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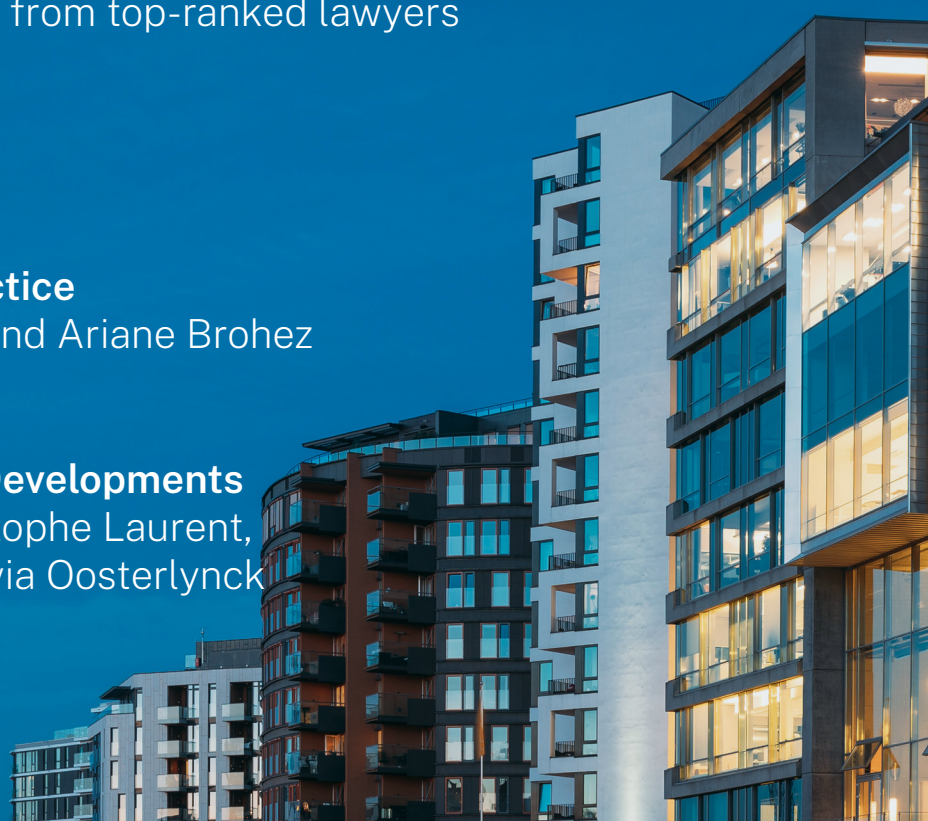

Belgium: Law & Practice
Christophe Laurent and Ariane Brohez
Loyens & Loeff

Belgium: Trends & Developments
Ariane Brohez, Christophe Laurent, Julien Lecler and Olivia Oosterlynck
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BELGIUM

Law and Practice

Contributed by:
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Contents

Loyens & Loeff has a real estate law practice that is part of a fully integrated (law and tax) firm with home markets in the Benelux countries and in Switzerland, as well as offices in all the major financial centres. In Belgium, the real estate law practice is made up of two partners, two counsels and 11 associates. The firm has extended its reputation for tax excellence to all legal aspects of real estate, becoming the only truly integrated (tax and legal) real estate department of a major law firm in Belgium providing full-service support to investors in real estate assets. Loyens & Loeff partners with clients at all stages of their investments in real estate assets – from the design and implementation of the investment structure through to the development, acquisition, hold period and disposal of the assets.

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1. General

1.1 Main Sources of Law

The federal Civil Code regulates the main aspects of real estate law in Belgium: property rights, contract law and common leases.

Considering the institutional organisation of Belgium around the Federal State and the three Regions (Brussels, Flanders and Wallonia), the following sources must be mentioned:

- retail lease – the (federal) Commercial Lease Act of 30 April 1951, which the Regions are competent to modify;
- residential lease – a specific regulation for each Region;
- zoning, planning and environmental matters – a specific set of regulations for each Region, supplemented by municipal planning regulations;
- transfer taxes – the competences in this matter are divided between the Federal State and the Regions; and
- federal regulations applicable to investments and investment structures – the Code of Companies and Association, the Income Tax Code, the VAT Code, the law of 12 May 2014 on Belgian REITs, the law of 19 April 2014 on alternative investment funds and their managers and the related decree of 9 November 2016 on the Belgian SREIF (specialised real estate investment fund).

1.2 Main Market Trends and Deals

The Belgian investment market expanded in 2022, with around EUR9 billion investment value. The market has been boosted by the Befimmo deal, a public-to-private transaction in which Brookfield acquired and delisted the Belgian REIT. The largest single asset transactions occurred in the office sector, but it is fair to say that all segments have expanded.

The top deals of 2022 are as follows, with estimated values:

- Befimmo – EUR2.6 billion (office);
- North Galaxy – EUR622 million (office);
- Egmont I & II – EUR400 million (office);
- Engie Towers – EUR392 million (office);
- Conscience – EUR175 million (office);
- Cordeel project's portfolio – EUR247.5 million (logistics); and
- part of AGRE's care home portfolio – EUR130 million (residential).

The COVID-19 pandemic seems to be an old story, and 2022 saw the most impacted sectors (retail, hotel & leisure) recover.

The current economic circumstances did not affect 2022, although many investors faced difficult negotiations with tenants in relation to the indexation of rent. Despite a slow start for the investment market in 2023, the (long-term) impact remains difficult to predict.

1.3 Impact of Disruptive Technologies

The impact of new technologies remains limited, considering the publicity and enforceability requirements, although the evolution towards a (more) digital world has been boosted. Belgian law recognises electronic signatures as legal and enforceable (or at least it stipulates that they shall not be denied legal effect or admissibility as evidence in legal proceedings) and, under certain conditions, they are fully assimilated to wet ink signatures. For notarial deeds (eg, acquisition, mortgage), a data bank managed by the Federal of Notaries has been created to store electronic signed deeds, combined with the possibility to grant a digital power of attorney

to execute notarial deeds, although only via a qualified electronic signature.

1.4 Proposals for Reform

The Belgian government has started a major reform of the (old) Civil Code. The reform of property rights already entered into force on 1 September 2021, followed by a reform of contract that entered into force on 1 January 2023. The reform of the Civil Code dedicated to "special contracts" (eg sale, lease) is still awaited, and no draft is available yet.

2. Sale and Purchase

2.1 Categories of Property Rights

Property rights under Belgian law are as follows.

- Ownership (*propriété/eigendom*) is the most complete right of enjoyment of a property and a perpetual right.
- The right to build (*droit de superficie/opstalrecht*) is a property right on a volume, on, above or below the property of another person. Except for property in volume, the right to build has a maximum duration of 99 years. Upon termination, the owner of the land becomes the owner of the erected constructions.
- The long-term lease right (*droit d'emphytéose/erfpachtrecht*) is the right to use a property and collect all income deriving from it as if the long-term lessee was the owner. A long-term lease right can be granted on the land and/or on existing buildings. The long-term lessee shall be the owner of the constructions erected by it until the long-term lease right expires. The long-term lease right is granted for a minimum duration of 15 years and a maximum duration of 99 years.
- Usufruct (*usufruit/vruchtgebruik*) is the right to enjoy a property that is owned by another person. It is a temporary right (99 years maximum), which terminates upon the beneficiary's death (in the case of an individual) or upon its bankruptcy or dissolution (in the case of a corporation).
- Easements (*servitudes/erfdienstbaarheden*) are rights in rem vested on a property to the benefit of another property. They are indivisible and accessory rights that cannot be sold, otherwise transferred, attached or mortgaged separately from the dominant property.

2.2 Laws Applicable to Transfer of Title

The Civil Code applies to transfers of title and provides for a consensual regime where a transfer is perfected between parties once there is an agreement on the object and the price; in order to be valid, the price must be determined or determinable.

In terms of formalities to perform a valid and/or enforceable transfer, specific attention must be paid to:

- zoning and planning regulations listing the information that must be delivered to a buyer prior to an acquisition;
- environmental regulations listing the information that must be delivered to a buyer prior to an acquisition and prescribing which formalities must be complied with in the case of potential contamination of the ground; and
- transcription and registration formalities to perfect the transfer.

These formalities apply in an asset deal.

No specific legal requirement applies in a share deal, except the recordation of the share transfer in the share register.

2.3 Effecting Lawful and Proper Transfer of Title

The title must be transcribed in the mortgage register. Only notarial deeds can be transcribed, and these deeds must also be registered, which triggers the payment of transfer taxes. The mortgage register keeps track of transfers of property rights over the past 30 years; it also indicates whether the property is burdened with a mortgage or has been subject to title or zoning litigation.

There is no state guarantee on the title. "Title insurance" is starting to develop in the framework of real estate transactions, but it is not yet common.

For share deals, the recordation of the share transfer in the share register is required.

In terms of processes and after the COVID-19 pandemic, the market is shifting towards digital processes for signature, including for notarial powers of attorney.

2.4 Real Estate Due Diligence

Real estate due diligence is usually carried out by lawyers and covers the following topics:

- title;
- use;
- building and environmental permits;
- leases;
- construction and management contracts;
- the soil situation;
- VAT and transfer taxes; and
- litigation.

Technical and environmental advisers usually carry out technical due diligence on the physical status of the property and compliance with conditions under the permits.

In share transactions, extensive corporate and tax due diligence is performed.

2.5 Typical Representations and Warranties

Representations and warranties will typically be limited by the seller's disclosures, including the data room, so it is essential to agree on a representation about this data room. Parties should also pay attention to disclosures covering "all publicly available information" and at least agree on a closed list and a cut-off date, since not all this information is available online.

Sale in General

By law, the seller is bound by two obligations:

- the delivery of the object of the sale; and
- the guarantee of the object of the sale.

This guarantee is twofold, covering peaceful possession (a guarantee against eviction) and any hidden defects. From a legal standpoint, the seller cannot exclude liability for hidden defects of which they were aware.

These two obligations apply to both asset and share transactions.

The parties can contractually limit these guarantees, which often occurs in transactions between institutional investors.

The sale and purchase agreement shall also contain standard representations on the capacity of both parties to contract and execute their respective obligations.

Asset Transactions

As a starting point, it must be said that asset transactions are regulated in terms of information to be provided to the candidate buyer on

zoning, environment, soil, etc. The absence of such information is often a ground for annulment of the sale.

Parties are free to agree on a set of representations and warranties, mainly concerning title, leases, permits and contracts. Except for representation on title, it is market practice to place a time limit on the seller's exposure, usually ranging between 12 and 18 months in asset transactions. In addition, the seller's liability is capped at a percentage of the deal value, usually set at 10%.

Share Transactions

As the guarantees provided by law are limited to the shares, it is market practice to agree on an extensive set of representations and warranties covering all real estate-related items, corporate matters, litigation and taxes.

These representations are divided into three sets:

- the fundamental warranties (ie, title to share and title to the asset), which are subject to a ten-year time limitation;
- the tax warranties, for which the time limitation matches the statute of limitation; and
- other warranties, which are subject to a time limitation ranging between 18 and 36 months.

Parties usually also negotiate a cap on the seller's liability, usually ranging between 5% and 20%.

State of the Building

The practice is to agree on an "as is, where is" status, and to reflect potential issues in the price.

Buyer's Remedies

Under Belgian law, the buyer can request the annulment of the sale if their consent has been vitiated, and can claim damages if there has been any misrepresentation. A claim for damages must demonstrate the damage suffered, the fault of the seller (ie, the misrepresentation) and the link between the damage and the fault.

In share transactions, specific attention is required when defining the damage and drafting the claim procedure in order to ensure that a misrepresentation at target level (eg, compliance with tax law) can qualify as damage (and for which amount) in the hands of the buyer.

Parties usually agree on exclusive remedy clauses limiting the possibility for the buyer to claim damages exclusively in accordance with the provisions of the sale and purchase agreement, meaning they can only claim damages for misrepresentation and within the indemnification limits, except in cases of fraud. When the seller is an SPV and presents potential issues in terms of financial robustness (eg, the risk for future liquidation), a parent guarantee is often negotiated as a security mechanism.

W&I Insurance

Many share deals involve the conclusion of W&I insurance, especially in large transactions and/or when the foreign buyer is used to having such insurance in place. Tax insurances for identified risks are also developing quickly, subject to the counsels delivering a robust analysis of the risk and arguments in favour of the taxpayer in case of audit.

2.6 Important Areas of Law for Investors

The investor must first have a complete view of the conditions that might affect the title, particularly pre-emption rights and specific conditions

that might be imposed in the property title. The existence of such specific conditions is usual for logistics assets, mainly consisting in economic conditions (eg, employment conditions). These conditions might impede an investor's full enjoyment and, more fundamentally, the bankability of a project.

The investor should then have a comprehensive understanding of the lease law, especially when the asset involves retail or residential elements. The legislation on retail leases and residential leases contains a series of provisions that are mandatory and protective for the tenant.

In an investment in view of a development, the zoning regulations are to be reviewed carefully as they will determine whether the contemplated development is authorised in terms of destination and size.

2.7 Soil Pollution or Environmental Contamination

As a matter of principle, the "polluter pays" principle is applicable in Belgium, so an investor (landowner) should not be held liable for contamination caused by another person. However, the legislation on this subject in each Region provides for a "waterfall" responsibility, with the first in line being the polluter, but there will be recourse to the owner in the absence of identification or in the case of bankruptcy. It is therefore highly recommended to have appropriate verifications carried out, from both an environmental and an insolvency standpoint.

The potential responsibility for soil contamination depends on the structure of the acquisition, with legal protection being available only in asset transactions.

Share Transactions

In a share transaction, the risks and liabilities (if any) remain with the target company and are inherited by the investor, including for any historical environmental damage. The applicable regulations do not protect the investor in share transactions since no specific (soil) formalities are provided for. Therefore, this should be part of a regular due diligence exercise.

Asset Transactions

The (most relevant) trigger event of soil formalities and decontamination is the "transfer of a risk land". Although the concept might differ depending on the Region concerned, an "asset deal" – being a straightforward purchase or the granting of a right in rem – shall most often qualify as a "transfer" in Brussels and Flanders. The question of whether one can speak about a "risk land" shall depend on the activities effectively carried out in the premises (with or without an environmental permit). If the asset transaction concerns a "risk land", then the transferor is obliged to perform a soil study and, depending on the results, to execute decontamination measures prior to the transfer. Even if the responsibility for complying with these soil formalities lies with the transferor, it can be shifted to the transferee if certain conditions are met.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

In each Region, the general legal framework for zoning and planning is embodied in a Town Planning Act. In relation to the permitted use, zoning plans have been enacted that contain binding conditions on the nature of the buildings and the activities that can be authorised in each area. These zoning plans exist at the level of the Region, the province and the municipality.

A buyer can ascertain the permitted use by requesting the "town planning information" at the municipality in which the real estate is located. This official document mentions the applicable zoning plan and lists the permits requested. The detailed prescriptions of the zoning plan are available online most of the time.

2.9 Condemnation, Expropriation or Compulsory Purchase

There are three possibilities for a governmental entity to take (back) land or a real estate asset.

The Expropriation Procedure

An authority may decide to expropriate a property based on public interest (eg, the redevelopment of an area within a municipality). The authority shall enact an expropriation plan, which can be disputed before administrative courts. In the execution phase, the authority is obliged to pay fair and prior compensation for the expropriated property. The Constitutional Court has ruled that partial expropriations are valid and compatible with the property right protected by the Constitution if the following conditions are met:

- the fair compensation includes a depreciation for the non-expropriated portion of the property; and
- the owner has the right to oblige the authority to acquire the remaining part of the property for a price corresponding to its normal selling value after expropriation.

The Pre-emption Right

By law or contractually, authorities may benefit from pre-emption rights. This situation is frequently seen for logistics or residential assets. Subject to a review of each relevant provision, the authority has the right to be preferred if it matches the price and other conditions offered. The absence of the exercise of such pre-emption right is always a condition precedent to the sale.

The Repurchase Right

It is common for property titles related to logistics properties to contain special conditions. This is due to the fact that most of the industrial ground on which logistics buildings are currently located was initially purchased from public authorities and/or most of the logistics buildings have been built by means of subsidies.

The law on economic expansion – which has now become a regional competence – clearly defines the conditions under which private investors can acquire, develop, operate and sell these industrial grounds. Each deed pertaining to the sale of these industrial grounds must provide the economic activity to be carried out as well as the other conditions of use.

The clear goal of this legislation (and the related special conditions that are included in property titles) is to ensure that an economic activity is effectively deployed on the site. Consequently, all deeds of sale related to these industrial grounds contain the obligation for the purchaser to carry out a certain economic activity. The deeds usually also include an obligation for the purchaser to construct certain industrial buildings and to request the prior written approval of the public authority if they intend "to alienate" the ground (and, as the case may be, the buildings constructed thereon), whereby the term "to alienate" is often broadly defined (sale, lease, granting a personal right/right in rem, contribution in kind, etc). In certain cases, a minimum level of employment is also required.

If the purchaser ceases the economic activity or does not comply with the other conditions of use mentioned in the deed, the authority has the

right to repurchase the ground and the buildings constructed thereon for a pre-determined price.

2.10 Taxes Applicable to a Transaction

Asset Transactions

Asset deals are subject to either transfer tax or VAT, depending on whether or not the asset qualifies as "new" for VAT purposes. The standard VAT rate is 21%. The transfer tax rate is 12% in Flanders and 12.5% in Brussels and Wallonia. The transfer tax rate is 2% for long-term lease rights and rights to build.

Share Transactions

Share deals (including in changes of control or corporate restructurings) are not subject to transfer tax, stamp duty or VAT, unless the tax administration demonstrates that an abuse has occurred.

2.11 Legal Restrictions on Foreign Investors

There are no specific restrictions on foreign investors, but attention must be paid to the EU regulations on the prevention of money laundering and the financing of terrorism, and to sanctions, since economic operators might be prevented from entering into a business relationship with parties that are subject to restrictive measures or for which client due diligence is not conclusive.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions of commercial real estate are generally financed by equity, senior debt and intra-group (subordinated) debt. The structuring of the financing depends on the acquisition structure.

- Asset deal – the senior debt shall be drawn down by the acquisition vehicle and the purpose of the loan is to finance the acquisition.
- Share deal – the senior debt can take the form of an acquisition debt with the purpose of the acquisition of the shares, and/or of a refinancing debt with the purpose of refinancing the existing indebtedness of the target company.

3.2 Typical Security Created by Commercial Investors

The typical security package consists of a mortgage over the property right and a pledge of related receivables (rents, bank accounts, insurances).

In addition, it is frequent to have:

- a pledge of shares (the investor pledging the shares of the borrower), in which case particular attention must be paid to the appropriation clause and the price determination formula; and
- a pledge on the counterparty's receivables (the investor pledging the claim receivables and guarantees against the seller, the contractor), in which case it must first be determined whether these receivables are transferable to the lenders.

The investor shall also agree on the subordination of any intra-group loan, which is usually subject to a specific waterfall mechanism allowing the repatriation of free cash flows.

3.3 Restrictions on Granting Security Over Real Estate to Foreign Lenders

There are no specific restrictions on the granting of security interests to foreign lenders, nor on making repayment to those lenders. Under tax laws, payments to persons established in non-

co-operative jurisdictions are subject to reporting obligations and, in most cases, to interest withholding tax. The borrowers usually protect themselves by including restrictions to transfer in the finance documents.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

Mortgages are subject to 1% transfer tax and 0.3% inscription duty computed on the amount for which they are inscribed. Notary fees and mortgage keeper fees are also due, and are calculated based on sliding scales. The enforcement of a mortgage results in a sale being subject to transfer taxes.

3.5 Legal Requirements Before an Entity Can Give Valid Security

The validity of the security package must be assessed against the corporate purpose and interest and the financial assistance prohibition.

Corporate Purpose and Interest

A company can validly enter into transactions if the following conditions are met:

- it derives a certain economic benefit in return;
- the transactions favour the realisation of the specific corporate purpose as laid down in the articles of association; and
- the transactions are in the company's best interest.

These questions are relevant in the case of cross-collateralisation and should be carefully justified in the corporate resolutions.

Financial Assistance

Belgian corporations are prohibited from making advances or granting security interests in relation to the acquisition of their own shares, unless very strict conditions are met. The financial assistance prohibition is a particular concern in share transactions, where the investor must first assess the leverage capacity at the target's level to determine the refinancing debt. Limited partnerships (*société en commandite/commanditaire vennootschap*) are not subject to this prohibition.

3.6 Formalities When a Borrower Is in Default

The rank of securities will determine their priority in the case of insolvency and enforcement.

A mortgage requires a notarial deed to be registered and inscribed, and the ranking is determined by the inscription in the mortgage register. For a pledge of shares, the pledge shall be inscribed in the share register of the company.

The creation and perfection of commercial pledges are effected by the conclusion of the pledge agreement, provided that the pledgee has the right to notify the debtors of the pledge. However, to make the pledge enforceable, the debtor will have to be notified of, or acknowledge, the pledge. Following notification or acknowledgment, the debtor's obligations can no longer be discharged by payment to the pledgor. Therefore, in the case of the borrower's default, and provided the pledges were not yet notified, the first action is to proceed with such notification.

A mortgage over real estate is enforced by the sale of the mortgaged property. The mortgagee has no right to appropriate and forfeit the property. Instead, the mortgagee must commence enforcement proceedings, which requires service upon the debtor of a formal order for payment and, within six months, a writ of executory attachment to be filed against the property. A notary public will be appointed by the court and charged with effecting the sale (generally by

public auction or, exceptionally, a private sale) and distributing the proceeds in accordance with the ranking of creditors.

In principle, a mortgage can be foreclosed within a couple of months. However, the length of time required for enforcement will depend on the debtor's attitude and the court's caseload (attachment proceedings, proceedings with regard to the merits of the case). The duration of the actual sale proceedings may also be affected by the applicable environmental law (eg, in case of soil contamination). An enforcement of a mortgage usually takes six months to one year.

During the pandemic, a general and temporary moratorium was put in place, preventing enforcement, and therefore decreasing the risk of bankruptcy. This measure was not specific to the real estate sector.

3.7 Subordinating Existing Debt to Newly Created Debt

Contractual subordination of existing debt or new debt is authorised under Belgian law, and is agreed via a subordination agreement or an intercreditor agreement determining the rights of each type of creditor.

3.8 Lenders' Liability Under Environmental Laws

Generally, lenders will not be liable for the borrower's environmental damages and breaches of environmental law as the "polluter pays" principle applies, and it can be assumed that the lender has not caused the environmental damage.

3.9 Effects of a Borrower Becoming Insolvent

In principle, security interests remain valid in the subsequent insolvency of the borrower.

Bankruptcy

Certain transactions made between the date of cessation of payments and the date of bankruptcy may not be enforceable against third parties. The cessation of payments is deemed to fall on the date the court sets the adjudication of bankruptcy, unless there are serious and objective reasons that unmistakably indicate otherwise. If – and only if – such reasons exist, the court can bring forward the date of the cessation of payments, to the date of the commencement of the "suspect period" before bankruptcy.

In principle, the date of cessation of payments cannot be set to more than six months before the adjudication of the bankruptcy, unless the company was dissolved more than six months prior to its declaration of bankruptcy, in which case the date of cessation of payments can be brought forward to the date of the winding-up decision (or the company's factual liquidation) if there are indications that the company was wound up to prejudice its creditors. Security interests granted during the suspect period shall be nullified and accordingly not be enforceable to the extent they secure pre-existing debt.

Judicial Reorganisation

There is no "suspect period" prior to judicial reorganisation. However, if the debtor applied for judicial reorganisation but is later declared bankrupt, the date of cessation may be brought forward in accordance with the rules set forth above. In a judicial reorganisation, with few exceptions (certain secured creditors), enforcement procedures against the company's assets are suspended for a maximum of six months, with a possible extension of a further six months (or 12 months in exceptional circumstances).

3.10 Consequences of LIBOR Index Expiry

The Belgian financing market is driven by EURIBOR, so the expiry of the LIBOR index is expected to have no impact.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Zoning plans have been enacted that contain binding conditions on the nature of the buildings and the activities that can be authorised in each area. These zoning plans exist at the level of the Region, the province and the municipality.

4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

The construction, modification, renovation and extension of a building require a building permit, as does a change of the use of a property (office, retail, etc). Via the permit application, the authority can control the design and appearance, and the compliance with the zoning plan. Other conditions may then apply, depending on the facts (the results of the public inquiry, environmental impact assessment, fire safety, etc).

4.3 Regulatory Authorities

The authority to grant a permit for a development or refurbishment lies primarily with the municipality in which the real estate is located. For large-scale projects, the competence is shifted to the Region. The authority shall apply the regional and local zoning regulations and rely on different compulsory advices.

4.4 Obtaining Entitlements to Develop a New Project

The procedure to obtain a permit varies from Region to Region, but the main common characteristics can be summarised as follows:

- the filing of a permit application together with, depending on the type and/or size of the project, an environmental impact assessment;
- obtaining the advice of various authorities (eg, regional town planning service, fire brigade); and
- the organisation of a public inquiry, allowing interested third parties to file their objections.

The length of the procedure varies depending on the Region and the projects, but four to six months is a fair estimate.

4.5 Right of Appeal Against an Authority's Decision

The authority's decision can be appealed by any parties showing an interest before the administrative college or jurisdiction.

4.6 Agreements With Local or Governmental Authorities

Provided that the public procurement regulations are complied with, it is permitted to enter into agreements for development with local authorities (eg, for a specific development to be carried out on land belonging to an authority).

4.7 Enforcement of Restrictions on Development and Designated Use

Various sanctions can apply if permit requirements are breached or if a development is carried out without the adequate permit. These sanctions include:

- administrative sanctions or measures, such as an order to cease the infringement, to

carry out adaptation works or to reinstate to the initial state, and fines and penalties; and
- criminal sanctions subject to actual legal action by the public prosecutor – for companies, the imprisonment sanctions are converted into fines.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Direct Acquisition

Foreign investors can directly acquire the property right.

Indirect Acquisition

Three main types of entity are available to hold real estate assets:

- a corporation (SPV) – ie, a private limited liability company (*société à responsabilité limitée/besloten vennootschap* – SRL/BV) or a public limited liability company (*société anonyme/naamloze vennootschap* – SA/NV);
- a limited partnership (*société en commandite/commanditaire vennootschap* – SComm/CommV) – this type of vehicle is not subject to capital protection rules, including the prohibition on financial assistance; or
- a specialised real estate investment fund (*fonds d'investissement immobilier spécialisé/gespecialiseerde vastgoedbeleggingsfonds* – FIIS/GVBF) incorporated under the form of an SA/NV or an SComm/CommV.

Investors might opt for an FIIS/GVBF either as the acquisition vehicle (of the shares or the asset) or by converting an SPV. The main advantage is its accounting regime and its tax regime. Financial statements must be established under IFRS, and the investment income is not subject to corporate income tax. The FIIS/GVBF should also allow the qualification of the investment as "real estate" in accordance with the Solvency II regulation. However, the following tax cost is associated with this structure:

- entering into this regime triggers "exit tax" – ie, taxation of the latent gain on the asset at a rate of 15%; and
- the entity must distribute most of its profits annually, which will trigger withholding tax based on any applicable tax treaty. In this respect, dividends distributed to foreign pension funds should benefit from a withholding tax exemption based on Belgian tax law.

From a regulatory standpoint, the FIIS/GVBF is an alternative investment fund, either by option if it only has one investor or is a joint venture, or by law in the case of multiple investors.

5.2 Main Features of the Constitution of Each Type of Entity

The incorporation of each type of entity requires a notarial deed containing the articles of association of said entity. Prior to the execution of the incorporation deed, the founding shareholders must:

- fulfil all know-your-customer requirements;
- open a bank account to which the amount of the share capital shall be wired; and
- justify the funding of the company through the establishment of a financial plan to be annexed to the incorporation deed.

5.3 Minimum Capital Requirement

No minimum share capital is provided by law for an SRL/BV or an SComm/CommV. For an SA/NV, the minimum share capital amounts to EUR61,500.

5.4 Applicable Governance Requirements

SRL/BV

The shareholders of an SRL/BV can appoint one or more persons as directors, acting individually or as a board. If a legal entity is appointed as director, it must designate a permanent representative, who no longer needs to be chosen from amongst its shareholders, managers, directors or employees. Daily management powers can be delegated to one or several persons.

SA/NV

In terms of governance, a public limited liability company must choose between different options:

- a monistic structure, whereby the company is governed by a board of directors;
- a true "dual system", whereby the company is governed by a management board, under supervision of a supervisory board; or
- a sole directorship.

Daily management powers can be delegated to one or several persons.

SComm/CommV

The partners are free to determine their governance rule, although an SComm/CommV must have at least two partners, one of whom is the general partner entrusted with the management of the SComm/CommV and bears unlimited liability in relation to its debts and obligations.

FIIS/GVBF

In addition to the requirements applying to an SA/NV or an SComm/CommV, the FIIS/GVBF (as an alternative investment fund) may also be obliged to appoint a licensed manager, unless an exemption applies. Note that by derogation to common law, an FIIS/GVBF incorporated as an SComm/CommV might have only one shareholder.

5.5 Annual Entity Maintenance and Accounting Compliance

For ordinary companies, the annual entity maintenance can range between EUR20,000 and EUR40,000, and covers an external accountant, a domiciliation agent and directorship and the yearly audit process.

In an FIIS/GVBF, a licensed manager may be appointed and a yearly compliance questionnaire must be answered and submitted to the tax administration. Depending on whether or not an external licensed manager must be appointed, the annual entity maintenance cost can exceed EUR75,000.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Two types of arrangements can be considered:

- a personal right (ie, a lease agreement); or
- a property right (ie, a usufruct right).

6.2 Types of Commercial Leases

Commercial premises are rented via a common lease or a retail lease.

- Common leases (eg, for office spaces) are regulated by the Civil Code and, contrary to the retail lease, those legal provisions are not mandatory except for the prohibition of perpetual leases.
- Retail leases apply to professionals that are in direct contact with the public in the leased premises, which are primarily used for retail

activities. These leases are governed by the Commercial Lease Act, which includes a wide raft of mandatory legal provisions, mostly for the benefit of the tenant.

6.3 Regulation of Rents or Lease Terms

The parties are free to negotiate the rent level and the type of rent. The most frequent form remains a fixed rent, but hotel businesses and shopping centres also apply variable rent based on turnover, subject to a minimum guaranteed rent. Under a retail lease, a rent review mechanism applies.

In response to the COVID-19 pandemic, several temporary regional incentives were enacted, mostly combining a rent reduction with a financing from the authority to guarantee the rent payment to the landlord. These measures are no longer in force.

6.4 Typical Terms of a Lease

Length of Lease Term

No specific provision applies in a common lease, subject to a prohibition on perpetual leases.

The minimum duration of a retail lease is nine years, subject to a tenant's break option every three years and a tenant's option to renew three times.

Survey of the Premises

The parties must draw up a survey report of the premises within one month of occupancy. In order to establish whether the tenant is responsible for damages to the leased premises at the end of the lease, the survey report upon entry must be compared with the survey report drawn up at the end of the lease. This measure is protective to the landlord.

If no survey report is drafted at the beginning of the lease, the tenant is deemed to have received the leased premises in the same condition as that in which they are returned at the end of the lease (except for normal wear and tear). Consequently, the burden of proof regarding damages caused by the tenant to the leased premises lies with the landlord.

Maintenance and Repairs

The default rule is a tenant-friendly provision whereby the tenant will only be liable for small maintenance and repair works. However, parties frequently derogate from this, providing for a landlord-friendly provision where the landlord shall only support major repairs (structure, roof, weathertightness, etc). In certain sale and leaseback transactions, lease agreements stipulate that all maintenance and repairs are the tenant's responsibility, including major repairs.

Impact of COVID-19

Force majeure in the strict sense of the legislation does not apply to payment obligations, and hardship was not recognised under Belgian law until 1 January 2023 and the entry into force of the new contract law. Because of the COVID-19 crisis, parties have recently been negotiating ad hoc force majeure or hardship clauses into their agreements.

6.5 Rent Variation

Indexation

Lease agreements may contain different types of price variation clauses, including the traditional indexation clause that provides for an adjustment of the rent to the costs of living on a yearly basis.

Rent Review

Under a retail lease, for a period of three months prior to the end of each three-year period, each

party can file a request to review the rent, provided that the rent value of the leased premises has changed by at least 15% due to new circumstances.

6.6 Determination of New Rent

Regular Indexation (Cost of Living)

The indexation formula is set by law, and it is common to agree that indexation will apply automatically.

Retail Lease

The rent revision under a retail lease is subject to legal proceedings, with the new rent being determined by the judge based on the arguments of the parties, usually substantiated by third-party experts.

6.7 Payment of VAT

Real estate letting is (mainly) a VAT-exempt activity, but a VAT option for B2B leases has existed since 1 January 2019, as well as other alternatives.

B2B VAT Leases Since 1 January 2019

The parties to a lease agreement can jointly opt to subject rent to VAT, provided that:

- the letting concerns a "new building" (or part thereof) – ie, buildings for which VAT on construction or refurbishment cost became chargeable for the first time on 1 October 2018 at the earliest;
- the building is used for the economic activity of the tenant; and
- the option is valid for the entire duration of the lease.

Performing a VAT-taxable letting activity allows the landlord to deduct input VAT on the construction or refurbishment cost but shall at the same time extend the VAT claw-back period to 25 years.

Other alternatives to a VAT-exempt letting include:

- the renting out of warehouse space;
- the renting out of a parking space;
- the provision of hotel accommodation;
- VAT leasing;
- the granting of the right to perform a professional activity in the building;
- the granting of a property right on a "new" building;
- a special regime for shopping centres; and
- a special regime for "business centres" or "service centres".

6.8 Costs Payable by a Tenant at the Start of a Lease

Payments on top of the rent at the start of a lease are not common. In the retail sector, such payment can be envisaged in the case of a transfer of business and lease.

6.9 Payment of Maintenance and Repair

In a multi-tenant situation, maintenance and repair are usually allocated in proportion to the square metreage of rented private premises.

6.10 Payment of Utilities and Telecommunications

Most of the time, the tenants take care of a private connection to utilities and communications.

6.11 Insurance Issues

Two types of insurance should be considered:

- property insurance, which is usually taken out by the landlord and the cost of which is recharged to the tenant, covering the events

of destruction, fire, explosion, water damage, terrorism, etc; and
- the tenant's insurance, which covers its own operation and liability as well as the tenant's fit-out and furniture. With respect to business interruption insurance policies, practice has shown that the COVID-19 pandemic was usually excluded, resulting in the tenant not being able to seek indemnification.

6.12 Restrictions on the Use of Real Estate

The use (office, retail, etc) and activities determined for the premises should comply with the zoning regulations. The parties are free to further determine any specific restrictions in the lease agreement.

6.13 Tenant's Ability to Alter and Improve Real Estate

Common Lease

Unless otherwise agreed, tenants are only allowed to alter the premises if the alterations can be removed at the end of the lease without damaging the premises. If the landlord did not agree to the removable alterations, the landlord may keep the alterations, provided an indemnity is paid to the tenant. However, if non-removable alterations were made without the landlord's consent, the landlord can either request their removal at the tenant's expense or maintain the alteration without paying an indemnity to the tenant.

Retail Lease

In addition to these general principles, a tenant is allowed to perform any necessary useful and important works to adjust the premises to their business needs, provided the following conditions are met:

- the works do not permanently alter the structure of the property;
- the total cost does not exceed three years' rent; and
- the works do not affect the safety of the property, its aesthetic value or its health aspects.

Prior to carrying out such works, the tenant must request the approval of the landlord by way of a formal procedure, and may submit the matter to a judge in the case of disagreement.

6.14 Specific Regulations

For residential leases, in addition to the housing standards established by the Regions, the leased premises must also respect basic safety, health and habitability requirements. If these basics standards are not met, the tenant is entitled to require the execution of the necessary works or to terminate the lease and claim damages.

6.15 Effect of the Tenant's Insolvency

Termination Clause and Termination Condition

The lease agreement may contain a termination condition, pursuant to which the lease automatically ends in the event of the tenant's bankruptcy. Such clause is valid in principle. This kind of clause must be distinguished from a mere termination clause, which does not provide for the automatic termination of the contract and relies upon the fault of the other party. A termination clause is ineffective.

Payment or Enforcement of the Claim

Once an order in bankruptcy has been issued, the individual enforcement of creditors' rights is suspended, subject to limited exceptions. In other words, the landlord can no longer enforce its claim on the tenant's assets. The landlord will have to file (in due time) a statement of claim, which includes all the unpaid rent (past and future) and the landlord's preferential status granted by law.

In a judicial reorganisation scenario, a moratorium is granted to the debtor in judicial reorganisation, which entails the general suspension of any creditors' enforcement rights, preventing the landlord from claiming payment of the outstanding rent that dates from before the opening of the reorganisation proceedings. However, it does not preclude the landlord from enforcing their claim on the debtor's assets for unpaid rent relating to the period following the opening of the judicial reorganisation.

Eviction of the Tenant

In the event of the tenant's bankruptcy, the landlord is entitled by law to repossess the premises but this may be delayed as the receiver in bankruptcy must, among other things, have the necessary time to sell off any movable assets in the premises. In a judicial reorganisation, the eviction of a tenant based on unpaid rent for the period following the opening of the judicial reorganisation should be permitted, as such a debt is not subject to the moratorium granted to the tenant. For debts that are subject to the moratorium, it is most likely that the landlord could not evict the tenant, especially if the building is the place where the tenant carries out their commercial activities.

6.16 Forms of Security to Protect Against a Failure of the Tenant to Meet Its Obligations

Rental Guarantee

There is no specific provision dealing with rental guarantees. In practice, it is usual for a landlord to request a guarantee equivalent to three or six months' rent, in the form of a deposit or a bank guarantee, or a higher amount depending on the duration of the lease and payment frequency.

Priority Right

Landlords also benefit from a statutory priority right (*voorrecht*/*privilège*) on the movable assets that furnish the leased premises.

6.17 Right to Occupy After Termination or Expiry of a Lease

A lease terminates automatically upon its expiry date, and the tenant is not allowed to occupy the premises beyond this date. However, in retail leases, if a tenant who lost their right to renewal remains in the premises after the expiry date, the lease agreement will be tacitly renewed for an indefinite period. The landlord is entitled to terminate the new lease by giving prior notice of 18 months or more, without prejudice to the right of the tenant to request the renewal of the lease. This provision is mandatory in favour of the tenant.

6.18 Right to Assign a Leasehold Interest

Unless otherwise agreed, tenants are free to sublease or assign the leased premises to third parties; only subleases or assignments to third parties intending to have their main residence in the leased premises are prohibited. To protect landlords against any adverse consequences of such assignments or subleases, most leases include restrictions on assignment or sublease. For retail leases, no restriction of assignment will be given effect if the assignment or sublease is done in conjunction with the transfer of the business, unless the landlord or their close relatives have their residence in the premises. The tenant must nevertheless comply with a strict formal procedure.

6.19 Right to Terminate a Lease

Lease agreements can be terminated in the following manner prior to their expiry date, subject to contractual arrangement:

- following the transfer of the leased premises, provided that the lease contains an eviction clause;
- by mutual consent;
- if the property is totally destroyed by force majeure during the lease. However, if the property is only partly destroyed, the tenant may choose between a rent reduction or the termination of the lease (in which case the landlord cannot claim any damages from the tenant); or
- by court decision following a contractual breach and subject to the assessment of the judge as to whether the breach is sufficiently serious to justify the termination of the lease.

If explicitly stipulated in the retail lease, the landlord may also terminate the lease every three years if they give notice by registered letter or by bailiff's writ, no later than one year prior to the end of the three-year period, and they or a close relative intend to run a business in the leased property. In such case, the tenant can claim an eviction indemnity, the amount of which depends on the nature of the new business.

6.20 Registration Requirements

Registration

Registration of the lease is a legal obligation that usually lies with the landlord, although the associated costs are borne by the tenant. Registration gives the lease a "fixed date", limiting the eviction possibilities by a third party claiming property right on the leased premises, such as the purchaser of the asset.

Notarisation

All leases exceeding nine years or including the discharge of a three-year rent must be executed before a notary and recorded in the mortgage register. If these formalities are not satisfied, the lease will not be enforceable beyond the nine-year term against bona fide third parties claiming a property right on the leased premises.

6.21 Forced Eviction

In the case of default, a tenant can be forced to leave and vacate the premises. Legal proceedings can take around six months or more.

6.22 Termination by a Third Party

The lease as such cannot be terminated by a third party, but shall terminate if the leased premises are expropriated. The tenant can claim an indemnity in such a case.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The most common price structure is the fixed price contract, which is subject to adjustment if changes are requested by the owner.

7.2 Assigning Responsibility for the Design and Construction of a Project

The following three entities are assigned responsibility for design and construction:

- the architect is liable for the design and must also supervise the execution;
- the contractor is liable for the execution of the construction, including in case of subcontracting; and
- the consulting engineers have a controlling role at the design and execution stage.

7.3 Management of Construction Risk

Owners benefit from a mandatory legal protection – ie, the ten-year liability for structural defaults. A contractual relationship must exist between the victim and the author of the damage. However, the ten-year liability is asset-

bound and will pass to the transferee in its capacity as the new owner. It is a liability and not a guarantee, and therefore the fault must be proven. It runs for ten years from the acceptance of the works (provisional or definitive acceptance as determined contractually).

The parties may then agree on the following series of contractual provisions, which may be jeopardised in the transfer of the property:

- with respect to hidden defects, a ten-year liability may also apply as of (provisional or final) acceptance, subject to contractual limitations in scope and/or time – in such a case, the fault, damage and causal link must be demonstrated, and the owner must act without any delay as of the moment the default is discovered;
- guarantee provisions for defects detected within a certain period of time (eg, two years from provisional acceptance for heating, ventilation and air conditioning);
- retainer or bank guarantee, usually amounting to 5% of the construction price, to guarantee the curing of the snag items and to be released on final acceptance;
- penalties in case of delay; and
- a set of warranties and indemnities.

7.4 Management of Schedule-Related Risk

Parties usually agree on a construction schedule and mitigate the risk with ad hoc force majeure clauses on the contractor's side, and with penalties on the owner's side.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

The most common guarantee is the retention of a bank guarantee, usually representing 5% to 10% of the agreed construction price. In forward transactions, parties usually agree on a completion guarantee (eg, bank guarantee) covering all sums necessary to terminate the works or to reimburse the sums paid by the (future) owner in case of the termination of the contract because of non-completion of the works, and step-in rights in case of default prior to the delivery of the premises.

7.6 Liens or Encumbrances in the Event of Non-payment

Architects and contractors benefit from a lien on the real estate for an amount corresponding to the gain in value upon the sale of the property resulting from the works.

Contractually, the parties usually agree on a direct payment from the bank to the contractor (in the case of external financing) and/or a parent guarantee or bank guarantee for the price of the contract.

7.7 Requirements Before Use or Inhabitation

Parties are free to determine the requirements to consider a project completed and fit for its intended use. Contrary to other countries, there is no verification by the authority.

When the intended use is residential, in the broad sense, regional regulations often impose a specific permit (for letting, hotel operation, etc).

8. Tax

8.1 VAT

Asset deals are subject to either transfer tax or VAT, depending on whether the asset qualifies as "new" for VAT purposes.

- A building is deemed new for VAT purposes until 31 December of the second year follow-

ing its first use or occupancy. Heavy refurbishment allows the qualification as "new building" in the following circumstances:

(a) when a drastic modification of essential elements (ie, the nature, structure or destination, whatever the costs of the works might be) is executed; or

(b) when modifications are executed, the cost of which (excluding VAT) equals at least 60% of the market value of the building (excluding ground) at the end of the works.

- Compulsory VAT-taxable transaction for new buildings – if the owner is a professional developer (ie, performs construction and sales as a regular activity, or has the intention to do so), the sale of the asset or the granting of a property right (ie, long-term lease, right to build or usufruct) must be subject to VAT at the standard rate of 21%. Under specific conditions for the residential sector, a reduced rate of 6% can apply.
- Optional VAT-taxable transaction for new buildings – when the owner is not a professional developer, they can opt to subject the transaction to VAT instead of transfer taxes. This option must be clearly mentioned to the purchaser and included in the (private) purchase agreement. Specific reporting formalities apply.
- Transfer taxes – in a straightforward sale or the granting of a usufruct right, the applicable rate is 12% in Flanders and 12.5% in Brussels and Wallonia, computed on the sale price or the market value, whichever is higher. Long-term lease rights and rights to build are subject to 2% transfer tax computed on the total of the fees paid to the owner over the full duration of the right, increased by the charges contractually borne by the beneficiary.

8.2 Mitigation of Tax Liability

Share Transaction

Share deals are not subject to transfer tax, stamp duty or VAT, unless the tax administration demonstrates that an abuse has occurred. The seller should also realise a tax-exempt capital gain but at the same time the purchaser shall, indirectly, inherit from the book value of the underlying asset (ie, no step-up in value). Market practice is to share the expected future tax costs between seller and buyer, by agreeing on a discount for tax latency most of the time equal to half of the corporate income tax that would have been due in the case of an asset transaction.

Asset Transaction

A new form of "asset deal" is being seen on the market, where an investor acquires a long-term lease right, subject to 2% transfer tax, and a third party acquires the residual property rights, subject to 12% or 12.5% transfer tax. To guarantee the liquidity of the asset, the transferee of the long-term lease right usually benefits from an option to acquire the residual property rights at market value, with such option being exercised 15 years after the (initial) granting of the long-term lease right, at the earliest.

8.3 Municipal Taxes

An annual property tax (*précompte immobilier/onroerende voorheffing*) applies for all locations and types of business, the rate of which depends on the Region and the municipality. In addition, regional taxes and municipal taxes apply, depending on the location and the type of business – eg, local taxes on office spaces or parking spaces, or unoccupied premises. These local taxes are usually recharged to the occupant, with the notable exemption of property tax for residence premises, which is by law borne by the owner.

8.4 Income Tax Withholding for Foreign Investors

Direct Acquisition by Foreign Investors

Foreign investors can directly acquire ownership or the long-term lease right. In such a case, the revenues and capital gain shall be subject to tax in Belgium, at the ordinary corporate income tax rate of 25%. No profit branch tax applies.

Indirect Acquisition by Foreign Investors via an SPV

Revenue from real estate income and capital gains shall be subject to corporate income tax, on their net amount, at a rate of 25% in the hands of the SPV.

Belgian source dividends benefit from a withholding tax exemption if the shareholder:

- is subject to regular income tax;
- is resident in a treaty country and has no dual residence;
- is incorporated in one of the forms listed in the annex to the EU Parent-Subsidiary Directive or in an analogous form; and
- holds at least 10% of the capital of the Belgian subsidiary.

Beside these formal conditions, specific attention is required for substance requirements and beneficial ownership entitlements. Reduced rates also apply to shareholders that are treaty protected.

In the absence of protection, the standard withholding tax rate is 30% (reduced by any applicable tax treaty, as the case may be).

Indirect Acquisition by Foreign Investors via an FIIS/GVBF

If the investment vehicle is a REIT or an S-REIF, real estate income and capital gains are excluded from the taxable base, but the taxation is shifted to the investor via the compulsory annual dividend distribution. Such distribution is subject to withholding tax, albeit at a reduced rate if there is treaty protection.

Specific Dividend Withholding Tax Exemption for Foreign Pension Funds

In accordance with domestic law, a withholding tax exemption applies to the benefit of foreign pension funds, provided that the pension fund:

- is a non-resident legal person with the sole purpose of managing and investing funds collected for the purpose of paying statutory or supplementary pensions;
- engages in these management and investment activities without the aim of making profit and in the framework of its statutory purpose;
- is exempt from income taxes in its country of residence;
- is the owner or usufructuary of the income-generating assets; and
- is not obliged to transfer the income of such assets to the beneficial owner by virtue of a contractual obligation.

8.5 Tax Benefits

No specific tax benefit is linked to the owning of real estate. Tax laws follow accounting rules in Belgium, unless a specific derogation exists. In this respect, real estate assets (excluding land) are depreciable assets from an accounting standpoint, and such depreciation – corresponding to a straight-line depreciation over the economic lifetime – should be tax deductible.

Trends and Developments

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Loyens & Loeff has a real estate law practice that is part of a fully integrated (law and tax) firm with home markets in the Benelux countries and in Switzerland, as well as offices in all the major financial centres. In Belgium, the real estate law practice is made up of two partners, two counsels and 11 associates. The firm has extended its reputation for tax excellence to all legal aspects of real estate, becoming the only truly integrated (tax and legal) real estate department of a major law firm in Belgium providing full-service support to investors in real estate assets. Loyens & Loeff partners with clients at all stages of their investments in real estate assets – from the design and implementation of the investment structure through to the development, acquisition, hold period and disposal of the assets.

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ESG and Asset Management in Belgium

ESG considerations and, in particular, the energy performance of buildings are continuous preoccupations for investors and asset managers. Ongoing refurbishments and renovations have raised numerous questions regarding the landlord-tenant relationship, the allocation of costs and the availability of tax incentives.

The applicable regulations are summarised below.

Maintenance and repair clauses

The cornerstone of these obligations is contractual freedom: parties are free to negotiate and to agree on the applicable regime. As a default rule, the Civil Code provides for a tenant-friendly regime where the tenant is only in charge of a limited category of small maintenance and repair works (eg, floor covering, broken windows, doors, painting). All other maintenance and repair obligations lie with the landlord.

Alternatively, parties can opt for the landlord-friendly regime provided by the Civil Code, whereby the obligations of the landlord are limited to major repairs (ie, repairs that affect the structure of the property or the costs of which manifestly exceed the revenues of the property). It is important to note that a "real" triple net lease is authorised under Belgium law, whereby all maintenance and repair costs are borne by the tenant.

Improvements and statutory works

Alterations and statutory works (ie, works required due to new regulations applicable to the building) are not captured in the maintenance and repair clause, nor in the legal provisions, and often also not in the agreements. A limited exception exists for improvements in the framework of a retail lease (provided that the alterations are necessary for the enterprise of the tenant).

Parties should therefore address these matters in their agreements, determining, for example, what is authorised, who is responsible, who bears the costs and benefits from the incentives, and what are the reinstatement obligations at the end of the lease. It is important to note that, unless the parties agree otherwise, a tenant that is allowed to make certain alterations or supplementary works (eg, solar panels on the roof) based on the lease agreement will retain ownership of these improvements/alterations until the end of the lease, and should therefore be able to benefit from related tax incentives or other allowances.

Investment deduction

Being aware of the climate challenges, the Belgian government has proposed to reinstate the so-called "investment deduction", in the framework of a tax reform. The current investment deduction allows part of the taxable profits corresponding to a percentage of the value of certain qualifying investments to be exempted from corporate income tax. However, this investment deduction is only available to individuals and SMEs.

The tax reform introduces an enhanced thematic investment deduction, corresponding to 30% of the investment value (with a possibility to carry-forward in case of insufficient benefits in the year of the investment). This deduction would apply to four categories of investment (to be further specified by Royal Decree):

- investments in the efficient use of energy and renewable energy;
- investments in zero emission transport;
- environmentally friendly investments; and
- digital support investments.

Like under the current system and in order to benefit from this deduction, the taxpayer cannot:

- transfer the right of use to a third party via a property right or a financial lease; or
- transfer the right of use to a third party that would not itself benefit from this investment deduction.

In addition to this investment deduction, the taxpayer would also be allowed to double the yearly depreciation over the assets concerned (eg, an asset depreciated over ten years would be depreciated over five years). If voted by the Parliament, this tax reform will enter into force on 1 January 2024.

ESG and the EU taxonomy will have a lasting impact on asset management, and parties should consider the following questions when negotiating leases and renewals.

- Who is the best placed to be in charge? It is fair to say that the landlord being in charge will gain (more) certainty on the ESG/taxonomy impact, and thus improve the landlord's own reporting and financing. If these obligations are shifted to the tenant, the landlord will be (more) dependent in terms of execution, which will increase the actual impact of ESG and the EU taxonomy.
- Having a taxonomy-aligned building impacts the charges, but is there (always) an impact on the rent? Or is it an impact on the property valuation? This remains to be seen.
- If the tenant is in charge, how will the reinstatement obligations be adjusted in the future? This will most probably depend on the economic duration of the investment versus the lease term.
- What are the available tax incentives?

Market trends – forward transactions

Between increasing interest rates and inflation, and against the backdrop of the war in Ukraine, the first semester of 2023 is likely to be more challenging for the real estate sector. A measure of recovery is expected for the second semester of 2023, driven by a decrease in interest rates and a rebalance of prices.

The market is then expected to return to the upward trend of acquiring real estate developments in future states of completion, regardless of the investment sector (office, retail, healthcare, residential or warehouse). Such structures succeed because the developer has the comfort of being able to sell its development to an investor before the start of the construction works or at least before the completion of the real estate asset, subject to any conditions precedent that may arise.

This kind of transaction is structured either as a forward purchase or as a forward funding.

Forward purchase

In a forward purchase structure, the parties agree to sign a sale and purchase agreement, either for the shares of the company owning real estate under development or for the real estate itself, with the completion of the works being a condition precedent (in most cases upon the provisional acceptance). The transfer of ownership therefore occurs only after provisional acceptance, meaning that the investor-buyer will bear neither the construction risk nor the risk of the insolvency of the developer-seller. This could also ease the financing of the transaction, which is often negotiated before signing but with a drawdown only upon completion.

Most of the time, there is no down-payment from the investor-buyer to the developer-seller upon signing, but this depends on commercial negotiations. In terms of pricing, vacant spaces are often valued at ERV (Estimated Rental Value) and the forward purchase is accompanied by an incentive for the developer-seller to let the premises at pre-agreed conditions and to benefit from an earn-out if successful letting occurs within an agreed period of time.

Forward funding

In a forward funding structure, the parties agree to sign a sale and purchase agreement, either for the shares of the company owning real estate under development or for the real estate itself, without the completion of the works being a condition precedent. To mitigate the risk for the investor-buyer, parties usually agree on a condition precedent of definitive permits.

Contrary to the forward purchase, the sale – and thus the transfer of ownership – occurs prior to

the completion of the construction works and the price is paid upfront, usually in instalments throughout the construction process. This means that, except for the regulated forward funding under the Breyne Act of 9 July 1971, the parties must contractually agree on the process and the allocation of risks during the entire construction process.

Because the investor-buyer is on board at an early stage, it can tailor the development and remain involved throughout the development process. From a pricing standpoint, the same incentives usually apply as for a forward purchase. From an economic standpoint, both parties should measure the impact of early payment on their own return; the developer-seller benefits from an absence of upfront funding of the project but the investor-buyer is required to call capital at an early stage without presenting rental revenues. External financing agreements are also tailor-made for this type of transaction, since the parties will (strictly) agree on the conditions to be met for drawdown during the construction phase.

Forward funding has a higher risk profile for the investor-buyer (and its lender), since the investor-buyer will be exposed if the developer-seller does not perform or becomes insolvent. In addition, forward funding structures usually require more complex transaction documentation, such as a more extensive sale and purchase agreement, detailed and accurate specifications of the real estate development, a development management agreement and a letting mandate.

To mitigate risk, the sale documentation should contain appropriate protection mechanisms for the investor-buyer, particularly to cover the insolvency risk of the developer-seller (such as step-in rights, escrow and guarantee).

The Breyne Act applies to forward funding in asset deals for residential assets; this is the only forward funding regulated under Belgian law. The application of the Breyne Act is excluded when the usual activity of the investor-buyer is to build properties, or to have them built, with a in view to selling them. Moreover, the investor-buyer is required to execute one or more payments before the completion of the works.

The Breyne Act notably offers the following guarantees:

- the down-payment cannot exceed 5% of the total price;
- the balance of the price is paid in instalments, depending on the stage of completion; and
- transfer of the ownership occurs gradually, based on the payments executed, although the risks are transferred to the investor-buyer upon provisional acceptance.

The type of guarantee depends on whether the developer-seller is recognised as a registered contractor. Registered contractors are obliged to post a financial guarantee equal to 5% of the total price to the *Caisse des Dépôts et Consignations*. Half of this guarantee is released upon the provisional acceptance, with the balance being released upon final acceptance. Other sellers are required to deliver a completion guarantee (eg, bank guarantee) covering all sums necessary to complete the works, or to reimburse the sums paid by the (future) owner if the contract is terminated due to non-completion of the works.

Other forward funding transactions (eg, non-residential assets, share deals) fall outside the scope of the Breyne Act. In general, parties often apply similar principles in their contractual agreements.

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