LOYENS & LOEFF

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Real Estate Update

In this edition

Reform of property law

- Long-term lease vs (retail) lease

In the spotlight

- Forward transactions: key principles and attention points
- Rent waiver - accounting
- Room hire and the supply of additional services: subject to VAT or not?

Last month in short

On the website

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Reform of property law

Introduction

The law of 4 February 2020 containing Book 3 “Goods” of the new Civil Code has been approved and shall enter into force on 1 September 2021 (with exceptions). It undoubtedly introduces the most far-reaching reform of Belgian property law since the Code Napoleon of 1804. The new Book 3 repeals, inter alia, the acts of 10 January 1824 on long-term lease right and right to build.

With the new Book 3, the legislator wishes to better structure, modernize and integrate (the rules of) property law into a single code. In addition, the legislator wants to create a functional, useful and flexible set of rules with a new - sometimes delicate - balance between contractual freedom and legal certainty.

This reform will surely be on top of your agenda. On our side, sharing knowledge is a top priority and, on this topic, we are organizing the following sharing moments:

– A monthly update on a specific topic via this newsletter
– A series of breakfast webinars given in French and in Dutch
– A half-day seminar to go deeper into the new regulations on usufruct right (droit d’usufruit/vruchtgebruikrecht), right to build (droit de superficie/opstalrecht) and long-term lease right (droit d’emphytéose/erfpachtrecht), to analyse the tax aspects of these new regulations and to comment on bankability of property rights structure. This seminar shall be given in English.

Any questions or suggestions? Do not hesitate to contact us!

Ariane Brohez
Lien Bellinck

Long-term lease vs (retail) lease

In the new Book 3, the mandatory minimum duration of a long-term lease right (droit d'emphytéose / erfpachtrecht) is reduced from 27 years to 15 years. The question arises: will this lead to parties concluding a long-term lease more often than a (retail) lease? To answer this question, we will comment the differences between a long-term lease (as regulated in the new Book 3) and a (retail) lease from various perspectives.

Duration

The mandatory minimum duration of **long-term lease rights** will be 15 years. The maximum duration remains unchanged: long-term lease rights can be granted for maximum 99 years. The new Book 3 provides one exception: if and to the extend that the long-term lease right is granted for public domain purposes, a perpetual long-term lease right can be established.

Regarding the **early termination**, the new Book 3 provides that it is *not* possible to unilaterally terminate the long-term lease during the minimum duration of 15 years, but *only afterwards*. In addition, if the long-term lessee relinquishes his long-term lease right, this will only have consequences for the future. If the long-term lease right was granted against payment of a certain fee (i.e. a canon), the long-term lessee will not be able to free himself from his obligation to pay that canon: in the event of a renunciation, the long-term lessee will remain liable for the payment of the current *and future* canons. On the other hand, the new Book 3 confirms that it is possible to terminate the long-term lease right by amicable *agreement* of both parties *at any time*. In that case, however, the termination will only have relative effect: the termination will not prejudice the rights of bona fide third parties (e.g. the financier of the long-term lessee) on the terminated long-term lease right.

Finally, the new Book 3 confirms that a long-term lease right can be **renewed** provided that the parties explicitly agree with such renewal and the maximum duration of 99 years is being complied with.

Retail leases are subject to a much more restrictive regime: retail leases must be concluded for at least 9 years, the tenant being entitled by law to request 3 renewals of 9 years each (subject to compliance with specific formalities). Nevertheless, the tenant's right to request a renewal of the retail lease is not absolute. To protect landlords, the Commercial Lease Act provides that a renewal can always be refused by the landlord. If the landlord refuses the renewal without any reason, he must pay a mandatory compensation to the tenant, amounting to 3-year rent. If the renewal is justified by certain limited circumstances, the compensation may be lower.

Contrary to the rules on long-term leases, the Commercial Lease Act provides that a retail tenant is entitled to **early terminate** the retail lease at the end of each 3-year period. No indemnification or justification is required. If explicitly stipulated in the retail lease agreement, the landlord may also terminate the retail lease at the end of each 3-year period provided that he or a close relative intends to run a business in the leased premises. In such case, the tenant can claim an eviction indemnity of which the amount depends on the nature of the new business. Finally, a retail lease can also be terminated by mutual consent, but in such case, the mutual agreement must be formalised.

Looking at the duration, it can be said that the conclusion of a long-term lease right shall guarantee to both parties an occupation of 15 years.

Consideration

A major difference between long-term lease rights and leases is the **consideration** although it seems theoretical in commercial real estate. The canon is not an essential elements of a long-term lease right, while the rent is for a lease. In both, the parties can freely determine the amount of the initial consideration.

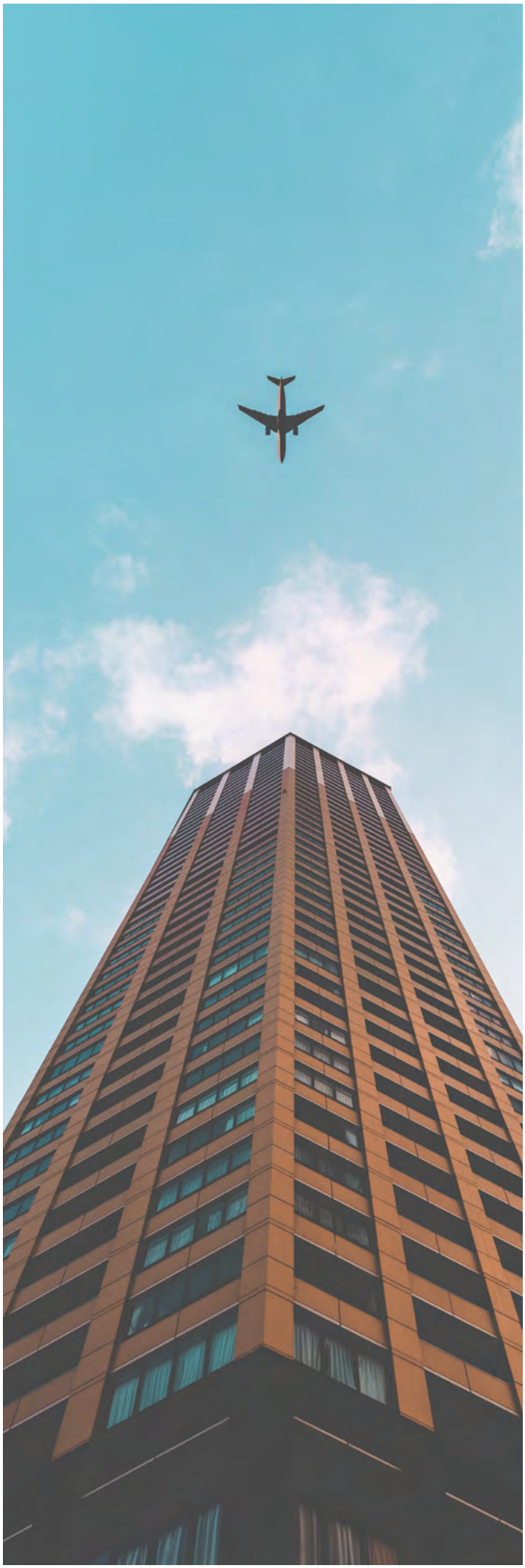
When it comes to *indexation* and *revision*, there exists no legal provision for **long-term lease rights**; it is left to the *contractual freedom* of the parties. It is totally different for **leases.** In case the parties agree to yearly adapt the rent to the cost of living, the *indexation formula* provided by law is compulsory. For **retail leases**, *each party* can, during a period of 3 months prior to the end of every 3-year period of the lease, file a request to review the rent with the Justice of the Peace provided the rent value of the leased premises has changed by at least 15% due to new circumstances.

Looking at the consideration, it can be said that the conclusion of a long-term lease right shall guarantee to both parties the consideration throughout its duration. The long-term lease right offers also more flexibility when it comes to indexation and revision of the price.

Rights and obligations of the parties

1. During the term

Transfer and mortgage. The long-term lessee may transfer his long-term lease right and encumber it with a *mortgage* (see our last article on this matter). In case of transfer, he will not be released from this obligation to pay the canon (and will remain jointly liable with the transferee), but will well be released from the other obligations as from the transfer (e.g. the maintenance and repairs obligations). In case of a *lease*, the tenant cannot mortgage his tenancy right or the constructions of which he is the temporary owner based on his accessory building right. Based on the general lease principles, a tenant can transfer his tenancy right, unless the parties agreed otherwise. The Commercial Lease Act provides specific rules in case the transfer of the tenancy right takes place together with the transfer of the business. In case of transfer of the tenancy right, the tenant remains jointly and severally liable with the transferee for the performance of the obligations due after the transfer, such as the payment of the rent.



Right on the premises. The long-term lessee has the right *to use and enjoy* the immovable property to which his long-term lease right relates. Unless otherwise agreed, he can build constructions on the encumbered property, of which he will be the temporary owner based on his accessory building right. The only thing the long-term lessee is not allowed to do is to reduce the value of the encumbered property (subject to normal wear and tear, age and force majeure). The long-term lessee may change the *destination* of the property to which his long-term lease right relates, unless otherwise agreed in the long-term lease agreement. With a lease, tenants have the right to use and enjoy the leased premises in accordance with their destination as contractually agreed (or derived from the facts and circumstances in the absence of any contractual provision). Landlords must allow their tenant to peacefully enjoy the leased premises during the lease and, amongst others, safeguard them in case of defects in the leased premises that prevent their use. Regarding alterations, the general lease principles provide that, unless otherwise agreed, tenants are only allowed to alter the leased premises if the alterations can be removed at the end of the lease without damaging the leased premises. With regard to retail leases, the **Commercial Lease Act** provides in addition that a retail tenant is allowed to perform any useful and important renovation works required to adjust the leased premises to his business needs if

1. the renovation works do not permanently alter the structure of the leased premises,
2. the total cost of the works does not exceed 3-year rent, and
3. the works do not affect the safety of the leased premises, their aesthetic value or their health aspects.

Prior to the carrying out of such useful and important renovation works, the tenant must request approval of the landlord by way of a formal procedure. If the landlord does not agree with the suggested alterations, the tenant may submit the matter to the Justice of the Peace.

Maintenance and repairs obligations. In a **long-term lease right**, the long-term lessee must carry out all maintenance repairs and major repairs within the meaning of articles 3.153 and 3.154 of the Civil Code on the property to which his long-term lease right relates and on the constructions he is required to erect, so as not to reduce their value. In a **lease**, and unless the parties have agreed otherwise, tenants are only liable for minor repairs and "small" maintenance works to be carried out during the lease, with the exception of repairs resulting from normal wear and tear or force majeure. The landlord remains liable for all the remaining repairs and maintenance works, including major repairs, such as roof or structural repairs

Taxes and charges. During the long-term lease right, the long-term lessee is liable for all charges and taxes relating to the property to which his long-term lease right relates and relating to the constructions owned by him based on his accessory building right. There is no specific legal provision in this respect for a lease (except for residential leases).

2. At the end

At the end of the **long-term lease right** or of the lease, accession will take place. Consequently, the ownership over the constructions or alterations built or installed during the term of the right shall revert to the owner. In case of a long-term lease, the owner must compensate the long-term lessee for the constructions that he acquires at the end of the long-term lease, on the grounds of unjust enrichment. Until the payment of this compensation, the long-term lessee has a lien on the constructions.
No similar legal provision exists for leases.

Looking at the rights and obligations of the parties, major differences exist between a long-term lease and a lease. It should however be noted that the legal provisions in this respect are subsidiary and that the parties can contractually agree otherwise.

VAT and transfer taxes

For the comparison being relevant the working assumption is that we are speaking about a "new building" for which it must be opted to subject the long-term lease right or the lease to VAT, and that the parties shall opt. We also consider a 15-year duration.

The granting of a long-term lease right on such building can be subject to VAT at a rate of 21%. In case of a lease, the parties shall also opt to subject the lease to VAT at a rate of 21%. But from a VAT standpoint, the qualification of both transactions shall differ:

– The granting of a long-term lease right qualifies as a delivery of good (livraison de biens / levering van goederen). Consequently, (i) the VAT is calculated and due over the total consideration for the entire duration of the right and (ii) the VAT claw back (révision/herziening) risk over a period of 15 years is shifted to the long-term lessee since his right is an investment good in his hands. It also means that the long-term lessee must pay (and thus prefinance) the VAT upon inception. The grantor, provided that the total consideration represents at least 97.50% of his investment, will be able to recover the VAT paid on the construction cost.
– The (retail) lease qualifies as a supply of services (prestation de services / diensten). Consequently, the VAT shall be invoiced together with the rent (and charges) without any prefinancing for the tenant at inception of the lease. The landlord will have already deducted the VAT on the construction cost irrespective the duration of the lease or the rent level. However, in such a case, the property remains an investment good in the hands of the landlord who will bear the VAT claw back risk over a period of 25 years.

In case VAT would not be applicable (anymore) upon inception or renewal, transfer taxes apply at a rate of 0.2% for (retail) leases and 2% for long-term leases.

Looking at the VAT aspects, and assuming both transactions can be subject to VAT via an option mechanism, it could be concluded that the situation should be neutral. A major difference however exists, considering the VAT qualification of such transactions: in a long-term lease, the VAT claw back risk over a period of 15 years is shifted to the long-term lessee, while it stays with the owner, over a period of 25 years, in case of a (retail) lease.

Conclusion

A long-term is a property right while a (retail) lease is a personal right; only on this basis differences exist between both and they are important. These differences can be advantageous to one or the other party, or to both parties. It must also be said that when it comes to the rights and obligations of the parties, the contractual freedom largely prevails. In our view, the decisive criterion for choosing one or the other will be the (fixed) duration that the parties want to give to their agreement.

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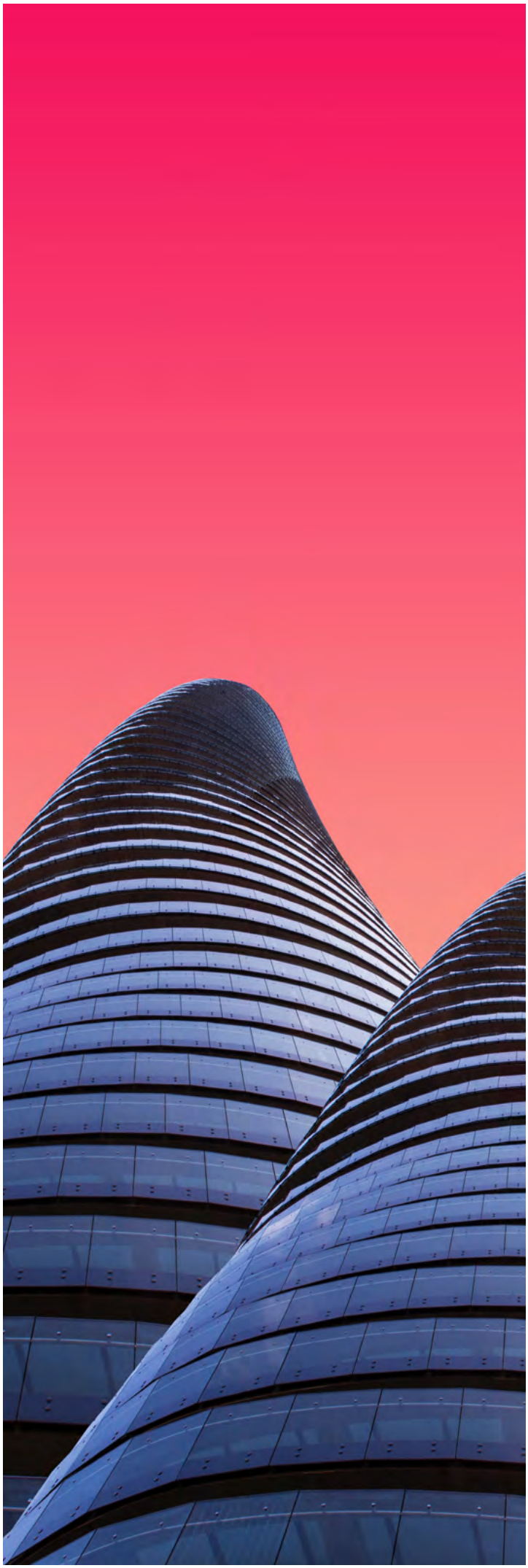

LOYENS & LOEFF

In the spotlight

Forward transactions: key principles and attention points

The combination of scarcity of investment products and reluctance of developers to build at risk has led to an upward trend in acquiring real estate in future state of completion, no matter the asset class. But what does really mean a "forward transaction" and how is it regulated?

Forward purchase vs. forward funding

Forward purchase. 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, under the *condition precedent* of the completion of the works (being in most cases the provisional acceptance). *Transfer of ownership therefore occurs only after provisional acceptance*, meaning that the investor-buyer will neither bear the construction risk nor the risk of insolvency of the developer-seller. This could also ease the financing of the transaction, such financing being most of the time negotiated before signing but with a draw-down only on completion. Most of the time, there is no down-payment from the investor-buyer to the developer-seller on signing but this depends on commercial negotiations. In terms of pricing, we often see that the vacant spaces are valued at ERV (Estimated Rental Value) capitalized at a conservative yield and that the forward purchase is accompanied by an incentive for the developer-seller to let the premises at pre-agreed conditions to benefit from an earn-out in case of successful letting within an agreed period of time (i.e., higher rental value capitalized at lower yields).

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 condition precedent of completion of the works*. In most cases, and to mitigate the development 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, most of the time in installments over the construction process. From a pricing standpoint, we usually see the same incentives 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 benefitting from an absence of upfront funding of the project but the investor-buyer being required to call capital at an early stage without presenting rental revenues. It is part of the commercial negotiations, but investor-buyers are usually remunerated for this upfront capital call until completion of the works.

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. The forward funding has a *higher risk profile for the investor-buyer (and its lender)*

since the investor-buyer will in principle be exposed if the developer-seller does not perform or becomes insolvent. 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, development management agreement and a letting mandate). To mitigate its risk, the sale documentation should contain appropriate protection mechanisms for the investor-buyer to cover notably the insolvency risk or the non-proper performance of the developer-seller (such as step-in rights, escrow and/or (completion) guarantee).

It is however fair to say that there are different "forward funding" structures, each with their own features and legal protection.

The main "forward funding" structures

There are two main structures: the share deal or the asset deal, each of them bearing its own level of risk for the investor-buyer.

Share deal. The investor-buyer shall acquire the shares of the company, which in its turn has a contract with a developer for the construction (and as the case maybe subsequent letting) of the real estate asset. In absence of adequate contractual provisions and guarantees, the risk is maximal for the investor-buyer: he acquires immediately the shares of the company owning the real estate in development, and this company is bearing the construction risk in the broad sense, including an insolvency of the developer. The most important agreements in such structure are the share purchase agreement (**SPA**) and the project development agreement (**PDA**). The SPA will in such a case be rather standard, save for the pricing mechanism that will take into account the agreed and book value of the property as if completed and the earn-out mechanism (as the case may be). The

PDA must be carefully drafted since, in most cases it details (i) the technical specifications of the property to be built, (ii) the obligations of the developer-seller in terms of tender with the contractors, (iii) the works follow-up obligations, (iv) the involvement and the level of control of the investor-buyer, (v) the invoicing process, (vi) the process of provisional and final acceptance, (vii) the works guarantee obligations (e.g., curing of the snags and hidden defects), the financial guarantee of the developer (e.g., completion guarantee), etc.

Asset deal. The investor-buyer shall acquire the land and conclude a PDA with the developer-seller. Although quite theoretical, it can be said that the risk level is lower, in such a structure, for the investor, since the acquisition deed shall most of the time provides that the transfer of the risk over the construction passes to the investor-buyer at provisional acceptance. Nevertheless, as investor-buyer, you are the owner of a land subject to a real estate development and you should be protected against the construction risk, especially the insolvency of the developer-seller. This level of protection shall depend whether the forward funding is regulated by law. We present below this "regulated forward funding". In a non-regulated scenario, it is up to the parties to negotiate the type of guarantees but most of the time the investor-buyers will insist to obtain a similar protection.

Breyne Act: the only regulated forward funding

The Breyne Act of 9 July 1971 applies to forward funding in asset deal for residential assets. This is the only forward funding regulated under Belgian law. We often hear that the protection offered by the Breyne Act only applies to individuals buying their own dwelling. This is not entirely correct.

- The protection of the Breyne Act is not limited to individuals. There are no provisions in this law that refer to "individual" (as opposed to legal entities or corporations). The law itself refers, in general terms, to the purchaser or the client. However, the application of the Breyne Act is excluded when the agreement concerned is concluded by an investor-buyer whose usual activity is to build or to have built properties in view of their sale. This exclusion has as a consequence that certain real estate professionals will not benefit from the protection of the Breyne Act.
- The protection of the Breyne Act is not limited to the own dwelling but is offered for all residential (in the strict sense) asset being a house, an apartment, or an apartment building.

In fact the Breyne Act applies to agreements defined as follows: any agreement for the transfer of ownership of a house or apartment to be built or in the process of being built, as well as any agreement to build, have built or procure such an immovable property, where the house or apartment is intended for residential use or for professional and residential use and where, under the agreement, the purchaser or client is obliged to make one or more payments before the completion of the construction. This agreement must comply with a series of formal requirements (e.g., to include the detailed specifications) as further defined by law.

The Breyne Act offers notably the following guarantees:

- *Payments:* (i) the down payment upon signing of the private agreement cannot exceed 5% of the total price, (ii) the first instalment upon signing of the acquisition deed, considering the down payment, cannot exceed the value of the land and of the constructions already built at that time subject to the approval of the architect and (iii) the balance is paid in several instalments depending of the construction progress.
- *Transfer of ownership and of risks*: the transfer of the ownership occurs gradually, via accession, while the

transfer of the risks to the investor-buyer occurs on provisional acceptance.

- *Acceptance:* the acceptance of the works occurs in two steps, a provisional acceptance and a final acceptance. The final acceptance occurs at the soonest one year after the provisional acceptance, it being understood that in case of an apartment building, the final acceptance of the common areas must occur first.
- *Completion guarantee*: the type of guarantee depends whether the developer-seller is recognised as registered contractor. Registered contractors are obliged to post a financial guarantee equal to 5% of the building price to the Caisse des Dépôts et Consignations. This guarantee is released for the half on the provisional acceptance and for the balance at final acceptance. In case of delay or (partial or total) inexecution, the investor-buyer can call upon this guarantee. Other sellers are required to deliver a completion guarantee, in the form of a joint and several guarantee of a credit institution, a mortgage enterprise or an insurance company. The completion guarantee concerns all sums that would be needed for the completion of the works; the completion guarantee is released at provisional acceptance.

Forward transactions in joint venture

It is not unusual to have large developments carried out in a joint venture between an investor and a developer. Key clauses on equity allocation, financing and governance shall be determined based on the commercial negotiations between the parties, but specific attention is required in real estate developments for the following clauses:

1. the project development management and follow-up of the works,
2. the pipeline projects and their offering to the joint venture (as the case maybe) and
3. exit clauses since the developer shall most probably request an exit possibility at an earlier stage.

Forward transactions with right to build

This is a type of forward purchase. The investor-buyer shall buy shares of an existing company owning asset already built and asset still to be developed. Instead of agreeing on a forward funding for those assets still to be developed, the purchased company shall grant a right to build (*droit de superficie / opstalrecht*) to the developer-seller and the parties shall agree to purchase the asset (and also terminate the right to build) upon completion. With such a structure, the investor-buyer will (in most cases) not finance the construction cost prior to completion and the entire development risk (but also the temporary ownership) stays with the developer-seller. In such a structure, the construction cost is paid by the developer-seller who also has the legal possibility to mortgage its right to build and the constructions erected to obtain external financing.

Parties usually also agree on a completion guarantee from the developer-seller in case of unproper execution that would justify a termination of the right to build.

The investor-buyer must however be prudent in the drafting of the right to build considering the applicable legal provisions. In accordance with the new law on property rights (i) an indemnity is due to the developer-seller upon termination of the right to build (which leads to the full ownership of the constructions reverting by accession to the purchased company) and (ii) an abnormal termination of the right to build (e.g. renunciation, early termination) is not enforceable towards bona fide third parties having a concurring right (e.g. the financing provider of the developer-seller who benefits from a mortgage).

These legal provisions are not problematic in a situation where the development is executed as scheduled and expected. In such a case, the right to build is usually granted for a period extending beyond the construction period, and the constructions are sold (via option mechanism and pre-agreed price) at acceptance, before the term of the right to build. The sale includes the right to build itself which shall terminate by confusion (i.e. the purchased company being land owner "re-acquires" the right to build together with the constructions, and reconstitutes the full ownership over the land and the constructions in its hands).

But these legal provisions can lead to issues in case of unproper execution from the developer-seller. Unless the parties have derogated from the principle of an indemnity upon termination of the right to build (or agreed on specific indemnification in such as case, when the termination occurs prior to the sale), the investor-buyer cannot "simply wait" to recuperate the asset, at ordinary termination of the right to build, to entrust a new party with the development. And in case the investor-buyer wants to early terminate the right to build, it runs the risk of recovering an asset already mortgaged, such termination not having effect towards the financing provider of the developer-seller. To limit the risk for the investor-buyer adequate condition subsequent (*condition résolutoire / ontbindende voorwaarde*) should be agreed upon.

VAT aspects

The VAT treatment applicable to transactions on new buildings shall first depend on the qualification of this transaction and the quality of the counterparty. The forward purchase should correspond to a delivery of goods (livraison de bien / levering van goederen) while the forward funding shall lead to a supply of services (prestation de services / diensten). The below gives a summary of the main principles but a case-by-case analysis is recommended.

Delivery of good. From a VAT standpoint, a sale of a real estate asset as well as the granting of a property right (droit réel d'usage / zakelijk gebruiksrecht) qualifies as a delivery of goods. This delivery must or can be subject to VAT depending on the quality of the seller.

- Quality of the seller and recoverability of VAT in his hands: In case the seller is a professional constructor (constructeur professionnel / beroepsoprichter), he is obliged to subject such delivery to VAT – and at the same time he will be able to immediately deduct all VAT paid on construction cost. On the contrary, an 'ordinary' seller shall be obliged to opt for VAT, and to strictly follow the procedure, in order to subject the delivery to VAT. For those sellers, the input VAT on the construction costs must be prefinanced to the extent it can only be recovered upon the sale or upon the granting of the property right. In the latter case, and assuming a property right of at least 15 years, the VAT-taxable base should correspond to at least 97.50% of the investment made (ground excluded) to allow a full recovery of the input VAT.
- VAT-taxable base: In a straight-forward sale, the VAT is invoiced together with the purchase price, and must be paid by the investor-buyer to the seller, acting as collector for the State. In case of a property right, and even if the "price" is spread in instalments throughout the duration of the right, the total VAT is invoiced in once, computed over the total instalments to be paid throughout the period. The question often raises whether the aggregate of the instalments over a (long) period of time should be discounted to determine the VAT-taxable basis. For the VAT administration, this is a possibility but not an obligation. In several individual decisions, the VAT administration has confirmed that no such discount should be applied on the aggregate of the instalments since the indexation was also not considered in determining the VAT-taxable base. In other words, the indexation and the discount neutralize each other, and the VAT-taxable base is equal to the mathematical addition of the basic fee for the duration of the right.

Supply of services. In a forward funding, the project development services performed qualify as a supply of construction services (travaux immobiliers / werken in onroerend staat) subject to VAT. In case of investor-buyer is a VAT-taxable person, such services are invoiced with the reverse charge mechanism, meaning that the invoice will not include the VAT which will be accrued by the client in his own VAT return.

VAT recovery right in the hands of the investor-buyer. The ability to recover input VAT shall depend on the activity of the investor-buyer. In case he would perform a VAT-taxable activity (e.g. a letting subject to VAT), he will indeed deduct this input VAT, subject to a claw-back period of 15 or 25 years. In case some of his activities would be VAT-exempt (e.g. a letting not subject to VAT), then his VAT recovery right shall be limited.

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Rent waiver - accounting

In April, the Accounting Standards Commission (ASC) published an opinion on the accounting treatment of a rent waiver in the framework of the COVID-19 pandemic. The central question is whether the cost of a rent waiver can be booked at once or must be spread over the remaining term of the contract.

Rental incentives

If a landlord grants rent-free periods to his (future) tenant, the cost of these incentives should, according to the vision developed by the ASC in 2012, be recognised as a reduction of rental income on a straight-line basis over the complete lease term (or at least until the first break option). The tenant, for his part, will also book this incentive into its result as a reduction of the rental costs on a straight-line basis over the rental period.

Is a waiver an incentive?

But the 2012 ASC opinion is mainly focused on the incentives granted by a landlord in the framework of negotiations to encourage the tenant to sign a new contract or to renew an existing one.

The ASC notes that a waiver of rent in the context of the COVID-19 pandemic is more likely to be motivated by liquidity issues on the part of the tenant, than by a commercial (re)negotiation. Moreover, if a Court were to decide that the landlord must grant debt remission, there is no question of commercial relief neither.

Therefore, according to the ASC, the 2012 opinion is not applicable and neither the tenant nor the landlord must spread the waiver of rent under such circumstances.
In our view, it should be added that the matching principle also justifies the absence of spread of such waiver during the lease term. Indeed, contrary to commercial gesture to conclude or renew a (long-term) agreement, the waiver or rent reductions currently applied are specifically linked to the COVID-19 pandemic and, most of the time to a specific event being the mandatory closure of the shops. It should therefore be concluded that this cost is to be expended in, and only, during the accounting period of this specific event.

Operational and financial leasing

What if lease payments are temporarily deferred?
The ASC makes logically a distinction between operational and financial leases.

An operational lease has many similarities with an ordinary lease and the ASC therefore advises to apply the method described above in the context of an operational lease.

With a financial lease, the asset is depreciated on the balance sheet of the lessee and there is in any case a decoupling of the debt from the asset concerned.

In practice, the deferral should only relate to the principal amount, so that in the lessee's balance sheet, the breakdown between lease payables at more than one year and less than one year has to be adjusted appropriately. The maturity of the debt is then postponed, and the interest generally remains due. At the lessor side, the same happens with respect to the receivable(s).

For example, a three-month waiver of the lease payment (only as regards the principal) combined with a three-month extension of the lease contract: the postponement of the payment of the debt means that the debt is reclassified from a short-term debt to a long-term debt, while the interest part of the three months' lease payments will remain due.

Principle of prudence

In its recent advice, the ASC emphasises that the lessor must take into account the income relating to the financial year (or previous financial years), regardless of the day on which these costs and income are paid or collected, except if the actual collection of this income is uncertain. If, due to the pandemic, the rental income is uncertain, the landlord's board of directors must evaluate whether this income can be recognised or remains recognised. If, based on the criteria of prudence, sincerity and good faith, the landlord believes that the effective collection of the revenue is uncertain, then the landlord may choose not to recognize such revenue as long as the effective collection remains uncertain. The landlord's board of directors may also choose to book the income as profit whereby the uncertainty affecting its collection will result in an impairment charge in the P&L.

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Ariane Brohez

For more information

Boekhoudrechtelijke behandeling van kwijtschelding van huur ten gevolge van de COVID-19-pandemie | CNC CBN (cbn-cnc.be)

Traitement comptable de la renonciation au paiement du loyer par suite de la pandémie de COVID-19 | CNC CBN (cnc-cbn.be)

Room hire and the supply of additional services: subject to VAT or not?

The letting of immovable property in Belgium is in general exempt from VAT (article 44, §3, 2° VAT Code) but exceptions apply (e.g. an active letting for VAT purposes). The question whether a contract needs to be qualified as a VAT exempt letting with additional services or a taxable active letting, whereby the ancillary services constitute an essential part of the agreement, can only be answered on a case-by-case basis and strongly depends on the contract conditions.

In this respect, a recently published ruling provides an overview of these principles. The Ruling Commission ruled that the letting of a celebration hall needs to be qualified as VAT exempt letting with additional services (ruling no. 2020.2024 dd. 23 March 2021).

Facts

A non-profit organization renovated its building in view of operating it as a venue to organise events. In addition to the mere letting of the venue, the organization intended to also provide the following services to future tenants:

- The provision of reception and technical management services
- Beverages to be purchased
- The cleaning of the venue.

All the above services (including the rent of the venue) would be supplied against a lump-sum price. Moreover, tenants would not be able to waive some of these services to obtain a lower price.

Legal background

Regarding the VAT treatment of immovable letting, the Belgian administrative guidelines describe the following 4 scenarios:

1. "classic" VAT (taxable or exempt) immovable letting.
2. immovable letting with additional services that can be economically separated (the supply of different individual main services): in this case each service will be following its own VAT treatment.
3. complex passive immovable letting with additional services: the entirety of services is considered a complex service from a VAT standpoint and hence subject to one single VAT treatment, i.e. a VAT exempt immovable letting.
4. complex active immovable letting with additional services that cannot be economically separated (closely linked services): the entirety of services is VAT taxable in case the following conditions are met:
    - the duration of the letting does not exceed one calendar day
    - a minimum supervision and technical management service is provided
    - catering service are included in the letting.

In case these conditions are not met, the VAT authorities provide for an administrative tolerance that the letting is still subject to VAT in case the economic value of the ancillary services represents more than 50% of the price.

Decision

In the case at hand, the Ruling Commission concluded that not all conditions were met to qualify the letting of the venue as well as the additional services as a single and taxable active immovable letting for VAT purposes.
More specifically, the Belgian Ruling Commission ruled that the non-profit organization did not comply with the requirements regarding the minimum supervision and the providing of catering services. The fact that beverages were included in the complete offering was not sufficient since these beverages were not served by the lessor. Hence, the supply of beverages could not be qualified as a supply of catering services. Since two of the three conditions were not met, the letting was qualified as a VAT exempt immovable letting.

The administrative tolerance did not lead to another outcome since the organisation could not demonstrate that the value of the services was more than 50% of the total price.

As a result, the organisation will not be able to deduct the input VAT relating to the renovation and furnishing costs of the venue.

Samira Moujahid

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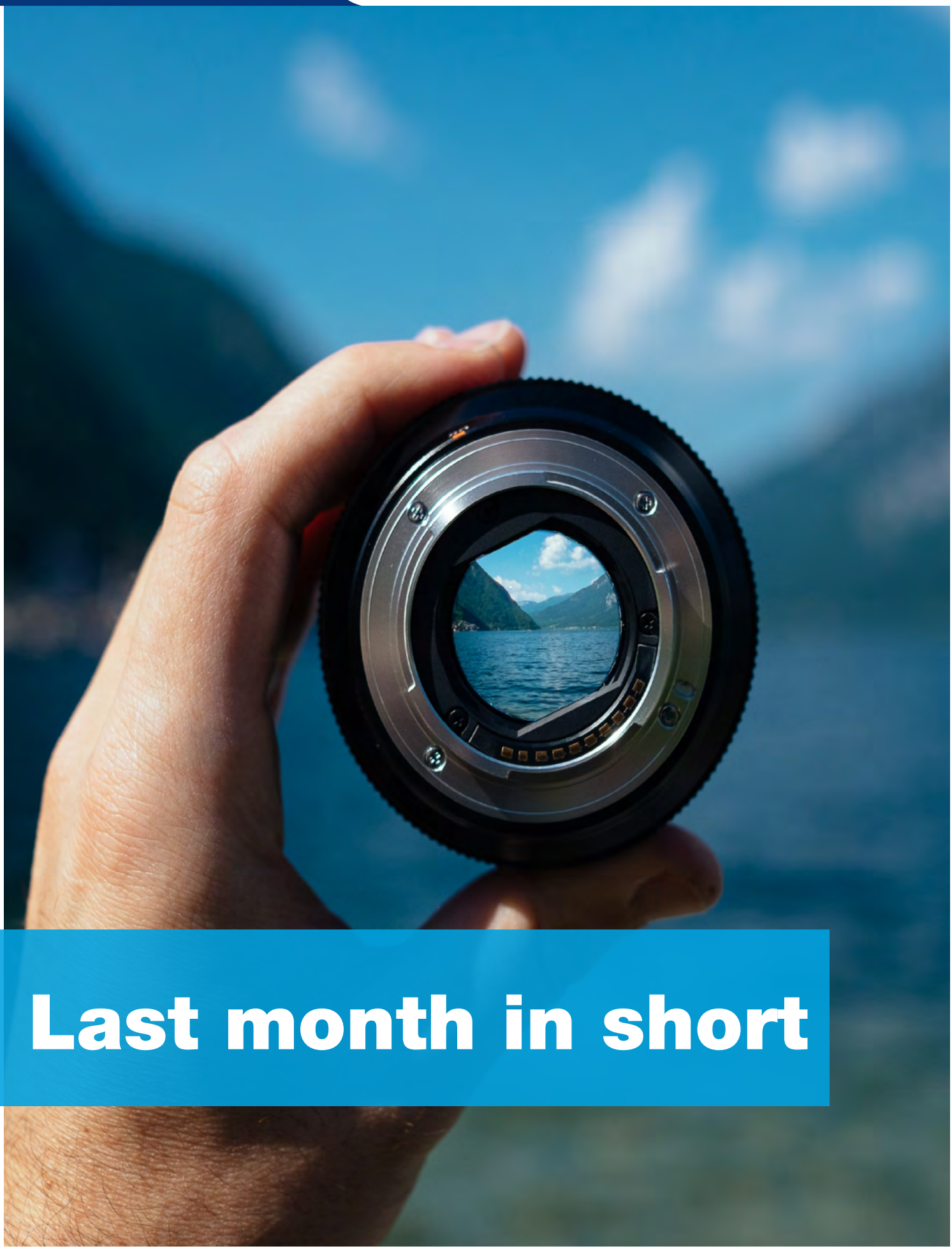


Last month in short

Brussels Commercial Lease Loan upgraded

On 6 May 2021 the Brussels Government approved the strengthening of three support measures for companies that are severely affected by the pandemic: the commercial lease loan, the delegated mandate granted to finance&invest.brussels and the so-called Oxygen loan.

As far as the commercial lease loan is concerned, the Brussels government decided to improve the regime by extending the possible duration of the loan and increasing the amount of the loan.

The commercial lease loan is available since 15 January 2021. The aim of this measure is, on the one hand, to alleviate the liquidity problems of Brussels entrepreneurs who rent commercial premises and, on the other hand, to offer the landlords of these premises increased payment security, even when the tenant is in a difficult financial situation. This loan is based on a prior agreement between the two parties in which the landlord waives the rent for a number of months. The tenant borrows for up to four months' rent from the Brussels Region. The loan is disbursed directly to the landlord and qualifies as rent in his hands.

In order to allow more tenants and landlords to benefit from the measure and to respond in the best way to their needs, the Brussels Government adopted on Thursday 6 May (in first reading) a decree that introduces some modifications, among which:

- the increase of the maximum amount of the commercial lease loan per tenant from 35,000 EUR to 75,000 EUR;
- the extension of the measure until 15 November 2021;
- the extension of the repayment period from two to five years;
- the possibility of using the loan despite the existence of rent arrears on 18 March 2020, provided that they are paid off at the time of the loan application.

These new provisions will apply after the adoption of the decision in second reading (expected very soon now)

To support this scheme and help tenants reach an agreement with their landlord, the Brussels Government has also introduced the possibility of using mediators, free of charge.

Tax relief for waiver of rent

Landlords who waive the rent for the months of March, April and/or May 2021 to tenants who were forced to close their business due to the corona measures are entitled to a 30 % tax reduction for the waived rent. In corporate tax, the benefit is granted in the form of a non-refundable tax credit.

Conditions

- A maximum of 5.,000 EUR per month per lease can qualify for the tax relief and a maximum of 45,000 EUR per landlord.
- The landlord must remit the rent definitively and voluntarily.
- The tenant must either qualify as a small company or small association based on applicable law or be a self-employed person carrying out a professional activity as his/her main occupation.
- The waiver must be laid down in a written agreement between the tenant and the landlord.

Written agreement

The Tax Authorities published a model agreement that can be used by the parties involved. It's optional, but recommended, as it contains all necessary information. If you use your own agreement with your tenant, you need to be aware that if insufficient information is provided, your application for a tax reduction may not be processed.

This agreement signed by both parties must be sent to the FPS Finance by 15 July 2021 at the latest either electronically via MyMinfin or by ordinary mail to the address indicated on the form.

For more information

Contrat type de renonciation au loyer | SPF Finances (belgium.be)

Modelovereenkomst kwijtschelding van huur | FOD Financiën (belgium.be)

Flanders Region: Mandatory renovation of non-residential buildings

On 7 May 2021, the Flemish Government agreed on the introduction of an obligation to renovate *non-residential buildings.* This obligation was already inserted, in the Energy Decree of 8 May 2009 but the actual entry into force was still to be determined.

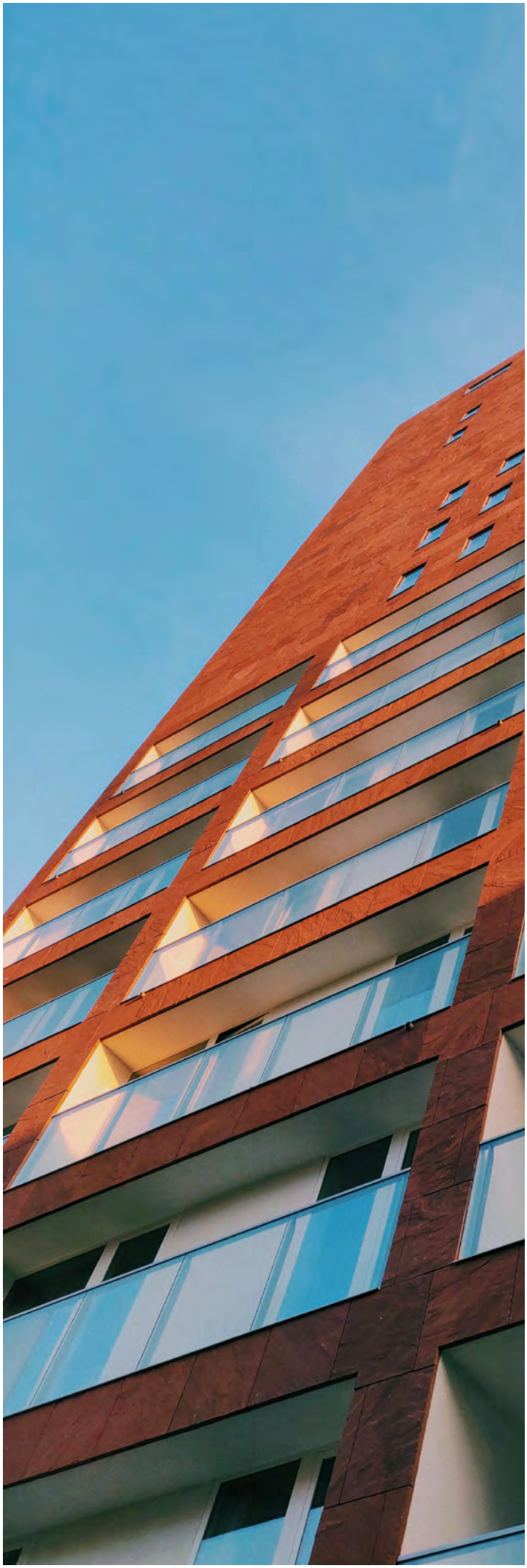
This Energy Decree stipulates that all non-residential buildings must comply with four energy renovation measures, being:

1. minimal roof insolation,
2. glazing,
3. heat generators older than 15 years must be renewed and
4. cooling installations should be replaced. Small non-residential units must also achieve energy performance label C whilst large buildings must additionally meet the requirement to use minimum 5% of renewable energy.

The Flemish government has now decided on the entry into force of this obligation. The “trigger” for the obligations will be the transfer of the full ownership of the building, the establishment of a building right (droit de superficie / opstalrecht) or the establishment of a long term lease (bail emphytéotique / erfpacht). As of **1 January 2022**, the buildings must meet the required standards *within 5 years following the date of the notary deed*, except for the requirement of 5% of renewable energy for large buildings. The latter requirement is applicable only if the deed is concluded as of **1 January 2023**.

For that purpose, the decree (in draft) also contains rules on the introduction of an energy performance certificate (EPC) for non-residential buildings similar to the EPC for houses.

Without any doubt this new obligation will have an important impact on the market of non-residential buildings in the Flemish Region.



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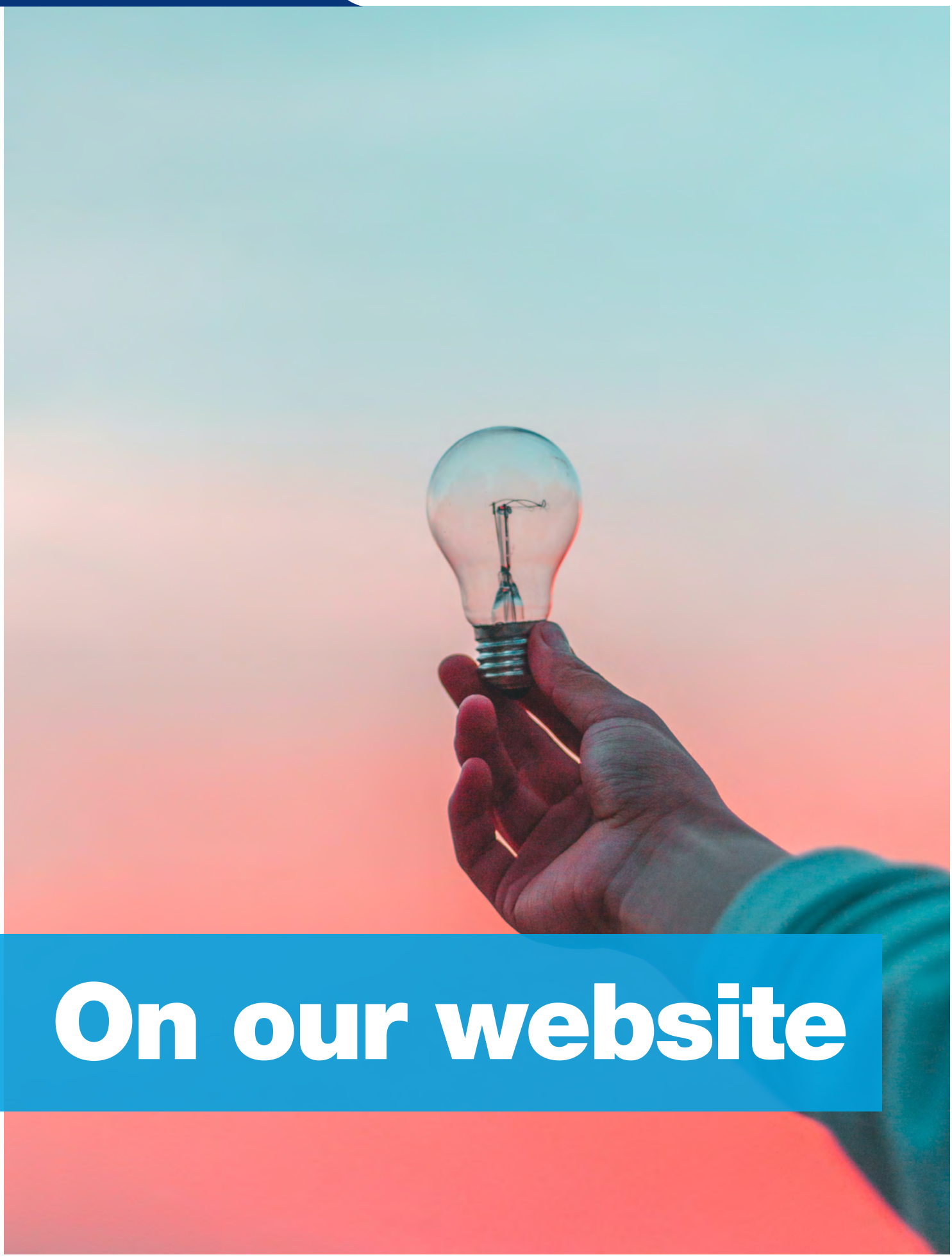

On our website

Discover more:

Nicolas Lippens joins Loyens & Loeff Belgium as new Tax partner

Nicolas Lippens has joined Loyens & Loeff in Belgium as partner. Next to Natalie Reypens, Nicolas Bertrand, Marc Dhaene, Saskia Lust and Bert Gevers, he will be the sixth partner in the Tax practice group in Brussels where he will further strengthen our Tier 1 Tax capabilities in Belgium.

Chambers global practice guides: Real Estate

How does Belgian real estate law work? What are the main rules to keep in mind during a real estate transaction? Below you can find a summary of the main legal, tax, finance and public-law aspects from a practical point of view, as well as an overview of the latest trends and developments on the Belgian real estate market.

About Loyens & Loeff

We are an international law and tax firm with cross-border expertise in a wide range of sectors. Our specialists in Belgium, Luxembourg, The Netherlands and Switzerland are recognised for their in-depth knowledge and unique approach, integrating tax and legal advice.

A unique approach

Tax and law are heavily intertwined. That is why we integrate these fields of expertise as much as needed. It results into high-end, extremely efficient solutions for our clients. As an independent full service law firm we assist multinationals, SME's, entrepreneurs and private clients internationally and locally. We offer our clients integrated tax and legal solutions. Our clients inspire us. And that makes the difference.

Independent cross-border expertise

Our international focus results into cross-border expertise. We advise our clients in implementing their business objectives in order to create tax and legal efficiencies. Consequently it empowers them to grow their business. Additionally we maintain excellent relationships with the most prominent law practices worldwide, and we are highly regarded for being able to work seamlessly together with them on cross-border matters.

In-depth knowledge of business sectors

We have long-lasting and in-depth knowledge of practically all business sectors. As soon as we believe we have developed a thorough and an exhaustive expertise related to a specific industry sector, we build a dedicated team to further expand those specific competencies and know-how. By combining this knowledge with our international focus and tax and legal expertise, we provide our clients the best advice on a local and a global level.

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Don't hestitate to get in touch with your usual contact person for more information on the topics covered.

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