

THE REAL ESTATE  
LAW REVIEW

ELEVENTH EDITION

Editor  
John Nevin

THE LAWREVIEWS

# THE REAL ESTATE LAW REVIEW

ELEVENTH EDITION

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# PREFACE

Since a mystery disease, then known as 2019-nCoV, first appeared in Wuhan back in December 2019, coronavirus (covid-19) has continued to be the dominant global issue. The covid-19 pandemic has affected the economy like nothing this generation has previously experienced. Every major jurisdiction has been forced into a series of lockdowns, with the very real possibility of more to come. Fundamentally, the pandemic has been a terrible human tragedy with, at the time of writing, more than 250 million cases globally and over 5 million deaths. Although there is still some way to go, we are starting to see light at the end of the tunnel. The covid-19 pandemic will undoubtedly affect the global economy for some time to come. It will also leave its mark on how we live, work and play, including on each and every aspect of the global real estate market.

Another global event saw the great and the good, as well as a healthy number of protestors, converge on Glasgow for COP26. Despite the absence of some key world leaders and criticism that more could have been achieved, key pledges have been made to fight the climate change emergency. The year 2021 may be remembered as the year the world finally acknowledged that something needs to be done and now. The built environment accounts for more than its fair share of carbon emissions and the property industry is beginning to wake up to the fact that significant changes are necessary. How we design, build and use buildings is an important part of the transition towards net zero carbon. Environmental, social and governance (ESG) has finally become a very real issue with all parties, from governments through landlords, tenants and funders to individual workers, having a vested interest.

A great deal has happened since the first edition of *The Real Estate Law Review* appeared in 2012, but nothing more significant than the covid-19 pandemic, a truly global crisis. This eleventh edition of *The Real Estate Law Review* will continue to prove its worth by providing readers with an invaluable overview of how key markets across the globe operate and how they react to major world events. The covid-19 pandemic and COP26 have served as reminders that it is not possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of global events, and *The Real Estate Law Review* continues to help its readers to do just that.

This edition extends to 24 key jurisdictions around the world, and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effect on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of their client's own jurisdiction.

The covid-19 pandemic is a truly global issue affecting every jurisdiction and, of course, its real estate market. Although it has been overshadowed by the covid-19 pandemic, Brexit and

the associated economic and political fallout from leaving the European Union has continued to be a concern for the UK economy and its property industry. Rising costs, a critical shortage of labour and materials as well as crippling supply chain issues have threatened to destabilise the post-pandemic recovery. On a positive note, investment volumes have bounced back and we are seeing increased interest from both overseas and domestic investors, underlining the continued importance of UK real estate as an investment asset. Although global real estate investment has picked up, the recovery has been uneven across countries, markets and sectors. The United Kingdom will be anxious to maintain its position at the top of global shopping lists. The world's growing cache of investment capital is likely to prompt a surge in investment activity once international travel and business confidence stabilises. The United Kingdom seems certain to remain attractive to overseas investors looking for a safe haven for their funds. The next few years will undoubtedly be challenging as we continue on the journey to recovery, but opportunities will arise, and real estate will remain a key part of global investment strategies.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this eleventh edition of *The Real Estate Law Review*. I would also like to thank the members of the *Law Review* team for their sterling efforts in coordinating the contributions and compiling this edition. Finally, I wish everyone the very best of health for 2022 and beyond.

**John Nevin**

Slaughter and May

London

February 2022

# ROMANIA

Valentin Creața<sup>1</sup>

## I INTRODUCTION TO THE LEGAL FRAMEWORK

### i Ownership of real estate

The Roman law system distinguishes between rights *in rem*, as rights over or in connection with real estate, and rights *in personam*, as personal rights on performance of obligations.

The ownership is a right *in rem* and grants its holder the full right to use and dispose of the real estate. The other rights *in rem* (i.e., superficies, usufruct, easements, *usus* and *habitatio*) grant their holders only part of the attributions of the full ownership.

The superficies right is of particular importance to investors and, starting with the New Civil Code (which entered into force as of 1 October 2011),<sup>2</sup> enjoys unitary regulation. The superficies right entitles its owner to erect and to own a building on a third party's land. The owner of the building obtains the right of use on the land. The superficies right can be obtained for free or for a fee and is available for a maximum of 99 years, with the possibility to be extended repeatedly.

The ownership may be public or private. Public ownership belongs solely to public entities (Romanian state, counties or localities) and operates on real estate regulated by law as being publicly owned. Private ownership may belong to public or private entities and operates on any other real estate than that which is subject to public ownership.

There are several forms of private ownership:

- a* exclusive ownership – granting the free use and disposal of the real estate to a single entity;
- b* co-ownership by share quotas – real estate owned by more entities on ownership quotas, usually as pro-rata shares; and
- c* joint ownership – real estate owned by more entities without determining their quotas (usually in wedlock).

A recent institution under Romanian law is the fiduciary agreement,<sup>3</sup> which creates the possibility for any person to transfer rights (including ownership) to one or more fiduciaries (e.g., credit institutions, investment companies, management companies and insurance

1 Valentin Creața is a partner at Popovici Nițu Stoica & Asociații. The author would like to thank the real estate development team members, including Cristiana Blei, Diana Enache and Alina Georgescu, for their valuable support.

2 Law 287/2009 on Civil Code.

3 The fiduciary institution is similar to trust under the Anglo-Saxon law system.

companies), to exercise full prerogatives of such rights, for a specific purpose and period (not exceeding 33 years), for the benefit of one or more beneficiaries (constitutor, fiduciary or third person).

In Romania, there is no leasehold ownership. A lease is a right *in personam* and provides its holder only the personal right to use the property against the payment of rent during the contractual period.

## **ii Registration system**

Romanian real estate is registered with the land registry operated by the National Agency for Cadastre and Land Registration. The land registry is publicly available, and ownership information can be obtained by requesting a land book excerpt. An online system for accessing the land registry services was recently implemented, and accelerated in 2020 owing to pandemic restraints.

The land book excerpt consists of three parts:

- a* real estate description (surface, location and use type);
- b* ownership information (owner, title and relevant documents); and
- c* encumbrances (e.g., mortgages, easements, interdictions and litigations).

The registration of real estates with the land registry was given constitutive effect as of 1 October 2011. As a general rule, the rights *in rem* over real estate registered with the land book may only be transferred by registration with the land book, based on the valid title on the real estate. Similarly, rights *in rem* may be cancelled solely by removal from the land registry, based on their holder's written consent or a final judgment.

Nevertheless, this general rule shall only be implemented after completing the cadastral measurement formalities within each territorial unit, envisaged for the years to come.<sup>4</sup>

Until then, all formalities with the land book registry have only an opposable effect, so failure to register real estate operations with the land book registry does not affect their validity, but deprives the parties from legal protection against third parties who are not bound to observe these operations.

## **iii Choice of law**

Real estate transactions have to observe certain rules to be effective in Romania, such as authentication of the transfer deed by notary public, registration with the land book registry, price payment in local currency (for legal persons) and fiscal certificate attached.

Generally, parties to a transaction on real estate in Romania are free to choose the law applicable to the contractual matters, to the extent that the chosen law does not prejudice the Romanian legal provisions that cannot be exempted. Should the parties fail to choose a governing law, the Romanian law (*lex rei sitae*) will apply.

The aforementioned also applies when the parties are citizens of a European Union (EU) Member State.<sup>5</sup>

---

4 The registration procedure with the land book was accelerated by Law 264/2021, which amended and completed Law 7/1996 on cadastre and real estate publicity.

5 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

## II OVERVIEW OF REAL ESTATE ACTIVITY

In terms of economic growth, 2021 is not only marked by the continuation of the covid-19 pandemic, but also by a favourable macroeconomic environment, taking into consideration the positive review of economic growth. The Romanian GDP increased by 7.0 per cent in the first six months, compared to the same period of 2020,<sup>6</sup> Romania having one of the highest economic growth rates in the EU. Real GDP is forecast to increase by 5.1 per cent in 2022 and by 5.2 per cent in 2023.<sup>7</sup>

A positive sign is the recovery of private consumption, which increased by 6.3 per cent in the first half of 2021 and contributed 4.0 per cent to the economic growth.<sup>8</sup>

The total investments in Romania reached €563.6 million during the first nine months of 2021.<sup>9</sup> The investment market decreased by 29 per cent compared to real estate transactions of €890 million in the same period in 2020. Bucharest registered more than half of the investment volume, reaching approximately €400 million.

Office and industrial markets were the leading sectors, attracting both new and established real estate players. Prime yields decreased in the third quarter for office spaces from 7.0 to 6.9 per cent, for industrial spaces from 8.0 to 7.75 per cent, while the retail sector registered an increase from 7.0 to 7.25 per cent.

The office sector remains the main actor in delivering new supply on the market, with investments of approximately €350 million. In the first nine months, Bucharest provided new office buildings of approximately 178,200m<sup>2</sup>, the modern office stock reaching 3.11 million square metres and being expected to reach 3.24 million square metres by the end of 2021. Delivery of new office spaces could decrease in 2022 and 2023 (less than 150,000m<sup>2</sup> are expected in 2022 and less than 100,000m<sup>2</sup> in 2023). Since the beginning of 2021, approximately 189,000m<sup>2</sup> were leased in Bucharest, the vacancy rate standing at 13.0 per cent at the end of the third quarter of 2021.<sup>10</sup>

Second place in the investors' preferences in 2021 were the industrial and logistic spaces (30 per cent of the total investment value), attracting in the first nine months of 2021 investments over €170 million. At the end of the third quarter, Romania's modern industrial stock amounted to 5.42 million square metres after the delivery of approximately 280,000m<sup>2</sup> throughout the year. Industrial spaces of 460,000m<sup>2</sup> were leased throughout Romania during the first nine months, with 31 per cent less compared to the same period of 2020.<sup>11</sup>

Romania's retail stock reached 3.98 million square metres at the end of the third quarter, consisting of both shopping centres and retail parks. The year-to-date new supply amounts to 40,900m<sup>2</sup>, the combined surfaces of four retail parks throughout the country.<sup>12</sup> The retail

6 [https://ec.europa.eu/info/sites/default/files/economy-finance/report\\_edp\\_romania.pdf](https://ec.europa.eu/info/sites/default/files/economy-finance/report_edp_romania.pdf).

7 [https://ec.europa.eu/economy\\_finance/forecasts/2021/autumn/ecfin\\_forecast\\_autumn\\_2021\\_ro\\_en.pdf](https://ec.europa.eu/economy_finance/forecasts/2021/autumn/ecfin_forecast_autumn_2021_ro_en.pdf).

8 [https://ec.europa.eu/info/sites/default/files/economy-finance/report\\_edp\\_romania.pdf](https://ec.europa.eu/info/sites/default/files/economy-finance/report_edp_romania.pdf).

9 <https://www.cbre.ro/en/research-and-reports/Romania-Investment-MarketView-Q3-2021>. The third quarter of 2021 was the most animated in terms of transactional activity, with properties valued at approximately €260 million.

10 <https://www.cbre.ro/en/research-and-reports/Bucharest-Office-MarketView-Q3-2021>.

11 <https://www.cbre.ro/en/research-and-reports/Romania-Big-Box-Industrial-MarketView-Q3-2021>.

12 <https://www.cbre.ro/en/research-and-reports/Romania-Retail-MarketView-Q3-2021>.

market benefitted from a pipeline of around 120,000m<sup>2</sup> of under construction projects, while developments amounted to more than 460,000m<sup>2</sup>.<sup>13</sup> Prime rents were not substantially amended in 2021, varying from €17.50 to €18.50 per square metre.

### III FOREIGN INVESTMENT

As of 1 January 2014, all restrictions imposed by Romanian law on land ownership by foreign individuals and legal entities from EU Member States were removed. Moreover, land acquisition by non-EU nationals is permitted subject to reciprocity,<sup>14</sup> according to international treaties; however, non-EU nationals cannot acquire ownership of Romanian land in more favourable conditions than EU citizens.

Buildings are not subject to such restrictions and can be freely owned by foreign individuals and entities, to the extent that the relevant ownership is not also attached to a land quota.

It is common practice for foreign individuals and entities to indirectly acquire and hold real estate through special vehicles in the form of legal entities under Romanian company law.

Foreign investors benefit from national favourable treatment, have access to all sectors of the economy<sup>15</sup> and are granted important benefits, such as the full repatriation of capital and profits obtained in Romania, full protection against expropriation and nationalisation, and access to incentives and funds provided by EU and Romanian legislation.

In the context of land market liberalisation, a new regulation was enacted in April 2014<sup>16</sup> providing a pre-emption right in favour of co-owners, lessees, neighbouring owners (irrespective of their nationality) and the Romanian state, in this order, at equal price and in equal conditions, in case of selling agricultural lands outside the locality's borders. This regulation was amended in August 2020 by Law 175/2020,<sup>17</sup> mainly referring to:

- a* new categories of pre-emptors<sup>18</sup> for the acquisition of agricultural land outside the locality's borders and amendment of the pre-emption order;
- b* restrictive conditions precedent for the purchasers;<sup>19</sup> and

13 <https://www.cushmanwakefield.com/en/insights/covid-19/covid-19-impacts-romania-real-estate>.

14 The reciprocity principle states that foreign nationals are subject to the same restrictions related to real estate acquisitions as applied to Romanian nationals by their own country.

15 The main investment opportunities and key sectors in Romania are as follows: automotive and car component production, aerospace, wood industry, energy and renewable energy, IT&C, infrastructure, agriculture, food industry, pharmaceuticals and healthcare, chemicals, fast-moving consumer goods (FMCG), tourism, real estate and construction and natural resources.

16 Law 17/2014 on certain measures to regulate the sale and purchase of agricultural lands located outside the locality's borders.

17 For the amendment of Law 17/2014 and Law 268/2001 regarding the privatisation of the commercial companies.

18 Category of pre-emptors, in this order: (1) co-owners, spouses, relatives and in-laws up to third degree; (2) owners of agricultural investments or lessees; (3) owners or lessees of the agricultural lands adjacent to the target land; (4) young farmers; (5) Academy of Agricultural and Forestry Sciences; (6) natural persons residing in the territorial units or neighbouring territorial units where the land is located; and (7) Romanian State through the State Domains Agency.

19 (1) residence in Romania for at least five years prior to the date of the sale offer; (2) carrying out 'agricultural activities' for five years prior to the date of the sale offer; and (3) for legal persons, turnover of at least 75 per cent from 'agricultural activities', in the last five tax years prior to the sale offer.

- c* prohibition to transfer the agricultural land within eight years of purchase, subject to payment of 80 per cent tax for the positive difference value between the purchase and sale price.

New regulations are expected in the near future, to substantially amend the changes brought by Law 175/2020. These regulations will eliminate certain conditions to facilitate the purchase of agricultural lands by foreign investors.

#### IV STRUCTURING THE INVESTMENT

The acquisition of Romanian real estate is usually structured either as an asset deal (by which the real estate is purchased directly) or a share deal (by the acquisition of the shares of a Romanian company owning the targeted properties).

##### **i Asset deal**

The asset deal investment may be implemented either by simple acquisition of assets or as transfer of business (ongoing concern transfer). In this later case, the acquisition includes not only the property, but also the business attached to the respective asset (e.g., movable and immovable assets, agreements, employees and trademarks).

Through direct transfer of assets from the owner to the investor, the impact of the historical problems related to the title or to the vendor is diminished or even excluded.

This way, the acquirer:

- a* does not take over the fiscal exposures of the current owner and the obligations from the agreements that are not transferred to the investor (outside the transfer of business);
- b* secures a transfer of ownership in good faith and subject only to the land book registration rules;
- c* may register higher expenses with the fiscal depreciation than the vendor (as existing owner) and, to this end, the acquirer would register a reduced taxable profit and, implicitly, the income tax is lower; and
- d* may maintain certain authorisations (attached to the transferred assets) that do not lose their validity (e.g., firefighting permits). However, the other authorisations (e.g., operating permits) have to be obtained again by the investor.

The taxes attached to asset deal investments are higher than for share deals. The registration tax and the notary public's fee for contract's authentication amount up to 1 per cent of the transaction price.

The existing guarantees over the transaction and the assets provided by the original contractors remain in the vendor's patrimony (except for the legal guarantees), and the acquirer shall benefit only the guarantees provided by the vendor under the sale-purchase agreement (eviction and defects).

If the vendor is only a project company, there is a risk that it will no longer conduct business after the assets' transfer and it will be dissolved. In this case, it is recommended that the risk be covered through independent contractual guarantees provided by mother companies or by title insurance.

## **ii Share deal**

The share deal consists of transferring the entity (usually a company) currently owning the real estate, by transferring the shares in the respective entity.

The most commonly used corporate structures are the joint stock company and the limited liability company.

The joint stock company is the most complex corporate structure, composed of a minimum of two shareholders, with a minimum share capital of €25,000, in Romanian lei equivalent, and complex management rules. This is the entity suited for the investors interested in capital-driven structures and the only type of company to be listed with the stock exchange.

The limited liability company (LLC) is a simpler corporate structure, which may be incorporated even by a single shareholder and up to a maximum of 50 shareholders. LLC regulations were amended so as to eliminate the minimum value of the share capital together with the simplified share transfers to third parties.

In both corporate structures, the company's obligations are guaranteed with the company's patrimony, and the shareholders are liable only to the limit of their contribution to the share capital.

Another possible investment structure for an asset deal or share deal is the joint venture agreement. The participants bring together funds, assets or both, as contribution for developing a project, the ownership on the assets remaining in the participants' patrimony. The participants establish their rights and obligations in the agreement and appoint one of them as manager, representing the joint venture.

The joint venture does not imply the incorporation of a separate entity by its partners.

Although the authenticated form is only mandatory for asset deals, having an agreement concluded in authenticated form confers advantages on the investor when claiming the enforcement of contractual obligations.

In some cases, various formalities should be fulfilled for a valid transaction. For example, approvals for transferring special regime real estate (historical or archaeological monuments, protected areas), approvals from guarantors or persons holding specific rights on an asset (financial institutions, other creditors), obtaining a soil quality certificate (details provided below under Section V.ii) and Competition Council clearance (if the transaction meets the Competition Law conditions on minimum turnover and change of control, among others).

## **V REAL ESTATE OWNERSHIP**

### **i Planning**

The urbanism documentation has the main role in developing real estate projects, representing the outcome of land-plot planning and providing the general information for erecting buildings on specific land.<sup>20</sup>

After confirmation that a building may be developed, the investor should obtain information on the land plot scope of use (economic regime) and on construction conditions (technical regime), based on the urbanism certificate.

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20 Law 350/2001 on land planning and urbanism, as amended by Government Emergency Decision 51/2018.



The urbanism certificate also provides information on the approvals and permits necessary for a building permit, but does not grant the right to build, this being established only by the building permit.

The authorisation procedure is governed by Law 50/1991, which encompasses the entire legal process, from the urbanism certificate to the building permit.

Law 50/1991 was amended in 2019 by regulations that impact real estate development,<sup>21</sup> by aiming to simplify and accelerate the authorisation procedure, namely:

- a* reducing the approvals/permits issuance terms;
- b* obtaining the urbanism certificate in digital form;
- c* enlarging the works allowed without a building permit; and
- d* issuing a single permit (with a single tax) for both demolition and construction for building a new construction after demolishing an old one.

Amendments in 2020<sup>22</sup> provide for the registration with the land book of the buildings erected without a building permit (after the expiry of the statutes of limitation for penalising such contravention), based on:

- a* a certificate<sup>23</sup> issued by the relevant municipality, ascertaining the construction of the building in compliance with the urban planning provisions;
- b* cadastral documentation; and
- c* a technical expertise confirming the observance of the construction quality requirements.

## **ii Environment**

Irrespective of having a facility under development or a standing investment, the owner (including contractors, agents, tenants, employees) is bound to observe the environmental regulations.

These apply to any type of pollution (noise, land, water and air pollution, waste disposal and evacuation) and are related to all operational permits necessary for the development or exploitation of all facilities (e.g., firefighting, operating, environmental, health and security work, and civil protection).

The real estate beneficiaries bear the liability for ensuring compliance with the environment protection laws, which, depending on the outcome of the breach, may be administrative, civil or criminal liability.

As of 1 January 2021, Law 246/2020 entered into force, aiming to establish unitary, mandatory measures for the protection, improvement, and sustainable use of the Romanian soil, as well as for the systematic monitoring of the soil quality. The subjects of these regulations are both the individuals acting in the private sector (being compelled to obtain a soil quality certificate in case of sale or change of the landowner for some specific types of land), and the public authorities.

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21 Law 193/2019 regarding the amendment of Law 50/1991 regarding the authorisation of the execution of the construction works.

22 Law 7/2020 for the amendment of Law 10/1995 regarding the quality in constructions and amendment of Law 50/1991.

23 This certificate replaces the building permit.

The obligation to obtain a soil quality certificate is not yet applicable, since relevant Rules of Application have not yet been adopted, and the transactions are still completed without such certificate.<sup>24</sup>

### iii Tax

All asset owners owe local taxes on land and buildings. Exemptions may be available if the buildings serve a public or social interest.

The land tax is determined on:

- a* surface;
- b* location (e.g., inside or outside the locality's borders); and
- c* use category (e.g., constructions, agricultural), as all such are established by the local authorities.

The tax on buildings is determined by the building category, namely 0.08–0.2 per cent of the fiscal value of the residential buildings, 0.2–1.3 per cent on non-residential buildings and 0.4 per cent on agricultural buildings. Until 1 July 2021, the fiscal value of the buildings had to be updated every three years by valuation, but the term was extended to five years by Law 296/2020 for amendment of the Fiscal Code. Otherwise, the applicable quota of local tax is 5 per cent.

For transfers, taxes vary depending on the transaction structure. In a share deal, the stake seller owes the corporate income tax, which is of 16 per cent<sup>25</sup> of the capital gain (reduced to zero if the shareholder is a company owning more than 10 per cent of the shares for minimum one year, subject to additional conditions), or the personal income tax of 10 per cent.<sup>26</sup> For foreign nationals, additional benefits may be available under the conventions for the avoidance of double taxation.

In asset deals, 16 per cent corporate income tax<sup>27</sup> applies on the profit, except for natural persons, for which the tax is 3 per cent of the taxable income. As per the new fiscal regulations,<sup>28</sup> natural persons are exempt from taxation in asset deals lower than approximately €91,000, in Romanian lei equivalent (referred to as 'non-taxable amount'), the 3 per cent being applicable to the difference between the transfer price and the non-taxable amount.

The tax in real estate transactions is currently levied on the value declared by the parties in the contract. If the value stipulated by the parties is lower than the minimum value provided by the market survey, the public notary must notify the respective transaction to the fiscal authorities. A recent draft bill<sup>29</sup> amended the tax calculation scheme, to be levied on the minimum value provided by the survey, even if the contract value is inferior.

A reverse taxation mechanism is applicable to constructions and lands whose transfer is subject to VAT, which applies if both seller and buyer are registered for VAT purposes in Romania. Otherwise, the normal VAT system applies.

24 We expect the Rules of Application to bring more clarification on Law 246/2020, including sanctions for non-observance of its provisions.

25 The microenterprise taxation regime applicable for certain companies has not been considered.

26 Personal income tax was reduced from 16 to 10 per cent as of 1 January 2018, according to Government Emergency Decision 79/2017.

27 A microenterprise taxation regime applicable for certain companies has not been considered.

28 Government Emergency Decision 3/2017 for amendment of the Fiscal Code, approved by Law 177/2017.

29 Draft Bill No. 464/2021 for the amendment of Law 227/2015 on Fiscal Code.

If the land is not for construction purposes, the transfer is VAT exempt (with no deduction right). VAT exemptions also apply to transfer of buildings, except for the new buildings.

For all real-estate transactions where an exemption applies, the seller can opt to levy VAT, based on prior notification of the tax authorities.

Government Emergency Decision 13/2021 provided a decreased threshold for the acquisition by natural persons of a living household with a usable area of less than 120m<sup>2</sup> (excluding household annexes, but including the building's land), from €140,000<sup>30</sup> to approximately €100,000, excluding VAT. The decision will be effective on 1 January 2022, when Law 296/2020 becomes applicable, and the threshold will be increased again up to €140,000. For such acquisitions, a reduced 5 per cent VAT is applicable, if the entire price of the transaction is lower than this threshold.

#### **iv Finance and security**

The acquisition of real estate is most commonly financed by banks. The foremost securities are the mortgages, which may be established over immovable assets, owner's shares and certain present and future rights attached to the property (e.g., rent, indemnities and bank accounts).

The mortgages established over the immovable assets are valid if the relevant agreement is concluded in authenticated form before the public notary and become effective as of their registration with the land book registry, and regularly go along with interdictions to transfer the asset, to build or to otherwise affect the property (e.g., partitioning, consolidation, lease and easements).

The mortgage agreement validly concluded and registered with the land book registry or the Electronic National Registry for Movable Property represents enforceable title. Thus, the enforcement procedure of the corresponding security is simplified and the court intervention for establishing the enforceability of a mortgage is not necessary.

#### **v Fire safety requirements**

Certain constructions<sup>31</sup> (e.g., high buildings, office and commercial buildings or exceeding 600m<sup>2</sup>, as well as buildings for cultural or touristic activities) are subject to fire safety authorisation. The authorisation has to be obtained prior to the commencement of any construction, and the person bound to obtain it is either the investor or the beneficiary of the investment.

Recent regulations provided that, if a construction was commissioned without the necessary authorisation, the beneficiaries may obtain the authorisation until the end of 2022 (except in the case of a serious breach of fire safety regulations), subject to allocating the necessary funds for design and works' execution. In the meantime, exclusive liability lies with the investments' beneficiaries.

The fire safety authorisation is issued after submitting technical documentation (containing fire safety scenarios, fire safety notices and evacuation plans, among other things) and is valid as long as the conditions met at its issuance are fulfilled and no changes are made to the building. The lack of authorisation triggers administrative fines, but in the event of

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30 Law 248/2020 regarding the amendment of Article 291 of the Fiscal Code.

31 Government Decision 571/2016 for approval of the categories of buildings and fittings out subject to fire safety approval or authorisation, Law 307/2006 on fire protection, as amended by Law 28/2018.

major breach of fire safety requirements (irrespective of the existence of the authorisation) the authorities may stop the building operation. Criminal liability may be triggered if a fire causes injuries or death.

#### **vi Completion of the project**

Romanian law regulates the reception of construction works, certifying the construction works' fulfilment and takeover by the investor.

Recent Law 7/2020<sup>32</sup> provides new obligations for owners and investors related to the handing-over process, the building being commissioned and ready for use only after the completion of the reception procedure, which includes:

- a* reception of the construction works; and
- b* reception of the utilities connection works and commissioning the utilities (provided the building is connected to public utilities networks).

### **VI LEASES OF BUSINESS PREMISES**

#### **i Features of lease agreements**

The lease of all premises is governed by the New Civil Code.

The lease agreement signed by the parties and registered with the fiscal authorities or authenticated by a notary public represents enforceable title as regards the payment of rent and the obligation to return the premises (upon the term expiry or following the expiry of a notice period), respectively the evacuation of the tenant. Thus, the landlord may directly initiate the enforcement procedure for failure by the tenant to observe these obligations.

#### **ii Duration and the right of renewal**

The lease period may be determined by the parties. Should the parties not provide the lease term, the lease is considered concluded for one year. The lease agreement may be concluded for a maximum of 49 years. The lease agreement ceases on the expiry date of the lease term, when determined, or upon the request of any party through unilateral termination, with the observance of a notice period, in case the duration was not determined.

Romanian law provides the prolongation by tacit renewal: if the tenant continues to execute the lease agreement following the term expiry without any opposition of the landlord, a new lease is considered to have been concluded, under the same conditions, including the guarantees. However, the new lease term shall be undetermined.

#### **iii Repair works and related costs**

In the absence of an alternative parties' agreement, regular repairs that result from normal wear and tear are the tenant's responsibility and repairs that relate to the building's structure and common areas are the landlord's responsibility.

Insurance of the building is usually the landlord's responsibility, but a share of its value may be included in the service charges owed by the tenant. The tenant may be obligated to conclude certain insurances related to the rented space and its activity (civil liability insurance against third-party claims, insurance against damage and loss of furniture, equipment).

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32 For the amendment of Law 10/1995 and Law 50/1991.

**iv Service charge**

Usually, in addition to rent and other costs, a tenant of commercial premises (office, retail, logistic) may be obligated to pay service charges as part of the aggregate expenditures incurred by the landlord in respect of all the expenses regarding the building (utilities for common areas, managements fees, insurance premiums, property taxes).

**v Subletting and assignment of rights**

The tenant is entitled to sublease the premises or to assign its rights on the premises, if not expressly forbidden in the agreement.

Similarly, unless otherwise stipulated in the agreement, the lessor is entitled to assign its rights from the lease agreement without the consent of the tenant.

**vi The rent**

The rent may be freely established by the parties, either globally or fixed on time units. No rent control exists in the private sector. Should the parties fail to establish the payment terms, it shall be paid:

- a* in advance, if the lease term is under one month;
- b* on the first business day of each month, if the lease term is between one month and one year; or
- c* on the first business day of each quarter, if the lease term is at least one year.

Rent is generally calculated based on the premises' area and may be subject to VAT.

As standard practice for the lease of premises in commercial centres, the financial obligations of the tenant comprise:

- a* minimum guaranteed rent established in €/m<sup>2</sup>;
- b* turnover rent established as percentage for certain period (usually per year) of the net total turnover achieved by the tenant in connection with the premises, which is payable if it is higher than the prepaid minimum guaranteed rent; and
- c* operating costs, including common operating costs, marketing costs and own operating costs (utilities), measured either by independent consumption metres or by engineered value.

**vii Tenant's liability**

The leases for commercial premises are usually executed in favour of the landlord (excepting the cases of anchor tenants, with a strong market position and negotiation power), and therefore all matters of the tenant's liability and financial obligations are strictly regulated under such agreements.

Regularly, the tenant is liable for early termination of the agreement (save for the termination by landlord's fault), being compelled to pay the rent and related costs calculated until the end of the lease period or until the premises are leased to a new tenant at similar rent level.

Usually, the tenant obtains at its own cost the permits and authorisations necessary for the premises' use and related renovation works. The tenant's renovation works are usually not to be reimbursed to the tenant, except for the lease termination by landlord's fault.

Generally, the tenant assumes the risk of damage caused in or to the premises and is liable for the alteration and degradation of the premises, including in the case of fire, except for the *force majeure* or fortuity cases.

Furthermore, the tenant is liable to observe (and take appropriate measures to limit and prevent) the general fire protection regulations,<sup>33</sup> applicable for office or retail premises.

### **viii Security of tenure**

There are no mandatory provisions regarding the guarantees that the tenant must provide to the landlord to secure the tenure.

In practice, the tenant provides either a deposit or a letter of bank guarantee, valid throughout the lease period, for a value generally amounting to three months' rent and operating costs.

The parties may also agree for the tenant to provide a parent company guarantee (e.g., corporate guarantee, comfort letter), unconditionally securing the performance of the tenant's obligations.

## **VII DEVELOPMENTS IN PRACTICE**

### **i Law 77/2016**

In 2016, Law 77/2016 was enacted on the discharge of mortgage-backed debts through transfer of title over immovable property, granting the consumers in a non-performing loan under €250,000 the possibility to give back the residential property to the bank if they cannot return the loan and if the impossibility of repaying the loan is because of unpredictable causes (e.g., financial crisis and exchange rate).

Banks have reacted to this law, increasing the initial contribution of the borrower in a normal mortgage agreement from 15 per cent up to 25–35 per cent, depending on the bank.

The initial trend to give back properties was diminished by a Constitutional Court Decision<sup>34</sup> stating that not all non-performing loans are subject to this measure and the applicability of the law has to be investigated from case to case. This decision has also had an impact on the banking conditions for granting a loan because some of the banks have revised the conditions for the initial contribution mentioned above, again applying a limit of only 15 per cent.

Additional amendments were enacted in 2020, mostly regarding the clarification of hardship situations when the give-back mechanism may be applied. In this respect, the minimum depreciation of the local currency by 52.6 per cent and the increase of the monthly payment obligation by 50 per cent have been indicated as foreign exchange evolution that can be considered hardship, allowing the debtor to apply the give-back mechanism, transferring the property to the bank with no further obligations.

33 Law 307/2006 on fire protection, as amended by Government Emergency Decision 80/2021, and Order 712/2005, as amended by Order 786/2005 and Order 187/2010 issued by the Ministry of Administration and Interior Affairs.

34 Decision 623/2016 of the Constitutional Court.

In 2021, the Constitutional Court declared unconstitutional some provisions of Law 77/2016<sup>35</sup> and decided that the debtor under the enforcement proceeding (by sale of mortgaged immovable property) cannot be *de jure* considered under a hardship situation (as Law 77/2016 previously provided). The unconstitutional provisions allowed the debtors to avoid their monthly payments and, consequently, the credit agreements were considered affected by hardship (as cause of limitation of the debtor's contractual liability). The court decided that the enforcement proceeding may be the consequence of hardship but not the hardship itself. However, the debtors under enforcement proceedings are still eligible to benefit from the provisions of Law 77/2016, if they meet the hardship thresholds set by this law.

## ii 'New Home' programme and limitation of indebtedness

The 'First Home' governmental programme launched in 2009 was renamed and amended in 2020 into the 'New Home' programme, the regulations including relevant implications of the pandemic.

One of the main amendments is the increase of the threshold for credit loans from €70,000 to €140,000.

The programme was an effective measure during the economic recession but is currently following a deceleration strategy.<sup>36</sup> For 2021, the budget assigned to the 'New Home' programme was of 1.5 billion lei, which was spent in just four months. Additional amendments were enacted,<sup>37</sup> which were mainly related to the beneficiaries' obligation to conclude insurance policies for the households purchased under the programme throughout the entire financing period.

The real estate transactions with natural persons were limited from 1 January 2019,<sup>38</sup> as the National Bank of Romania established the indebtedness level for loans from banks and non-banking financial institutions to 40 per cent (except for first-home buyers, for which the ratio may be of 45 per cent) for the first time since 2007. These limitations will not apply to refinancing of credits contracted before July 2020, exclusively for the amounts related to the respective debts, and new consumption and real estate investment loans that are granted in each quarter up to a maximum 15 per cent of the volume of consumption or real estate investment loans granted by the borrower in the previous quarter.

## iii The new Fiscal Code

The real estate market continues to be subject to legal changes that might have significant consequences.

The Fiscal Code reduced the standard VAT, which is currently 19 per cent. Substantial amendments of the fiscal regulations were approved in 2018, mainly for:

- a reducing the personal income tax from 16 to 10 per cent;

35 Decision 432/2021 of the Constitutional Court. Law 77/2016 was challenged by bank entities in approximately 2,000 files, being the most challenged normative deed in the history of the Romanian Constitutional Court.

36 On 29 November 2016, the Romanian government signed the deceleration strategy of the 'First Home' Programme for 2017–2020.

37 Government Decision 342/2021 for amending and completing the Government Decision 717/2009.

38 National Bank of Romania Regulation 6/2018 for amendment of Regulation 17/2012 on lending conditions.

- b* increasing the threshold for the microenterprises regime from €500,000 to €1 million; and
- c* applying new thin capitalisation mechanism rules.

The Fiscal Code was amended several times in 2020 and 2021 (mostly owing to pandemic fiscal incentives), from which the most important amendments relate to the following:

- a* maintaining tax facilities (e.g., state aids for microenterprises in the context of the pandemic);
- b* clarifying affiliated companies, increasing the turnover threshold for the application of the VAT collection system from 2.25 million lei to 4.5 million lei;
- c* repelling the dividend income received by microenterprises from a Romanian legal entity (as non-taxable income) for the calculation of the income tax; and
- d* implementing Directive (EU) 2021/1159 on temporary exemptions for imports and certain supplies of goods or services in response to the pandemic.

A significant change is the new concept of ‘fiscal group’ from the perspective of corporate tax and the possibility of fiscal consolidation at group level; namely, the tax profits of the group companies being offset by the tax losses of the other companies jointly owned, directly or indirectly, by at least 75 per cent of the value or number of shareholdings or voting rights.

#### **iv Other relevant aspects**

A new package of laws on public procurement was adopted in 2016, initiating changes aimed to simplify the process and to create better communication between the public and private sector and more transparency.

The national strategy<sup>39</sup> for public procurement contains the obligation to implement FIDIC standards within the public procurement agreements to unify the contractual arrangements, but it has recently been announced that such agreements may differ from FIDIC standards, so we may expect some changes in this field.

New regulations on price adjustment<sup>40</sup> provide that the prices of the materials will be updated, by an adjustment coefficient, for any increase or decrease in the cost of materials on which the contract price was based. The regulations are applicable only to public procurement contracts for which the price adjustment clause does not exist or is not applicable. The FIDIC standard contracts do not fall under the scope of these regulations.

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39 The adoption of such strategy was assumed within the Romanian Partnership Agreement for the 2014–2020 Programming Period.

40 Government Decision 15/2021 on regulating fiscal-budgetary measures.



## **VIII OUTLOOK AND CONCLUSIONS**

According to an economic forecast published by the European Commission,<sup>41</sup> Romania's economy is currently entering a strong recovery driven mainly by domestic demand. Although the economy is expected to recover faster than expected, uncertainty remains high given the evolution of the covid-19 pandemic and real output is not set to return to pre-pandemic levels before the end of 2022.

Although the legal system may raise concerns about stability perspectives and the duration of court proceedings is rather long, significant steps have been made in fighting corruption, with Romania receiving positive assessments in this respect.

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41 [https://ec.europa.eu/economy\\_finance/forecasts/2021/autumn/ecfin\\_forecast\\_autumn\\_2021\\_ro\\_en.pdf](https://ec.europa.eu/economy_finance/forecasts/2021/autumn/ecfin_forecast_autumn_2021_ro_en.pdf).

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Throughout his career, spanning the past 22 years, Valentin has provided key advice to high-profile real estate investors and developers in relation to major acquisition, construction and operation projects, including the country's largest shopping centres and residential projects, office buildings, logistics centres and industrial parks.

Valentin represents clients in a wide range of corporate governance cases and complex commercial matters, leading the real estate transactions team into the largest transactions in the market. He is highly experienced in structuring and implementing high-ranked real estate portfolios and assisting extended greenfield and brownfield developments.

According to international legal directories, 'the real estate team at Popovici Nițu Stoica & Asociații operates to "the highest professional standards" and "is deeply committed to their needs"; Valentin Creața is recommended'.

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