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Real Estate Newsletter

Recent Developments, Topics and Decisions

No corresponding Application of Section 179a AktG to the GmbH – Clarity or Uncertainty?

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Section 179a AktG (German Stock Corporation Act) is not applicable correspondingly to the GmbH (company with limited liability) so that a (notarized) shareholder resolution for the sale of the predominant assets of the company is not necessary for the effectiveness of the contractual obligations under the law of obligations

(BGH, judgement of 8 January 2019 – II ZR 364/18)

Introduction

For many years, lawyers have been struggling to meet the exact requirements for a necessary approving shareholder resolution when selling all or most of a company's assets. This constellation can also be found very frequently in the real estate sector, whether in the case of the sale of all subsidiaries by a holding company or in the case of the sale of real estate by the corresponding special purpose vehicle. Firstly, the background to the struggle was the lack of a clear supreme court ruling on the questions for which company forms a resolution in which form and with which majorities had to be passed when. Secondly, the threatening consequences were serious, because without a correct resolution the contract of sale under the law of obligations would be floatingly ineffective and even the effective transfer of the assets in rem would not heal the missing resolution, but could in turn have been reclaimed according to the principles of unjust enrichment. The starting point for the consideration of the wording of the law in stock corporation law was the following: For stock corporations, Section 179a of the German Stock Corporation Act (AktG) stipulates that a notarized resolution by a three-quarters majority of the shareholders' meeting is required for the sale of all of the company's assets. This is an exception to the principle that corporate bodies can represent companies in an external relationship in an unlimited and not restrictable manner. Subsequently, the BGH (Federal Court of Justice) had drawn an analogy to Section. 179a AktG in the sale of only the predominant company assets (so-called "Holzmüller jurisprudence").
Finally, in a ruling of 1995, the BGH confirmed the requirement of a resolution for the validity of the contract under the law of obligations of a limited partnership (KG) regarding its real estate as the main asset. Therefore, it was a well-established opinion that an analogous application of Section 179a AktG is made in the case of a GmbH and that a notarized resolution is therefore required. The BGH has now opposed this view in a dismissal of its previous case law on the subject.

No corresponding Application of Section 179a AktG to the GmbH – Clarity or Uncertainty?

The Decision

In the underlying case of the decision the co-shareholder of a GmbH in liquidation was interested in acquiring the only significant asset, namely the business real property. However, the other co-shareholder sold this to another interested party as a liquidator with sole power of representation without obtaining a shareholder resolution. The other shareholder coming away empty-handed claimed the invalidity of the contract due to the missing power of representation of the liquidator and the missing approving shareholder resolution in analogous application of Section 179a AktG. The BGH first discards with a rather flimsy argumentation its former argument that Section 179a AktG would embody a general principle of corporate law and thus would apply in principle to all companies. Instead, the BGH agrees with the previous minority view in legal literature that the GmbH shareholder has a significantly stronger position and more rights in the GmbH than the shareholder in the stock corporation (AG) and, therefore, does not require corresponding protection of Section 179a AktG.

Therefore, and also for the protection of legal relations, an analogous application would be excluded. In the case of transactions of special significance such as the transfer of all or most of the assets, however, the managing director is always required internally to bring about a resolution by the shareholders. For the justification of when legal transactions in these cases cease to be in need of protection, the BGH relies on earlier case law on the abuse of the power of representation and the party contracting in bad faith. A third party would act in bad faith and could not invoke a binding contract not only in the case of a collusive cooperation with the managing director but neither if (i) the third party was either aware of the abuse of the power of representation, i.e. the absence of the resolution, or (ii) under the circumstances it had to force himself upon him that the managing director exceeded his power of representation without a resolution of consent. Depending on the individual case - for example in the case of the sale of all assets - the contractual partner may even have a duty to inquire. In the present case, the BGH referred the matter back to the court of appeal for a new hearing, as it was not clear whether the third party knew that the co-shareholder did not agree with the transaction. Then, according to the BGH, it would be obvious to force the abuse on oneself.

Effects on Practice

On the one hand, the BGH - despite a certain astonishment at the nonchalance with which it dismisses its clear statements of 1995 as a completely misunderstood quotation of opinions in legal literature - creates clarity to begin with. He ends the uncertainties about the scope of Section 179a AktG and the resulting pending invalidity of contracts. However, the BGH still leaves some questions unanswered: Does such a shareholder resolution nevertheless require a certain form, at least for the GmbH? The better arguments speak against heightened requirements. If one assumes a greater proximity to a resolution to liquidate or a transaction which is subject to the approval of the shareholders simply because of its significance for the company, it seems remote to require a notarization of the resolution. Without the analogous application of Section 179a AktG, the argumentation of the quality of such resolu-

No corresponding Application of Section 179a AktG to the GmbH – Clarity or Uncertainty?

tion as amending the articles of association would also lose its persuasiveness. Final clarity, however, will only come from future decisions. The questions of the required majorities are equally unanswered. However, it seems obvious anyway not to postulate any special majorities above the normal legal majorities or those agreed in the articles of association. Far more problematic for future everyday business is the newly raised question as to when an acquirer is forced to recognize an exceeding of powers by the management or even has a duty to make enquiries. Although normally the threshold for assuming bad faith of the contracting party should be rather high, the differentiation based on the circumstances of the individual case could also easily lead to a proliferation of affirmations of bad faith in case law. This is because in a purchase investigation or in contract negotiations clues and evidence may accrue fast that the seller is a property company with a single purpose focused only on the real property in question or that this property is the last significant asset still owned by the company. The well-known market practices regarding investment structures with special purpose vehicles (SPVs) and their quick unwinding after the sale of the property also do the rest. Against this background, it seems advisable that, as a precautionary measure, the submission of an approving shareholder resolution is required as of the first clue gained. Compared to previous practice, therefore, hardly anything is likely to change except that the requirements for the form of such a shareholder resolution are less stringent.

News on General Terms and Conditions in the Hereditary Building Right Contract

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A Waiver of the Property Owner of his Right to avert Compensation agreed in a Hereditary Building Right Agreement qualifying as general terms and conditions is ineffective

(BGH, judgement of 23 November 2018 - V ZR 33/18)

Introduction

The hereditary building right is an encumbrance upon real property consisting of the right to build or develop the land above or below the surface. If the heritable building right lapses due to expiry of the term, the property owner must compensate the holder of the heritable right for the value of the building (Sec. 27 para 1, 1st sentence, Law of Hereditary Building Rights, ErbbauRG). The property owner can avert this claim by extending the heritable building right prior to its expiration for the expected lifetime of the building. If the holder of the hereditary building right refuses the extension, his claim for compensation ceases to exist (Sec. 27 para 3, 1st sentence ErbbauRG). It has so far been disputed whether the claim of the holder of the hereditary building against the property owner for compensation was permissible only by individual contractual agreement or also by General Terms and Conditions. The Federal Court of Justice (*BGH*) has now decided that a clause used in a standard leasehold contract, according to which the property owner's right if extension is excluded, contradicts the basic principles of the leasehold and is therefore invalid in case of doubt. This also applies if the compensation is limited to two thirds of the market value of the building.

The Decision

The decision was based on a leasehold contract in which the amount of the compensation claim of the holder of the hereditary building right was limited to two thirds of the market value of the constructions erected after expiry of the contract and at the same time the property owner's right to avert the extension was excluded. The BGH confirms the view of the prevailing opinion that the right of the property owner – i.e. the power to avert according to § 27 (3) ErbbauRG – can be amended or completely excluded in the individual contract without restriction. If, however, there is no individual contractual waiver, but rather a waiver by General Terms and Conditions, the waiver is deemed to be invalid because of a violation of essential basic ideas of § 27 (3) ErbbauRG. According to the BGH the concept of the Law on Heriditary Building Rights is to regulate the risk with regard to the further use of the building after expiry of the hereditary building

News on General Terms and Conditions in the Hereditary Building Right Contract

right in a certain way. The purpose of the averting right was to prevent the property owner from getting into economic difficulties as a result of the obligation to pay compensationto the holder of thee hereditary building right. The property owner's option to choose between taking over the building against payment of a compensation and extending the heritable building right was of decisive importance for the reconciliation of interests with the heritable building owner. If the landowner could not avert the obligation to pay compensation, the expiration of the heritable building right would possibly entail considerable economic burdens for him. Rather, the BGH considers it to be in the interests of the parties that, after expiry of the leasehold contract, the holder of the hereditary building right bears the risk of further use of the building because it is he who made the structural investments and was responsible for the economic orientation and maintenance of the building during the term of the leasehold contract.

The BGH points out that a violation of the General Terms and Conditions of Business against the legal model in case of doubt leads to its invalidity. This would only be justified if the legal protection purpose was ensured in a different way. However, according to the BGH the reduction of the amount of compensation to two thirds of the market value of the building would not be adequate, because this could result in a significant amount of compensation though.

Effects on Practice

The decision of the BGH must be viewed critically in two respects: On the one hand, the question arises as to whether the strong emphasis on owner protection appears appropriate. It is conceivable that interests might be involved which would not make it unreasonable to exclude the claim for compensation. In legal literature, various cases are mentioned, e.g. as compensation for a ground rent below the market level or when ordering for certain industrial purposes, which are no longer relevant as technological development progresses at the end of the term. Therefore, it seems doubtful to acknowledge the legal claim for compensation of the property owner as a legal model function which makes the exclusion invalid in the case of general terms and conditions.

On the other hand, the judgment raises the question under which circumstances the BGH would exceptionally consider an exclusion of the claim for compensation to be effective also in the case of general terms and conditions. A further reduction of the amount of compensation is to be considered here. It remains unclear, however, what threshold may be regarded as acceptable. Thus, the judgment does not ultimately create legal certainty, but rather ambiguity about the prerequisites for an effective exclusion of the compensation claim. Ultimately, it depends on a case-by-case consideration the judgement of which cannot be predicted.

On the other hand, the practical relevance of the judgment appears to be rather limited: it concerns general terms and conditions, i.e. terms and conditions pre-formulated for a large number of contracts which one party to the contract (user) provides to the other party upon conclusion of a contract, Section 305 German Civil Code (*BGB*). According to the interests involved, this is hardly likely to be the property owner, since the latter will not exercise his statutory right to turn away in his own interests. Such a clause might rather be

News on General Terms and Conditions in the Hereditary Building Right Contract

desired by a holder of the hereditary building right. The fact that this group of market participants introduces such clauses as general terms and conditions or can even enforce them due to their market position seems to be rather a rare case. This is because leasehold contracts are predominantly used by property owners, e.g. by communities, church institutions, foundations etc. that make use of this legal institution.

For the sake of completeness, reference should be made to the principles of burden of presentation and proof regarding the existence of general terms and conditions of business: The contractual partner (here probably the property owner) must explain and prove the positive prerequisites of the general terms and conditions quality. If these are present, it is the responsibility of the user (in this case practically the leaseholder) to explain and prove a negotiation in detail. According to consistent case law of the BGH, negotiation in this sense can only be considered if the user is willing to amend the content of the unlawful core content contained in his General Terms and Conditions. He must therefore clearly and seriously declare his willingness to make the desired changes to individual clauses. This proof is difficult in practice and requires detailed examination.

Ineffective Obligation to carry out Cosmetic Repairs in Commercial Tenancy Law

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Transfer of decorative repairs to the tenant within general terms and conditions with handover of unrenovated premises is ineffective in commercial tenancy law as well

(OLG Dresden, decision of 6 March 2019 - 5 U 1613/18)

Introduction

In its judgement of 18 March 2015, the BGH (Federal Court of Justice) decided that the transfer of the obligation to carry out decorative repair to the tenant by means of general terms and conditions is invalid if the apartment is handed over unrenovated or in need of renovation, unless the landlord grants the tenant "appropriate" compensation for this. Following the Lüneburg District Court and the Celle Higher Regional Court, the Dresden Higher Regional Court (OLG) has now also decided that this jurisdiction is transferable to commercial lease law.

The Decision

The tenancy agreement contained a clause according to which the costs for decorative repairs were not included in the rent. Therefore, the tenant had to carry out the decorative repairs at his own expense. A further provision described which works were covered by the term "decorative repairs". A third regulation in this context related to when decorative repairs should be due in each case. After the end of the lease and the return of the commercially rented apartments, the landlord – unsuccessfully – requested the tenant to carry out decorative repairs. After the landlord had then renovated the flats at own expense, he demanded reimbursement from the tenant.

The Higher Regional Court has rejected this demand. According to the OLG the jurisdiction of the BGH outlined at the beginning is to be transferred to the commercial lease law. The case-law of the BGH is based on the consideration that the tenant simply cannot differentiate which traces of use are caused by his use and which originate from the previous tenant. In this constellation, the tenant is thus not only obliged to carry out decorative repairs caused by his use of the property, but also to remove traces of use of the previous tenant. According to the BGH, this lack of transparency discriminates against the tenant in an unreasonable way and is only justifiable if the tenant is granted "reasonable" compensation. In the opinion of the Higher Regional Court, a transfer of this jurisdiction to commercial lease law is necessary, because in both cases the same legal regulations are deviated from and in both cases the identical demarcation problem arises between the traces of use existing at the beginning of the tenancy and those attributable to the tenant's rental use.

Ineffective Obligation to carry out Cosmetic Repairs in Commercial Tenancy Law

Effects on Practice

After a further Higher Regional Court has now ruled that the jurisdiction of the BGH described above is to be applied to commercial leases, commercial landlords who intend to transfer the obligation for decorative repairs to the tenant should ensure that either only renovated premises are handed over (and that this is documented accordingly!) or that the tenant is granted "appropriate" compensation. In the latter case, however, the landlord bears the risk that the compensation actually granted is "appropriate". If landlords intend – as in the present case – to take recourse for omitted decorative repairs, they should be aware of the considerable litigation risk – insofar as the rooms were unrenovated at the time of handover.

Construction Noise as a Defect under the Lease – a Permanent Construction Site

Considerable noise caused by construction work or refurbishment principally entitles the tenant to a rent reduction

(LG Hamburg, judgement of 21 December 2018 - 316 S 71/18 and LG Berlin, judgement of 15 January 2019 - 67 S 309/18)

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Introduction

If the use of the leased object is considerably impaired by commercial construction noise, the tenant often has a right to a rent reduction. However, the legal situation was unclear insofar as the building noise was not caused by the landlord and affected the tenant from the neighboring property. It was also unclear whether a uniform reduction rate could be formed for ongoing noise nuisance. Up to now, the legal situation had only been clarified for permanent noise immission from neighboring properties. In 2015 the Federal Court of Justice (BGH) decided that subsequently increased noise immissions emanating from a neighboring property do not, in the absence of other quality agreements, constitute a defect in the rented apartment which would entitle the tenant to a rent reduction. If the landlord must accept the nuisance as insignificant or customary without a defense or compensation option under neighborhood law, this would also apply for the tenant.

The Decision

With their latest decisions on the subject of rent reduction due to noise caused by construction or renovation work, the Hamburg Regional Court and the Berlin Regional Court have recently decided in a tenant-friendly manner. For such a case the rulings state that noise as a rent deficiency (*Lärm als Mietmangel*) can entitle the tenant to a rent reduction, and that this is not dependent on factors from the sphere of the landlord, and that a fluctuating noise intensity does not change anything about a continuous uniform reduction right with a corresponding reduction rate. The recent case law of the Regional Courts now makes it clear that the so-called "amateur football field decision", which concerns the warranty consequences of a permanent change of the environment, is not relevant in the case of a merely temporary change of the environment due to construction work, and that in the case of its transferability, it would be in unresolved contradiction to the contrary case law of the XIIth Chamber of the Federal Court of Justice. Therefore the Berlin Regional Court ruled that irrespective of whether the landlord is entitled to compensation from the party causing the noise, a tenant is entitled to a reduction in the rent if he is exposed to considerable construction noise. If legal relations between the causer of the immission and the landlord were decisive, the reduction claim would be a matter of chance,

Construction Noise as a Defect under the Lease – a Permanent Construction Site

- which would be unacceptable. In addition, the Berlin Regional Court states that even with fluctuating intensity of noise pollution a uniform reduction is possible. The Hamburg Regional Court comes to the same conclusion, but takes a tenancy law perspective. According to this, the only thing that matters is the impairment of the rental use in the relationship between landlord and tenant. Further the Hamburg Regional Court clarifies that noise from construction work other than traffic noise is not to be tolerated – this principle also applies to in large city situations.

Effects on Practice

According to the most recent case law of both of the regional courts, the landlord of a property has hardly any possibility to protect himself against a rent reduction of his tenants due to noise immissions of third parties. The only possibility that can still be considered is to inform potential tenants at an early stage before the conclusion of the lease, so that the landlord can later claim that the lease has been concluded despite of the tenants knowledge of a noise immission that is likely to occur at a later date.

Municipal Pre-emption Right – Content and Legal Consequences

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Introduction

"The notary instructed the persons appearing that a pre-emption right (*Vorkaufsrecht*) may exist according to the German Building Code." The notary's instruction will regularly be recorded in a property purchase agreement as above or in a similar manner.

The relevance of this instruction results from the existing blocking effect (*Grundbuchsperre*) of the pre-emption right. This effect only terminates when the so-called "negative certificate" is approved by the competent authority. The content of the aforementioned negative certificate is that (i) no pre-emptive right exists in favor of the municipality or (ii) it is declared that the pre-emption right is not exercised.

The existence or non-existence as well as the exercise modalities of the municipal pre-emption right are governed by the law in Sec. 24 et. seq. of the German Building Code (*BauGB*). This article is intended to provide a brief overview of the content and legal consequences of the municipal pre-emption right.

Content

Firstly, all municipalities are entitled by law to the general pre-emption right (*Allgemeines Vorkaufsrecht*) according to Sec. 24 of the German Building Code in course of purchase of properties,

- for which a public use or environmental compensatory measure has been determined by a zoning plan (*Bebauungsplan*);
- in reallocation (Umlegungsgebiet) or redevelopment (*Sanierungsgebiet*) areas, in development areas (*Entwicklungsgebiet*) or within the area of a preservation statute (Erhaltungssatzung);
- in areas that are to be kept free of buildings for flood protection purposes;
- within outlying areas (*Außenbereichsflächen*) of a structure plan (*Flächennutzungsplan*), intended for residential development and usage;
- in areas that can mainly be built on with residential buildings;

the areas of the last two categories must be undeveloped.

If a structure plan is a requirement for exercise, the pre-emption right can already be exercised by the municipality after a resolution has been passed (*Beschluss*) and the public announcement (*Öffentliche Bekanntmachung*) has been made. However, according to the state of planning it must be assumed that the future structure plan will indicate use as residential building land.

In addition, a special pre-emption right (*Besonderes Vorkaufsrecht*) according to Sec. 25 of the German Building Code may be exercised by municipalities which have enacted corresponding statutes (*Satzungen*) by legislative act.

Such a pre-emption right may be established by statutes (i) in the area covered by a zoning plan for undeveloped land and (ii) in areas in which urban development measures are being consid-

Municipal Pre-emption Right – Content and Legal Consequences

ered, provided, that this is necessary to ensure the orderly urban development (*geordnete städtebauliche Entwicklung*). In the second case, the areas to which the pre-emption right shall apply must be specified under the respective statute.

For both pre-emption rights, i.e. the general right and the special right, the following applies: If the a zoning plan is a requirement for existence of a pre-emption right, the pre-emption right can already be exercised after passing of the resolution on the creation or amendment of the respective zoning plan. In addition the public display (*Öffentliche Auslegung*) must have started. However, a project-related zoning plan (*Vorhabenbezogener Bebauungsplan*) is not suitable for establishing a pre-emption right in favor of the municipality (Sec. 12 (3) of the German Building Code).

Legal Consequences

The existence of these pre-emption rights, means that all property purchase agreements must be reported to the municipality. A non-extendable period of two months for the municipality to exercise its right of first refusal starts from receipt of notification of the legally effective property purchase agreement. In order for property purchase agreement to be legally effective, its effectiveness must in particular not be dependent on the occurrence of other conditions. Otherwise the exercise period starts with the occurrence of all conditions and other conditions of legal effectiveness.

If the municipality exercises its pre-emption right in the form of an administrative act (*Verwaltungsakt*), a sales and purchase agreement is concluded between the municipality and the seller on the terms initially agreed between the seller and the purchaser. This includes in particular the obligation to pay the agreed purchase price. However, in the event that the property is intended for public use or environmental compensation measures, the exception applies that the municipality only has to pay the market value to the seller (Sec. 28 (4) of the German Building Code).

In addition to this explicit exception, the municipality can also determine in all other cases of pre-emption by administrative act that only the market value is owed if the initially agreed purchase price clearly exceeds the market value. In this case, however, the seller is entitled to a one-month withdrawal right in accordance to Sec. 28 (3) of the German Building Code.

According to Sec. 27 of the German Building Code, the applicable law provides the purchaser with the possibility to avert the pre-emption right. The purchaser is entitled to exercise this right if he undertakes to use the property in accordance with the objectives and purposes which have caused the pre-emption right for the municipality to be established. Moreover, such an avoidance is not necessary in cases where the pre-emption right does not arise. This applies principally to exchange contracts (*Tauschverträge*) and gifts (*Schenkungen*). According to the prevailing legal opinion, there is also no pre-emption right for the municipality if the shares of a company are acquired (share deal), even if its only asset is a property. However, there is a limitation by case law where the agreements are designed solely to circumvent pre-emption rights. If such a circumvention transaction (*Umgehungsgeschäft*) exists, this triggers the case of pre-emption right in favor of the municipality.

Overview Real Estate Transfer Tax Rates

The following table provides an overview of the current status of the real estate transfer tax rates in the individual federal states (1 October 2019). Changes since the last issue in spring 2019 are marked in bold.

Baden-Württemberg	5.0 %
Bavaria	3.5 %
Berlin	6.0 %
Brandenburg	6.5 %
Bremen	5.0 %
Hamburg	4.5 %
Hessen	6.0 %
Mecklenburg-Western Pomerania	**6.0 %**
Lower Saxony	5.0 %
North Rhine Westphalia	6.5 %
Rhineland-Palatinate	5.0 %
Saarland	6.5 %
Saxony	3.5 %
Saxony-Anhalt	5.0 %
Schleswig-Holstein	6.5 %
Thuringia	6.5 %

Tax

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About Mayer Brown

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- REIT structuring and compliance
- Joint ventures and strategic alliances
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OUR CLIENTS include real estate institutional investors; pension funds and advisers; private equity funds; opportunity funds; real estate investment trusts; commercial, investment and industrial banks; governments; statutory bodies; insurance companies; real estate holding companies; developers; and multinational corporations.

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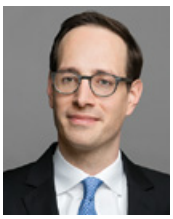

Real Estate Finance

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Selected Experience

Advised **Credit Suisse Asset Management Immobilien KAG** on the disposal of the shopping center "Rathaus Galerie" in downtown Essen to a joint venture between Henderson Park and HBB Hanseatische Betreuungs- und Beteiligungsgesellschaft mbH. The established shopping center comprises approx. 31,000 sqm of rental space with the anchor tenants Real, Decathlon, dm etc. Comprehensive modernisation and restructuring is to take place.

Advised **Commerz Real AG** on the acquisition of the project development "Terra". "Terra" is one of the four high-rise towers in the "Four Frankfurt" quarter on land formerly occupied by Deutsche Bank. The seller is the project developer Groß & Partner. The transaction has been structured by way of forward purchase.

Advised **Generali Real Estate S.p.A.** and Italian insurer **Poste Vita** on the acquisition of the project development office building "The Westlight" in Berlin's City West. The seller of the 15-story structure on the corner of Budapester Straße 35 and Kurfürstenstraße is Barings Real Estate, who will be building about 19,500 sqm office and retail space at that location by the middle of 2020.

Advised **Principal Real Estate Europe**, acting as asset and transaction manager of the SCPI NOVAPIERRE ALLEMAGNE Fund managed by PAREF Gestion, on the acquisition of a commercial park in Herborn, Hesse in Germany. The vendor is AEW and the investment vehicle of Kintyre, which delivered the asset and property management services.

Advised **Generali S.p.A.** on the acquisition of the land mark building "Marienforum" located in the heart of the banking district of Frankfurt am Main. The Marienforum has been developed by a joint venture between Perella Weinberg Real Estate Funds and Pecan Development. The property comprises eleven floors and will serve as new headquarter for ABN AMRO bank in Frankfurt.