, which is due to be the first civil law codex adopted in Hungary in democracy. The final vote of the Parliament is expected to take place soon.

The draft of the new Civil Code has been prepared by the Civil Law Codification Editorial Committee which was comprised of the most reputable members of the legal profession and prominent theoretical experts and headed by Professor Lajos Vékás.

The new Civil Code will enter into force one year after its promulgation, expectedly in the beginning of 2014.

The structure of the new Civil Code is different from the Civil Code currently in force and it will also incorporate the provisions of family law and the legal rules governing business associations and legal entities. The New Civil Code will contain comprehensive legislation on all civil law subjects and will embrace legal provisions for the business world, commerce and private individuals.

We hereby summarize the most important changes the New Civil Code will bring to the rules on real estate matters in Hungary.

The new rules for the ownership of the real estate

— the new Civil Code will provide a clear definition of the ownership, which was missing from current code

— it has been clarified that the ownership of the real estate extends to the border of the utilisation of the real estate in respect of the air space above the ground and natural body under the ground

— it is possible to divide the ownership of the land and the buildings situated on the land at any time, as it will be possible to register the building as a separate real estate unit in the land registry upon request of the landowner. This will have a significant impact on shopping centres, condominiums, industrial parks and other schemes consisting of several buildings because the buildings will become sellable separately from each other and from the land. If title to the building and the underlying plot is separated, the owner of the land can restrict the alienation or encumbrance of the building in the agreement establishing the separate title and all terms of this agreement will bind future owners as well.

The new rules for the restriction on alienation and encumbrance

The owner can establish a restriction on alienation and encumbrance or a restriction on alienation against third person at any time, contrary to the currently effective Civil Code where such restriction could only be established upon conveyance of title. In case of real estate the right secured by the restriction on alienation and encumbrance shall also be registered in the land registry.

The new rules for the adverse possession of the real estate

— it is now clarified that the restriction on alienation and encumbrance does not exclude the acquisition of the ownership through the adverse possession, if the conditions of the adverse possession existed

— the adverse possession of a real estate occurs after five years (compared to the general 15 years deadline) in case the possessor acquired the possession of the real estate from the owner on the basis of a written contract according to which the possessor could have demanded the registration of its title, if the contract had met the formal requirements to registration assuming that the possessor has paid the consideration.

The new rules for the land registry system

— the new Civil Code incorporates the rules for the land registry

— the principle of authenticity is also extended to the fact and the subject of the pending procedures recorded as a marginal notes

— the existence of good faith is to be examined when the request is submitted. The person is not acting in good faith if it known or should have known that the content of the land registry is incorrect

— the person acquiring any right cannot refer to its good faith against a beneficiary whose pending application to register any right was recorded as a marginal note on the property sheet at the time when such person acquired its right

— the person, who suffers any harm because of an invalid or incorrect registration, may only initiate a lawsuit for deletion of the right of a registered person who has acquired its right in good faith and in trust of the completeness of the land registry for consideration from a predecessor whose registration turned out to be unlawful within six month from the date of the receipt of the resolution of the unlawful registration. If the resolution has not been delivered, the deadline for the commencement of the lawsuit for deletion is three years.

Poland

Tighter rules for protection of historical monuments

Historic properties are subject to legal protection in every country in the world. For example, an investor planning to buy a castle anywhere in Europe should carefully examine any applicable laws and registers to check if and how the property is protected. But the new rules introduced by recent changes to Polish legislation go beyond protecting castles. A register of monuments called the 'communal record of monuments' has been established in which any building or structure considered by conservators as having a historical value is recorded. And conservators go as far as including in the communal record of monuments buildings constructed as recently as in the 1970s.

The procedure of including a building in the communal record of monuments can take less than a week. Furthermore, the owner of the building concerned need not be asked for his/her consent nor even informed about the fact that the procedure has been initiated and completed. The procedure runs internally within government offices.

The consequences of including a building in the communal record of monuments are very burdensome for the owner. The conservator's consent is needed for the owner to demolish the building and to carry out any re-development or to change its use.

The communal record of monuments runs parallel with the register of monuments which lists buildings and structures which would be considered historical in any country. In addition, protection may be provided for in the local master (zoning plan) or planning permit.

In order to check if a building is protected in any way, an investor should apply directly to all applicable offices asking whether any protection applies and if any procedure is underway to enter the property in any register. However, there is never a guarantee that the procedure will not be commenced after the answer has been sent.

Therefore, investors buying any property in Poland should be very careful about protection issues when buying buildings constructed in recent decades which they want to demolish or redevelop. What the investors may (and often do) consider as fit for demolition or redevelopment, conservators may consider as having historical value.

In practice, to limit the risks the investor should obtain a final building permit for the planned re-development even before buying a property. When buying an old building with the intention of demolishing it, the safest way would be to complete the demolition before the final purchase occurs.

Romania

New provisions in the cadastre and real estate law no. 7/1996

Significant changes to the law on cadastre and real estate publicity were enacted by Law no. 133/2012 published with the Official Gazette no. 506 of 24 July 2012 and entered into force on 27 July 2012 and under Law no. 219/2012 published in the Official Gazette no. 789 of 19 November 2012 and entered into force on 22 November 2012 (the 'Cadastre Law').

The main scope of the recent amendments is to create a unitary cadastral system that will make possible a more accurate registration of all real estate properties.

The most important changes brought in by the Cadastre Law are:

Online access to cadastral and land book information

In Romania, only approximately 15% of the estimated number of immovable properties is registered already with the cadastre and land book registries. In the absence of cadastral and land book registration, owners cannot sale or otherwise transfer their properties.

Therefore, it is envisaged the implementation of an electronic data base to register all existing cadastral data, maps and information on the properties followed by the drafting and registration of a national cadastral plan (indentifying borders of the administrative units, land and/or constructions within and outside city limits and granting cadastral numbers to all properties). Finally, based on the mentioned general cadastral plan, there will be registered *ex officio* all properties with the land book registries. All of the above-mentioned measures would mean a significant and healthy clean-up of the records on properties in Romania and will give a significantly improved security to all real estate transactions.

In implementation of the mentioned measures, a first important step is that starting with 2013, the National Agency for Cadastre and Real Estate Publicity ensured the direct and permanent access of the public notaries to electronic land books. This means that public notaries can check in real time the cadastral and land book registrations of properties and determine if there are any mortgages, registered property litigation (if case) or such other encumbrances registered on such properties. To enable such access to public notaries, there was concluded a protocol of collaboration between the National Agency for Cadastre and Real Estate Publicity and the National Union of Public Notaries in Romania.

The online access to the land book services shall also be available for any other interested party after the issuance of an order of the National Agency's general manager that shall set up the procedure to be followed for granting such access. This order is currently pending issuance, but when the procedure for access of third parties to the data base of properties will be in place, it shall simplify the access to the land books and hence provide quicker and easier access to a complete set of information with respect to any registered immovable asset.

Other significant new provisions set out in the Cadastre Law

By the recent amendments to Cadastre Law, the following measures were enacted for the implementation of the mentioned electronic data base that should eventually lead to a significant increase in the number of properties registered with the land book:

Registration of current holders who do not have documents to support ownership according to the law

— Provided that there are no challenges in court of such requests for registration, the holders of properties who act like owners will be able to be registered with the land book based on an acknowledgement given by any public notary that the respective holder is known as the actual owner of such property.

Correction of errors in the existing layouts of the properties

— In case from the cadastral measurements of properties that were previously registered with the land book arise any errors regarding the delimitation of properties, their correction shall be performed automatically, without the consent of the registered owner of such properties.

Cooperation between local authorities and public notaries regarding inheritance of properties

— In view of performing the cadastral registration works, the local authorities are obliged to inform the competent public notary of any owner's death, within 30 days from such occurrence, so that the notary can start immediately the inheritance procedure. This will speed-up the split of properties between the heirs and will limit uncertainty related to the actual owners of inherited properties.

Note, the cadastral services and registration operations performed for the implementation of the mentioned measures shall be carried out free of charge.

Russia

Granting a permit after construction has started

In practice, many titleholders to land plots start constructing buildings and structures prior to receiving a construction permit. Indeed, an application and other documents required to receive a construction permit are filed when at least part of a building has already been constructed. Frequently, the time between the issuance of a construction permit and the issuance of a commissioning permit is only a couple of months. By operating in such a way, developers commit administrative offenses, but they do save time.

Do the competent authorities have the right to issue a construction permit after construction has already begun? The absence of the necessary documents and/or nonconformity of those documents with the land plot development plan are the basis for being denied a construction permit. The Urban Planning Code of the Russian Federation does not stipulate completing construction without a permit as the basis for denying a construction permit. Therefore, it is possible to argue that a construction permit may be granted after construction has started. Even court practice supports this argument. The courts have indicated, in particular, the closed nature of the list of grounds for denying a construction permit, as well as the impossibility of denial based on a building having already been constructed.

In addition, the courts have expressed a contradictory position, particularly in instances when a construction permit is requested at the finishing stages of a project. These cases have been viewed as attempts to register structures illegally, and as a misuse of rights. This position, according to the author, contradicts the provisions of paragraph 3 of article 222 of the Civil Code of the Russian Federation, as well as the position of the Supreme Commercial Court of the Russian Federation, by which, under certain circumstances, a court may recognize the owner or leaseholder of a land plot as the owner of the buildings and structures constructed without proper permission on said plot. If a court has the possibility of recognizing ownership rights to a building constructed without a construction permit, and if the construction has been completed without any substantial infringements of the rules and regulations of city construction, is not a threat to life or health, and does not infringe upon the interests of third parties, then it is unclear why it is not permitted to grant a construction permit after the fact, particularly since the law does not explicitly forbid this. Furthermore, granting a construction permit under such circumstances in no way relieves a developer from liability under the Administration Offense Code.

In conclusion, it is necessary once again to note that a developer who has begun construction without first having obtained the proper permit is violating the law. However, when applying for a construction permit, a developer may refer to the fact that starting construction without first having received a permit is not stipulated in the law as a basis for denying a construction permit. At the same time, the courts do not always follow this argument; therefore, construction without the necessary permit is not only an offense, it is also a serious financial risk, particularly if an application is filed for a construction permit in the finishing stages of a project.

Slovakia

Changes to the VAT act relevant on real estate projects

From 1 October 2012, there are significant changes in liability for payment of VAT.

One change is the enlargement of the list of transactions where VAT liability is transferred from supplier to purchaser (who is also VAT registered).

The list now includes real estate transfers, occurring more than five years after the final inspection ('kolaudačné rozhodnutie') was granted, which are exempt from VAT unless the purchaser wants the liability to remain.

It also includes property transfers executed to discharge a liability in tax, insolvency or other debt recovery proceedings.

Another change is the extension of liability to VAT-registered purchasers of goods (e.g. constructions) or services (e.g. construction services) who know or have sufficient reason to know at the time that the tax would not be paid by the supplier. The change applies to existing contracts as well as those agreed after 1 October 2012.

A purchaser would have sufficient reason to know if:

— The amount payable in the invoice is too high or low with no economic justification.

— It continue doing business with the supplier after grounds for its deregistration appeared in the list maintained by the Financial Directorate, or

— The statutory body to which it belonged or one its members or associates was as statutory body to which the supplier belonged or one of its members of associates.

This means that if the supplier does not settle the tax listed on the invoice within the due date and at the same time one of the above points applies, the tax authority will transfer the obligation to pay the tax on the guarantor.

The liability will pass to the guarantor even if the supplier was wound up with no legal successor.

The supplier would have to pay the unpaid VAT within eight days of the tax authority ruling that it was liable to do so, even if it decided to appeal against the decision. It is likely that making an appeal against the decision may be the only option for the purchaser, but it will not prevent it from having to settle the tax within eight days. It would then receive a refund from the state if its appeal succeeded but would have got no other redress.

This change imposes a significant risk for purchasers, particularly in relation to large orders, since it can make them unexpectedly liable for a supplier's unpaid VAT and have a very short time within which to pay it. In case of large deliveries (e.g. constructions) this can seriously jeopardise the purchaser's financial stability. This risk should therefore be reflected in all future negotiations with suppliers.

Further, it is advisable to review on regular basis the 'black' list of suppliers which shall be kept by the Financial Directorate. It is expected that the list shall be adopted by the end of January 2013, so real application of the changed legal provision may occur in February 2013.

Ukraine

Changes to the registration of real estate in 2013

In 2010 the Ukrainian parliament passed a long-awaited law which substantially amended the rules and procedure for state registration of property rights and their limitations. These amendments will become effective from 1 January 2013, so their practical effectiveness remains to be seen. We set out here the changes of most significance to new developments.

Unification of the land plots register with the buildings registers

The current system of registration of title to real estate in Ukraine is rather complex, requiring investors to contend with five different registers. Starting from 1 January 2013, the five existing registers of property rights and encumbrances (limitations) will be replaced by a single unified register, which will be called **the State Registry of Real Rights to Immovable Property**. It will be maintained by the local departments of the State Registration Service of Ukraine and newly-appointed notaries performing the function of state registrars.

The new system is designed to meet the expectations of foreign investors for a simple, unified system providing a single point of access to information on title and encumbrances.

In contrast, the current system requires information to be accessed from the following five registers.

— The **State Land Register** managed by **local land resources bodies**. The register contains information on (i) the ownership of land plots, leases, and limitations (i.e. servitudes) on land plots' use and (ii) the characteristics of the land plots (area, location, designated purpose, cadastral number etc.).

— The **Register of Ownership Rights to Immovable Property** managed by the local **Bureaus of Technical Inventory**. The register contains information on title to buildings located on land plots and details the characteristics of these buildings.

— The **Unified Register of Prohibitions on Alienation of Immovable Property**, the **State Register of Mortgages** and the **State Register of Encumbrances on Movable Property** managed by **notaries** and local divisions of the **State Enterprise 'Information Centre' of the Ministry of Justice of Ukraine**. The registers contain information on mortgages and other existing encumbrances (limitations) on buildings and land plots.

Abolition of the registration of real estate legal acts title deeds

Under the current system, in addition to the obligatory registration of title to real estate, a title deed becomes effective only once recorded in the applicable Register of Legal Acts by a notary. This double registration of both title and title deed was much debated among experts and was criticised by some because it left uncertainty as to when title to the real estate is created (i.e. after its registration in the title register or after registration of the title deed). The new law abolishes the registration of real estate title deeds, including the registration of lease agreements with a term of three years or more and sale and purchase agreements for both buildings and land plots.

As a result, rights to real estate (including land plots) will arise from the moment of registration of title.

Access to the register is limited

Unfortunately, the law does not resolve the vital issue of access to information on title. It is a well-established practice in most European countries that the register of title to land and buildings is open for inspection by third parties who need information on real estate owners and encumbrances. In Ukraine, only the following groups will have the right to access information on title in the new unified state register of title:

— owners of the real estate in question, persons authorised by the owner, the owner's heirs or legal successors (in the case of legal entities), and persons who have the right to lease/use real estate owned by third parties

— state bodies.

Nevertheless the legal changes coming into effect in January will allow third parties to access the title register for the purpose of checking whether there are any mortgages or other encumbrances on a given property.

Previous attempts to introduce changes in this area faced a number of obstacles to implementation after coming into force. The new law may likewise run into difficulties, such as the practicalities of integrating several registers into one, and the need for the sate authorities currently in charge of registration to co-operate with the newly-appointed notaries. Nonetheless, the new law represents a positive step towards the establishment of a transparent system of title registration, and we hope that any implementation issues will be dealt with early in the new year.

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