LOYENS & LOEFF

NOVEMBER 2022

Belgium
Real Estate Update

In this edition

Introduction

The year 2022 should have been the year of recovery from the pandemic. It became a year of energy crises, sky-high inflation, and uncertainty over worldwide peace. Governments all over the world responded with measures to support their citizens, their companies, and their economic framework. So did Belgium. In this edition we explain you some of these measures.

Meanwhile the Flemish government continues to regulate (and oblige) the improvement of the environmental quality and energetic level of buildings situated in the Flemish Region. Furthermore, we have a look at the progress of the Civil Code reform. After last year's new book 3 (property rights), the entry into force of book 5 (on contract law) and book 1 (general dispositions) is approaching. You can find more details, both on book 3 and on book 5 in this Real Estate Update.

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

Ariane Brohez and Christophe Laurent

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News – Energy crisis and budget

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Indexation of residential rent prices

In Belgium, the Regions are competent for residential leases, incl. with respect to the fixing of prices. Unless parties agree on fixed rent price or an adjustment based on another metric than the cost of living, rent prices are indexed based the so-called “health index”. The health index is derived from the CPI excluding alcohol, fuel and tobacco.

The index follows the indexation, which has reach 12.27% in October 2022, being the highest percentage since June 1975, when it stood at 12.50%. Indexation based on health index of September 2022 amounted to 12.27%, and thus equals the indexation. Inflation rate is greatly impacted by the energy prices. Disregarding the energy prices, the inflation would amount to 6.97% in October 2022.

Considering the impact of the current crisis on rental prices, as well as the society’s concern for sustainability and climate change, the three Regions have decided to freeze or limit the indexation of the residential rent prices depending on the energy performance level of the asset.

Brussels:

In the Brussels Capital Region, indexation of residential rent is prohibited if the energy level of the dwelling carries an F or G-label. If the label mentions ‘E’ the indexation is limited to 50% of what is legally allowed. If the level is A, B, C or D, the indexation can be applied as foreseen by law or by contract. This regime is applicable as of 14 October 2022 and lasts for 12 months.

Flanders:

In the Flanders Region, indexation of residential rent is prohibited when the residence’s energy label is E or F. If the level is ‘D’ only half of the normal indexation is allowed. Full indexation is allowed for residences with energy levels A+, A, B or C. The entry-into-force is 1 October 2022. The measure is applicable during 12 months but after this period, a correction mechanism becomes applicable preventing a normal indexation (or recapture) for the D, E and F labels afterwards.

Wallonia:

In the Walloon region, an index-freeze regime similar to the two other regions is put in place. As of 1 November 2022, there will be a complete index freeze in case the energy level is F or G. If the energy label is E, the indexation is limited to 75%. For D energy labels the indexation is limited to 50%. Finally, there is no cap on the indexation of residential rent for premises with an energy level label A, B or C. The index freeze will last for 1 year after which a correction mechanism will become applicable for the contracts that fell under the index freeze preventing a normal indexation (or recapture).

Transfer taxes

Another field where the Regions are competent: the transfer taxes applicable to the acquisition of full ownership or usufruct of real estate. Here as well some Regions are keen to continue facilitating the acquisition of an own dwelling or apartment by individuals by deciding to increase the first tranche (of the acquisition price) which is exempt from transfer taxes.

Brussels

Applicable standard rate is 12.50% computed on the higher of the purchase price or the market value. The Region exempts the first tranche of 175,000 EUR of the purchase price, from these transfer taxes. This exempted tranche is likely to be increased to 200,000 EUR. Moreover, an additional 25,000 EUR can be exempted if the buyer commits to improve the energy performance of the dwelling through a renovation. Currently the exemption is only applicable it the purchase price does not exceed 500,000 EUR. This threshold should be increased to 600,000 EUR. The main condition for this exemption is that the buyer must occupy the property himself.

Flanders

Applicable standard rate is 12% computed on the higher of the purchase price or the market value. The Flemish Region also had an exempted tranche to support people buying their first property. But this exemption was replaced by a lower transfer tax rate of 3% (applicable as of 1 January 2022) for the purchase of the own and only dwelling. This rate is even reduced to 1% if the buyer commits to major energy-related renovation works. The main condition of this measure is that the individual must use this building as his residence.

Wallonia

Applicable standard rate is 12.50% computed on the higher of the purchase price or the market value. The Region exempts the first tranche of 20,000 EUR from these transfer taxes, provided that amongst others, the building becomes the main residence of the buyer within 3 years after the purchase. Plans are to double this tax-free tranche (40,000 EUR) by the end of 2022 but only if the purchase price does not exceed 350,000 EUR.

VAT

Still for the residential market and to sustain the construction sector that also faces prices' increases: the minister of Finance has announced that the 6% reduced VAT rate will continue to apply after January 2023. The conditions remain the same (see below "Extension in time of 6% VAT rate for demolition and renovation of buildings").

Carried-forward tax losses

Last but not least at it might impact numerous of investors. A modification of the rules regarding the use of carried-forward tax losses should be applied as of next year. Currently, carried-forward tax losses can be used to offset the year's taxable profits until 1 MEUR and, above this threshold, up to 70% of the remaining profits.

This latter percentage should be reduced to 40%, but apparently only as a temporary measure for the tax year 2023 (financial years ending on 31 December 2022 or in 2023, at the latest on 30 December). This type of limit remains disputable in case a company goes from a regular corporate income tax status to a deviating income tax status (e.g., from a regular corporation to a SREIF) which triggers the exit tax. The corporation concerned would then not be allowed to use the totality of its carried-forward tax losses (when calculating the exit tax due) although the remaining losses would lose all relevancy.

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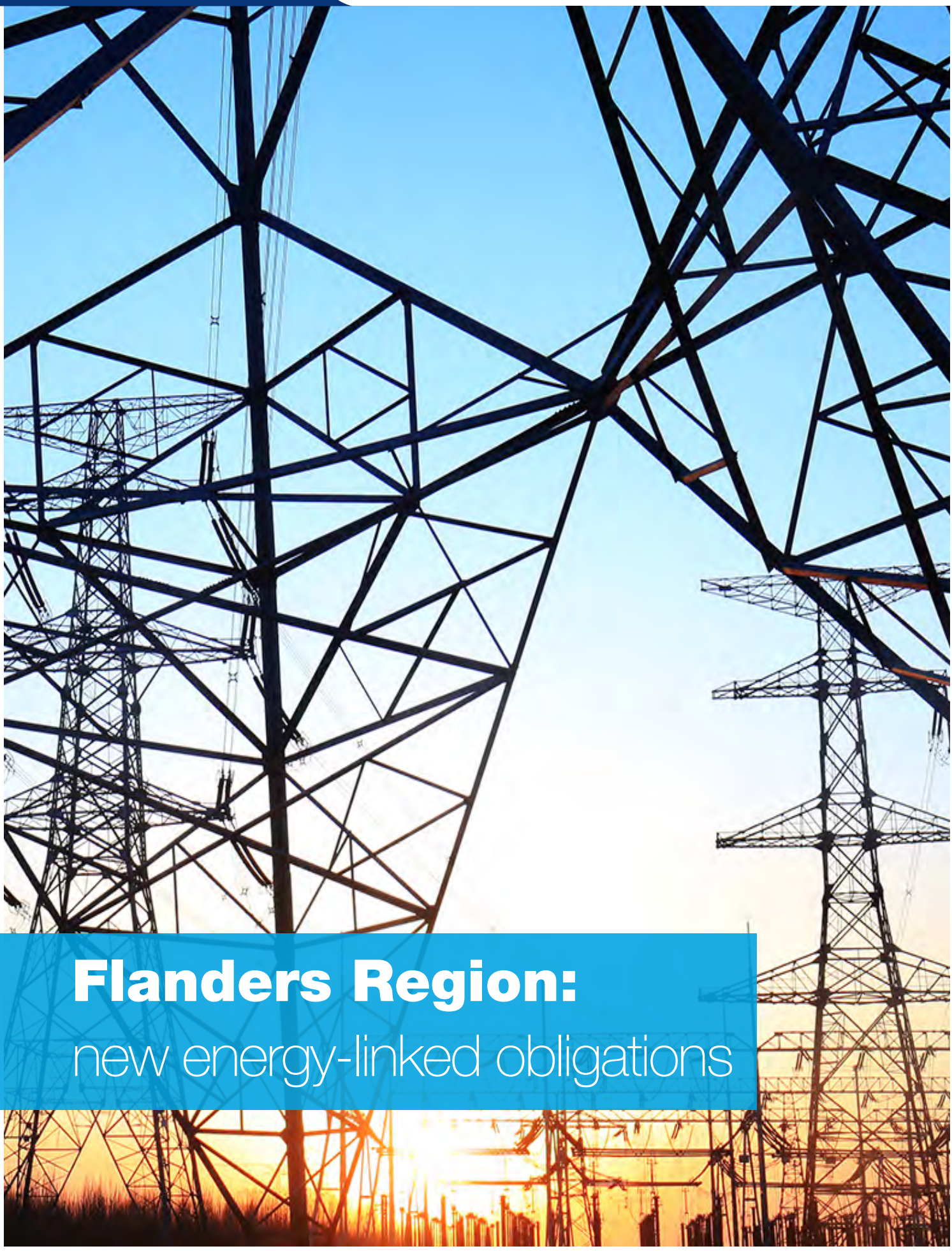

Flanders Region:
new energy-linked obligations

Flanders Region: new energy-linked obligations

New EPC requirements in Flemish Region

The EPC certificate has become an indispensable part of the Flemish legal landscape. Currently, an EPC certificate must be provided before every sale, granting of a right in rem (long-term lease right, building right or usufruct) or the letting of a certain EPC unit. An EPC-unit is defined as the smallest unit within a building that can operate independently and has its own access from a public road, yard, or shared circulation area. An EPC-unit must be suitable for residential, commercial, or recreational purposes or should consist of a common area.

With the new draft decree, the Flemish government aims to clarify and reinforce the current EPC regulations. Two new elements from the draft decree should be highlighted:

1. The draft decree provides a new definition for the "sale" of a (residential or non-residential) EPC-unit. A "sale" does not necessarily include all notarial transfers of ownership rights on an EPC-unit. Therefore, it is unclear whether an EPC certificate should be provided prior to other forms of transfers of ownership rights such as donations, exchanges or contributions of a line of business. The Flemish government tries to mitigate this inconsistency by proposing to replace the notion of "sale" by "notarial transfer in full ownership". This extended scope will include all transfers of full ownership rights on an EPC-unit for which a notarial deed must be drawn up. The new regulation shall not apply in case of a share deal transaction.
2. The draft decree also modifies the validity period of an EPC construction certificate for non-residential units. An EPC construction certificate is the certificate issued upon completion of the construction of a new building or upon completion of heavy energy renovation works. The validity period of an EPC construction certificate is currently 10 years. With the draft decree, the Flemish Region wants to reduce this period to 5 years, in order to bring it in line with the duration of the 'normal' EPC certificate for non-residential units (which is also 5 years).

The draft decree provides for a transitional provision for residential units. The new regulation will apply to all notarial transfers of full ownership for residential units, where the notarial deed is drawn up as of **1 May 2023**. For the remaining aforementioned regulations (i.e., the notarial transfer of non-residential units and the EPC construction certificate), no transitional provisions are provided.

"An EPC construction certificate will only be valid for 5 years instead of 10."

Draft decree: new obligation to install solar panels for buildings with large offtake

Besides new obligations with respect to EPC, the Flemish government also decided to introduce an obligation for large offtakers to install PV solar panels, amongst other obligations.

1. Obligation to install solar panels for buildings with offtake > 1 GWh in and beyond 2021

Building owners, longterm -lease holders or holders of a building right on buildings that consumed more than 1GWh in calendar year 2021 must install a certain number of solar panels in the coming years. These should be commissioned at the latest by 30 June 2025.
If a building consumes no more than 1 GWh in 2021 but exceeds that threshold in the years thereafter, the PV solar panels should be commissioned by the fourth calendar year following the calendar year when that 1 GWh threshold is exceeded.

They can install these solar panels on different sites in the Flanders Region. The solar panels may be installed not only on a building's roof, but also on carports, bike-sheds, marginal land or on water (floating solar panels).

2. Number of solar panels to be installed

The draft of decree provides an incremental system. Initially, by 30 June 2025, the above-mentioned parties should install at least 12.5 watt peak per m^2 of roof surfaces. However, by 2030, at least 18.75 and by 2035 at least 25 watt per m^2 should be installed.

The Flemish energy agency can however allow time extensions, for instance when roof replacements or renovations are planned.

3. Alternatives are possible

The Flemish Government took into account that other renewable energy alternatives might also reach similar sustainable objectives. These include the possibility to invest in renewable energy production on other sites or acquiring sufficient participation in renewable energy corporations.

An owner, long-term lease holder or building right holder may also opt for the commissioning of a wind turbine or of a sustainable combined heat and power plant (with biomass or biogas without biomethane as fuel), instead of a solar farm.

The draft marks a clear policy shift in the Flemish region. It can be expected that the Flemish government will in the future not only incentivize renewable energy technologies (e.g., by the system of renewable energy certificates or the recent tender-based subsidies), but also oblige large offtakers to invest in renewables.

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“Heavy repairs” defined… or not?

”Heavy repairs” defined… or not?

Until recently, there was no general definition of the concept of “heavy repairs” applicable in the context of rights in rem. The reform of property law introduced a legal framework for heavy repairs based on 3 principles. In this contribution we analyse the impact of this part of the reform on lease agreements. Indeed, lease agreements usually refers to concepts used in the usufruct legal framework to allocate the charge of the repairs between landlord and tenant.

Art. 606 old CC

As said, under the old Civil Code (hereafter old CC), there was no definition of the concept “heavy repairs”. The only reference to heavy repairs was made in article 606 old CC where a limitative list of heavy repairs were given in the context of a usufruct right: “Heavy repairs are those of heavy walls and ceilings, the renewal of beams and of entire roofs; also the renewal of dykes and of retaining and closing walls in their entirety. All other repairs are maintenance repairs”. This list has been further defined and sometimes somewhat expanded by case-law.

“Under the new Civil Code, the concept ‘heavy repairs’ is defined. This regime being suppletive legislation, parties are allowed to make other arrangements”

Art. 3.154 new CC

Since 1 September 2021, Article 606 old CC has been replaced by a new article 3.154 of the new Civil Code (hereafter new CC). This article changes the regime of heavy repairs based on 3 principles:

- **Flexibility**
  The concept of “heavy repairs” is defined in a flexible manner instead of through examples. The provision contains a new, open definition of the concept of “heavy repairs” in the context of a usufruct right, and refers to the same concept in the context of a long-term lease right and building right.

- **Costs**
  In the context of a usufruct right, the costs of heavy repairs are shared proportional between the bare owner and usufructuary. Note however that (i) this legal regime is suppletive and the parties are allowed to derogate in their contract and (ii) the default legal regime only provides for an allocation mechanism for individuals and not for corporations.

- **Immediately enforceable obligation during the usufruct**
  Under the old CC, there was much debate as to whether the bare owner can be obliged to carry out heavy repairs during the term of the usufruct. The new Civil Code puts an end to this debate and clearly provides that the obligation to carry out heavy repairs is immediately enforceable: the bare owner can be obliged to carry out heavy repairs during the term of the usufruct.

Two categories of heavy repairs

Pursuant to article 3.154 §1 new CC, heavy repairs are "*repairs that affect the structure of the property or its inherent components, or the cost of which manifestly exceeds the products of the property*". Consequently, there are 2 categories of heavy repairs:

Repairs that affect the structure of the property or its inherent components

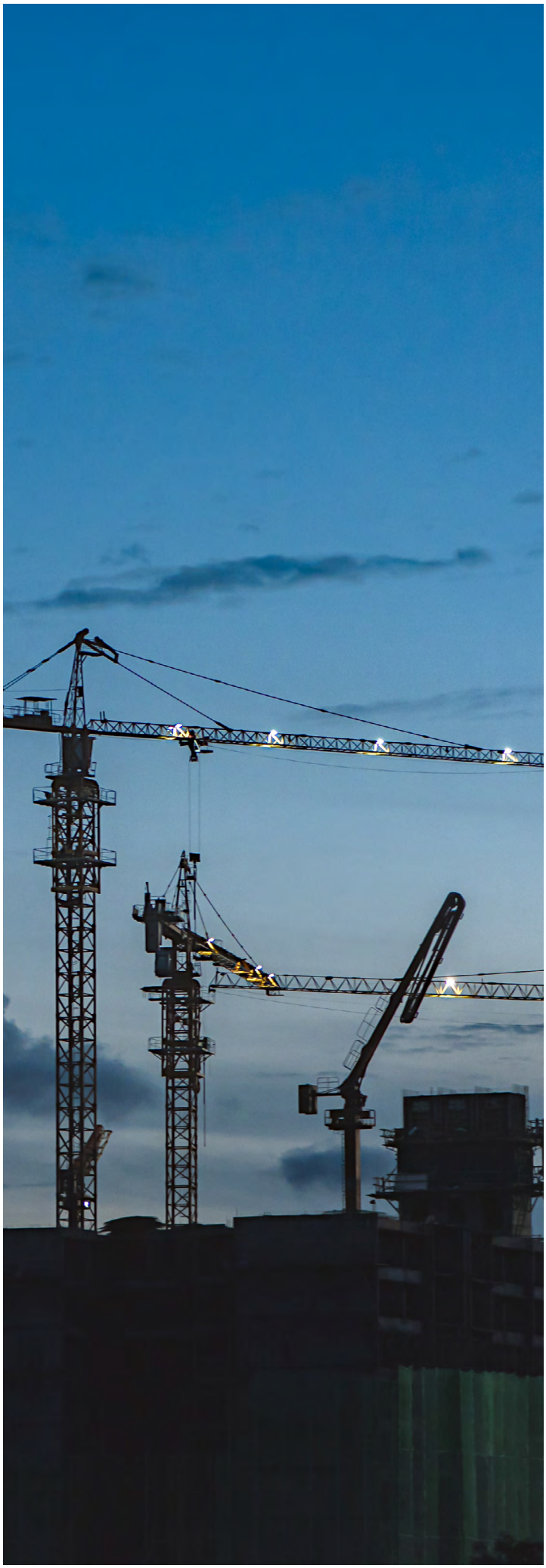
This category corresponds to the old concept of "heavy repairs", i.e., repairs that relate to the structure of the property. The new definition however adds that these repairs can also relate to the (structure of the) inherent components of the property.

Pursuant to article 3.8 § 2 new CC an "inherent component" of a good is "*a necessary element of that good which cannot be separated from it without affecting the physical or functional substance of that good*". Since this definition is based not only on a physical criterion (incorporation) but also on a functional criterion, the question remains how to apply this term in the context of heavy repairs. Does it mean that repairs to lifts, HVAC, central heating, electricity, stairs, roof,… must all be considered as heavy repairs?

Repairs of which the cost manifestly exceeds the products of the property

The fact that the works have a significant financial impact is not sufficient to consider them as heavy repairs: they must manifestly exceed the revenues generated by the property. But how to apply this in practice? How to determine the value of the "products"? With what costs should "these products" be compared? At what time should this comparison be made? When are the products "manifestly" exceeded?

According to article 3.154 §2 new CC, the bare owner is responsible for the heavy repairs within the meaning of article 3.154 §1 new CC. Article 3.153 new CC provides that all maintenance repairs which are necessary, in the short or long term, to preserve the value of the encumbered property (subject to normal wear and tear, age or force majeure) must be carried out by the usufructuary.



Impact on lease agreements

When we compare the definition of major repairs under article 606 old CC with the new concept of major repairs under article 3.154 new CC, it seems that the term has become much broader and that more repairs are considered to be major repairs at the expense of the bare owner under article 3.154 new CC. Given the fact that (i) in practice, lease agreements often provide that "*all repairs are at the tenant's expense, except for the major repairs within the meaning of article 606 old CC*", (ii) article 606 old CC is now replaced by article 3.154 new CC and (iii) the term "major repairs" appears to have been extended in the new article 3.154 new CC, the question arises as to how the term "major repairs" must be construed in a lease agreement referring to the old article 606 old CC.

In our view, in case a lease agreement explicitly provides that the landlord is responsible for the "major repairs" within the meaning of article 606 old CC, this should be construed in accordance with article 606 old CC and the case law relating thereto. One should not give this a broader meaning as the term is currently defined in article 3.154 new CC. All the more if it concerns a lease agreement concluded prior to 1 September 2021 since the legal provision only entered into force on 1 September 2021.

"Parties should avoid refering to the articles in the Civil Code (old or new) and in stead specify in the contract which party is responsible for which repair"

However, it is not excluded that a judge, when ruling on a dispute concerning maintenance/repair in the context of a lease agreement that refers to article 606 old CC, will in the future be guided by the definition of "major repairs" set out in article 3.154 new CC.

Therefore, we strongly recommend that parties avoid making reference to either the old or the new provision, and clearly specify in their lease agreement:

- which repairs are considered to be heavy repairs, and
- the party that is responsible for those repairs.

If, for example, it is intended that the landlord should only be responsible for major repairs within the meaning of article 606 old CC, we recommend stipulating that the landlord is "*only responsible for structural repairs relating to the leased premises, which are – and are limited to – repairs to heavy walls, vaults, renewal of beams, roofs and retaining and closing walls. The tenant is responsible for all maintenance works/repairs, replacements and other repairs*". By doing so, you avoid referring (i) to article 606 old CC, that no longer exists and (ii) to the new article 3.154 new CC, which seems to define the term "major repairs" more broadly than article 606 old CC, so that the landlord would be obliged to do more major repairs than under 606 old CC.

In addition, in order to solve the question whether repairs to lifts, HVAC, central heating, stairs, etc. qualify as heavy repairs, we recommend to expressly mention these repairs in the lease agreement and clearly state which party is responsible for those repairs.

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Reform of contract law

Reform of contract law

As part of a more general modernization of civil law, the Belgian Parliament adopted on 21 April 2022, together with the new book 1 (general provisions), the new book 5 of the Civil Code, containing the legal provisions on general Belgian contract law. The law was published on 1 July 2022 with as a result that it will enter into force on **1 January 2023.**

Legal certainty

The legislator's aim is to increase legal certainty for the parties as many important principles of Belgian contract law are currently not confirmed by law but result from case law and legal doctrine. These will now be included in book 5 of the Civil Code. At the same time, the legislator intends to modernize Belgian contract law. The freedom of contract of course remains the cornerstone of Belgian contract law. Most provisions of the new Belgian contract law are therefore not mandatory and can be set aside by the contracting parties.

The new contract law provides several features which may be of particular importance for the real estate practice, including:

Introduction of a "hardship" principle

Under current Belgian contract law, hardship is not acknowledged as a legal principle. A party will therefore only be able to benefit from hardship clauses if they are expressly included in the agreement. This principle will change under the new contract law: even in absence of contractual provisions, a party will be allowed to ask its counterparty (or the competent court) to amend an agreement if the execution of its contractual obligations has become excessively burdensome due to unforeseeable circumstances beyond its control - unless this possibility is excluded by law or by the agreement itself. This provision is indeed of suppletive law and the parties can exclude its application in their contract.

This reversal of the hardship principle may be of particular importance for (the drafting and negotiation of) long term agreements, e.g., project development agreements, long-term lease agreements, building rights agreements, leases.
The setting aside of unfair clauses

In addition to existing legislation prohibiting unfair clauses in B2B and B2C agreements, the new contract law provides for a legal provision setting aside unfair clauses, which are defined as clauses which cannot be negotiated, and which create a clear imbalance between the rights and obligations of the parties.

The unclear scope of this provision as well as the unclear relation between this general provision and similar provisions in B2B and B2C legislation may well give rise to debate and uncertainty, specifically in agreements which are not (heavily) negotiated.

Abuse of circumstances

The legislator's concern to protect weaker parties is not only reflected in the abovementioned prohibition of unfair clauses. The new book 5 also confirms that an "abuse of circumstances" can be a ground for nullity of an agreement (or as a legal ground to amend a party's contractual obligations).

An "abuse of circumstances" requires the existence, at the time of signing of the contract, of a clear imbalance between the parties' respective obligations as a result of one party abusing the other party's weaker (negotiation) position. Following extensive legal debate and case law on the principle of "abuse of circumstances", this principle as well as its application to all types of contracts is confirmed in the new book 5. One can expect quite some legal debate concerning this principle in real estate contracts between parties who may not have the same negotiation power at the time the contract is negotiated.

Confirmation of freedom to negotiate (and to end negotiations)

The new book 5 confirms not only the freedom of contract as a guiding principle but also confirms the parties' freedom to negotiate and to end negotiations. In accordance with case law, book 5 confirms that the freedom to negotiate/end negotiations is only limited by the general principle to act in good faith. The new contract law furthermore explicitly provides that, if a party is considered to have stopped negotiations in a way that is in breach of its good faith obligations, the sanction will, in principle, be limited to an indemnification required to put the other party in the situation it would have been in, if there would not have been any negotiations. In practice this means that the indemnification will be limited to the "costs of negotiation" incurred by the other party. The indemnification due will only include compensation for the "lost net-profits of the contract" if the other party could legitimately expect that the contract would undoubtedly have been concluded (which is a high burden of proof).

The confirmation of these general principles, and specifically the clarification on the indemnity due in case of breach of contract, is important to the real estate transactional practice as it clarifies the scope and limits of the freedom to negotiate.

Unilateral rights in case of breach of contract

The new book 5 explicitly confirms the right for a party suffering from a breach of contract by its counterparty to take unilateral (and sometimes even pre-emptive) action, without being required to go to court first. While the validity of some of these actions have recently been confirmed in case law under current Belgian contract law, the statutory confirmation of these remedies is important to enhance legal certainty. These remedies include remedies which can be of particular importance for real estate contracts as they include (i) the possibility to unilaterally terminate a contract and (ii) the possibility to unilaterally have work that was not or not properly performed by the counterparty, performed by a third party at the cost of the counterparty.

Statutory regime on transfer of debts and transfer of contracts

The new book 5 provides, for the first time in Belgian civil law, in statutory mechanisms for a transfer of debt and/or a transfer of contract. Under current law, there is only a statutory mechanism for a transfer of claim as well as a special regime for the transfer of leases in case the building is sold. These mechanisms are maintained but complemented by mechanisms setting out the conditions for a valid transfer of debt and/or contracts, effective towards third parties and the counterparty to the contract. This new regime will increase the legal certainty for the transfer of real estate contracts, be it in the framework of transactions or intra-group restructurings.

Entry into force

The new contract law enters into force on **1 January 2023**. In accordance with the transitional provisions, the new contract law will only apply to contracts entered into as of this date of entry into force. Contracts entered into before 1 January 2023 will remain subject to the "old" contract law. This results in the co-existence of the "old" and "new" contract law.

This is of particular importance for the real estate sector as real estate agreements are often entered into for a long term. Any of these long term agreements entered into prior to 1 January 2023 will therefore remain subject to the "old" contract law. This complexity can be mitigated by (i) taking the new book 5 into account when negotiating/drafting long term agreements or by (ii) amending existing agreements to confirm the application of the new book 5.

Other developments

As already mentioned, in addition to book 5, “book I - General Provisions” was also adopted. In this book you can find the provisions with transversal effect as well as definitions of concepts that are used in general (i.e. that are not specifically linked to one of the other books of the Code).

You will find definitions of concepts such as legal act, expression of will, abuse of right, etc. . Also discussed are

- the prohibition of the retroactive effect of new legislation (as is already the case at present)
- the notification by electronic means
- the concept of “working day”
- the concept of “subjective good faith”

This book too will also enter into force on 1 January 2023. As part of the global reform of the Civil Code, it should be noted that new legislation on “special contracts” (e.g., sale, lease) is also awaited.

Finally, we should mention that the Minister of Justice, by ministerial decree of 9 March 2022, has established a new Commission for the reform of mortgage law. The commission includes representatives from the legal (academic) and financial sectors as well as representatives from the federal public services of Justice and Finance.

The last time this area was reformed was almost 30 years ago. It is therefore to be expected that this commission will mainly focus on the consequences of the digitisation of our society.

However, the establishment of a commission is only the very beginning of a legislative process. An effective reform is therefore not yet for tomorrow.

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EU Sanction against Russia:
impact on real estate investment

EU Sanction against Russia: impact on real estate investment

When Russia invaded Crimea in 2014, the EU enacted a series of sanctions. The regulations that were taken then were systematically extended after the invasion of Ukraine on 24 February 2022. These measures may also have an impact in the real estate sector.

2014

After the invasion of Crimea in 2014, the EU adopted a series of restrictive measures. The first measures targeted individuals deemed responsible for the misappropriation of Ukrainian public funds. This led to the *"Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine".*

A list of individuals and companies were targeted with sanctions such as the freezing of assets.

As the annexation progressed, so did the sanctions. Additional measures were taken as a result of the shoot down of the passenger plane on flight MH17.
This eventually led to a second regulation: *Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.*

This regulation provided for measures such as

- An embargo on the import and export of arms and related material from/to Russia;
- A prohibition on exports of dual use goods and technology for military use in Russia or to Russian military end-users.
- Denial of export licenses for products destined for deep water oil exploration and production, arctic oil exploration or production and shale oil projects in Russia. Exports of certain energy-related equipment and technology to Russia became subject to prior authorisation by competent authorities of Member States.

2022

In the course of the following years, the measures were first relaxed somewhat (as a result of the first peace talks), then tightened again, and finally extended year after year. After the invasion of Ukraine in the beginning this year, more and more names were added to the list of individuals in several steps. But also the economic sanctions against Russia and partly also Belarus became more and more extensive (including a ban on transactions with the Russian central bank and a ban on access to EU air space).

On 12 July 2022, the EU adopted a 7th package of sanctions which now includes an oil embargo, the exclusion of Russian credit institutions from Swift, restrictions on exports and a ban on accounting, public relations and consultancy services to Russia.

Meanwhile also an 8th package was adopted but this package mainly extends the scope of the already existing sanctions without really adding new measures.

Real estate

The restrictive measures as they exist today can have an impact on investors in real estate.

An important restriction is found in the individual restrictive measures from Council Regulation (EU) No 269/2014 of 17 March 2014.
Currently more than 1100 individuals and 100 entities are subject to an asset freeze and a travel ban because their actions have undermined Ukraine's territorial integrity, sovereignty and independence. The list of sanctioned persons and entities is kept under constant review and is subject to periodic renewals by the Council.

The sanctions consist of

1. asset freezes (funds and economic resources belonging to, or owned, held or controlled by listed natural or legal persons, entities and bodies shall be frozen);
2. a prohibition to make funds or economic resources available, directly or indirectly, to or for the benefit of listed natural or legal persons, entities and bodies; and
3. loan and issuance specific restrictions.

The second sanction mentioned hereabove could trigger issues with respect to lease agreements. It means that the landlord of the property may no longer provide the enjoyment under the lease to a "listed" tenant. Moreover, the landlord is not allowed to release funds/payments to the tenant (e.g., the repayment of deposits to the tenant).

This is not only applicable to tenants actually listed in the Council Regulation (EU) No 269/2014 but also to tenants who are, either directly or indirectly, owned or controlled by a listed person or entity.
Owned in this context means that the listed person or entity owns more than 50% of the proprietary rights or has a majority interest in it. Controlled means that the listed person or entity is able to and effectively asserts a decisive influence over the conduct of the non-listed entity.

The mere fact that the tenant is a Russian national or a Russian company is not enough to apply the above-mentioned sanctions. Discrimination on the basis of nationality is in general not allowed. The EU-resident who is contracting with a counterpart with links to Russia will need to carry out a factual assessment of the organizational, structural and economic links of that counterpart.

Article 10 of Council Regulation (EU) No 269/2014 clearly stipulates that *"the freezing of funds and economic resources or the refusal to make funds or economic resources available, carried out in good faith on the basis that such action is in accordance with this Regulation, shall not give rise to liability of any kind on the part of the natural or legal person or entity or body implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen or withheld as a result of negligence."*

Competent authorities in Belgium

Different Belgian authorities oversee the implementation of restrictive EU measures, depending on the type of measure that is in play.

The authority that is in charge of exemptions on freezing of assets, notifications of financing and financial assistance and money transfer authorisations is the Federal Public Service Finance (Administration of Treasury)

Contact details :
30 Avenue des Arts
B-1040 Brussels
Tel: +32 2 574 72 79
Fax: +32 2 579 58 38
E-mail: quesfinvragen.tf@minfin.fed.be
Website of the Administration of the Treasury Financial sanctions | FPS Finances (belgium.be)

Other competent authorities are:

- Disclosure of suspicious financial transactions: Belgian Financial Intelligence Processing Unit (CTIF-CFI)
- Customs: Federal Public Service Finance (General Administration of Customs and Excise Duties)
- Authorities in charge of other export, import and transit licences for weapons, military and paramilitary equipment and dual-use goods and contact points for specific exports to Iran, Syria and Russia
    - Federal: Federal Public Service Economy, SMEs, Self-employed and Energy
    - Brussels-Capital Region: Brussels Regional Public Service
    - Walloon Region: Walloon Public Service DGO6 - Weapons Licensing Department
    - Government of Flanders: Department of Foreign Affairs - Strategic Goods Control Unit
- Goods, technical assistance, energy sector, nuclear imports and exports: Federal Public Service Economy, SMEs, Self-Employed & Energy - Directorate General of Economic Analysis and International Economics - Licensing Department
- Energy sector: Federal Public Service Economy, SMEs, Self-Employed & Energy - Directorate-General for Energy - Supply Security Service
- Nuclear exports and imports: Federal Public Service Economy, SMEs, Self-Employed & Energy Directorate-General for Energy - Nuclear Applications Service

More details can be found on Belgian authorities in charge of the implementation of restrictive measures of the European Union | Federal Public Service Foreign Affairs (belgium.be)

Penalties

Currently, non-compliance with the EU sanction regimes is sanctioned by each EU Member State individually. Although under investigation, the EU has not yet a unified regime of penalties in place.

In Belgium, infringements on sanction regimes such as the EU sanctions on Russia are sanctioned by the Law of 13 May 2003. This law provides prison sentences of 8 days up to 5 years, criminal fines from 25 EUR up to 25,000 EUR (to multiplied by 8) and administrative fines from 250 EUR up to 250,000 EUR.

We can however refer again to article 10 of Council Regulation (EU) No 269/2014 that states that *"actions by natural or legal persons, entities or bodies shall not give rise to any liability of any kind on their part if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in this Regulation."*

Other sanction regimes

One should also bear in mind that the EU sanction regime is not the only sanction regime. The US and the UK have their separate sets of rules that differ from the EU regime. This means that companies situated in Belgium, but part of a UK-group or US-group may also need to take into account these other sanction regimes in order to avoid penalties.

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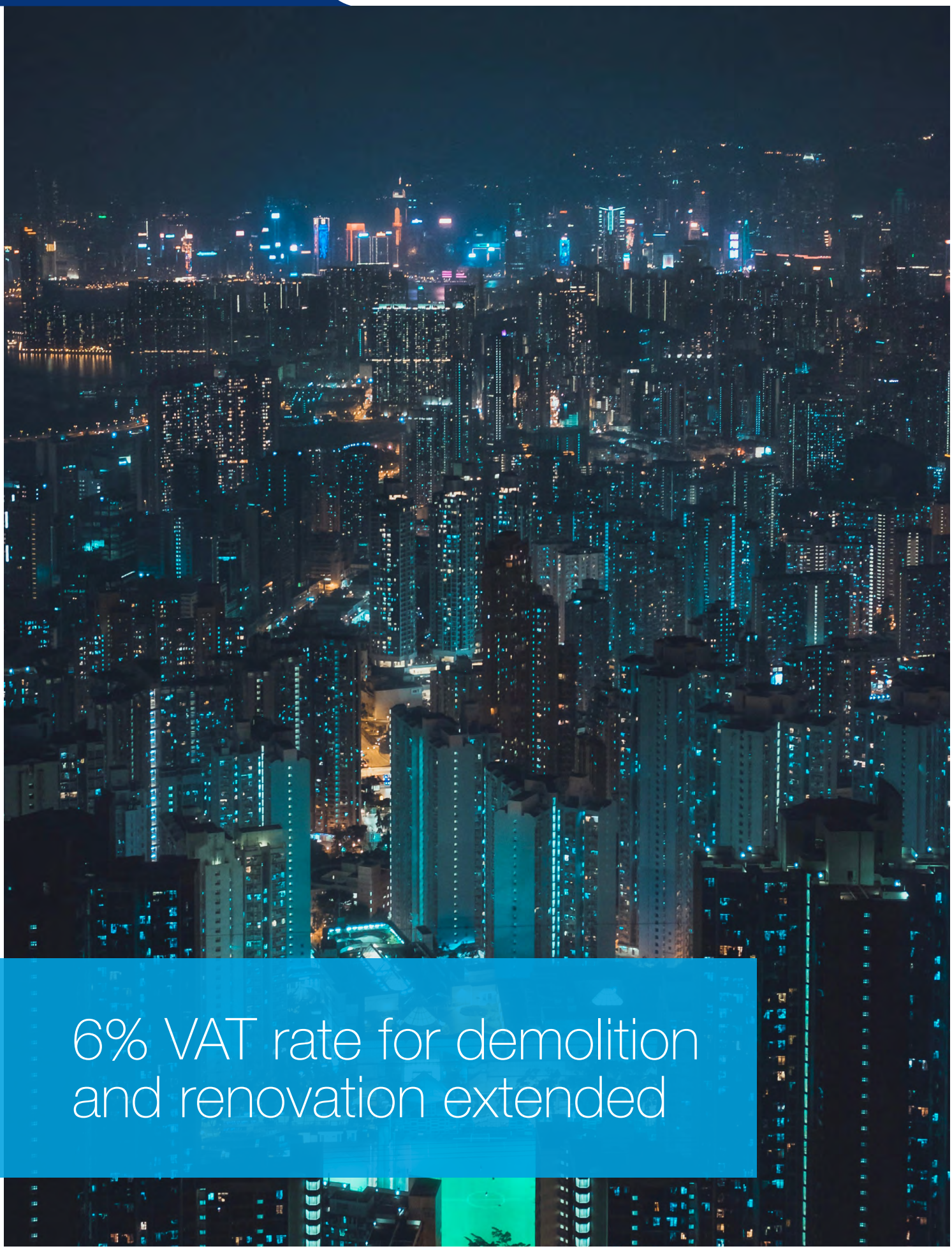

6% VAT rate for demolition and renovation extended

6% VAT rate for demolition and renovation extended

A Royal Decree of 27 March 2022 has extended the 6% VAT rate for demolition and renovation of buildings from 31 December 2022 until 31 December 2023. The conditions as such remain the same. But the Royal Decree contains some other interesting measures as well.

Demolition - reconstruction

The Royal Decree of 27 March 2022 extends the reduced (6%) VAT rate for the demolition and reconstruction of a private and only home until 31 December 2023.

This measure was originally introduced by the Programme Law of 20 December 2020 and would initially last until 31 December 2022 This Law reduced the VAT rate from 21% or 12% to 6% for:

- The demolition of a building and the subsequent reconstruction of private dwellings;
- The demolition of a building and the associated reconstruction of a private house intended for long-term rental as part of social policy;
- The transfer of houses and associated land by the taxpayer who has carried out the demolition of a building and the associated reconstruction of a private house.

The measure was as said, initially foreseen for a period of two years, from 1 January 2021 to 31 December 2022, and was actually intended as a corona related measure for the relaunch of the construction sector.

In this respect, it is important to note that the extension does not alter the conditions and application of the original measure such as the nature of the operations targeted, the fact that it must be the sole and predominant home, the maximum total habitable surface of 200 m2, etc.

Also for demolition and reconstruction works and the supplies relating to a dwelling that is the subject of a rental social rental agency, the rule remains that the conditions relating to the use of the property for social purposes must remain fulfilled during a period ending at the earliest on 31 December of the fifteenth year following the year of the first occupation or first possession of the dwelling.

The anti-abuse rule regarding taxpayers who pre-invoice their services in such an exorbitant manner that they overwrite the services actually provided during the period of application of the preferential tariff scheme remains applicable, but the hurdle date of 1 July 2022 is postponed by one year.

Energy crisis

As in other countries, the Belgian government decided to combat the sharp increase in energy prices by reducing the VAT rate on the supply of electricity and gas, among other things. But these are measures that only have a short-term effect.

The government also wants more structural solutions that should lead to a transition to sustainable and renewable energy sources. The result is a package of measures aimed to accelerate the energy transition and thus also increasing the independence of Belgium's energy supply.

Solar panels

The Royal Decree of 27 March 2022 also adds a new temporary VAT rate reduction for the supply with installation in homes of photovoltaic solar panels, thermal solar panels, solar boilers, and heat pumps. It must concern the supply of movable property and its installation on or in a building (or in the immediate vicinity of it, but connected to it) in such a way that this movable property becomes immovable by nature.
The rate will be reduced to 6%instead of the standard 21%.

The reduced VAT rate applies to all the work needed to install the facilities in question (site preparation, any specific earthworks such as drilling, electricity and plumbing work, finishing, etc.). It extends to all parts and accessories of the technical installation which are specific to the system concerned (e.g. fixing material, cables, pipes, heat exchangers, inverters, controls, circulation pumps, etc.) but does not apply to the a-specific part of the heating or electricity system which is necessary to distribute the electricity or heat generated in the dwelling (e.g. the underfloor heating system to which certain solar boilers or a heat pump are connected).

The 6% VAT rate is in principle always possible for this type of supply if the dwelling is 10 years old or older. With this (temporary) measure, the 6% rate now also applies if the dwelling has not yet reached that age.

Furthermore, the conditions for applying the reduced rate under this measure are similar to those for applying the reduced VAT rate to work on immovable property carried out on houses that are at least 10 years old.
This means that the work is carried out on private residences, approved residential establishments for the elderly, boarding schools or universities, etc.
The contractor must ensure that his invoices contain certain statements so that the invoice confirms that all the conditions have been met. The principal is liable if these statements do not correspond to reality.

Attention: the purpose of the measure is to allow individuals to find alternatives to reduce their consumption of fossil energy in their daily lives. The aim is not to allow excessive consumption of energy at a lower cost, such as heating a private swimming pool, a sauna, etc. The tariff reduction is therefore not applicable with regard to technical installations that exclusively supply energy or heat elements of the house that are not used for habitation in the strict sense, such as swimming pools, saunas and similar constructions. This was also the case under the scheme for residences of 10 years or older. In case of mixed use, the reduced VAT rate is possible.

The new measure came into effect on 1 April 2022 and is applicable until 31 December 2023.

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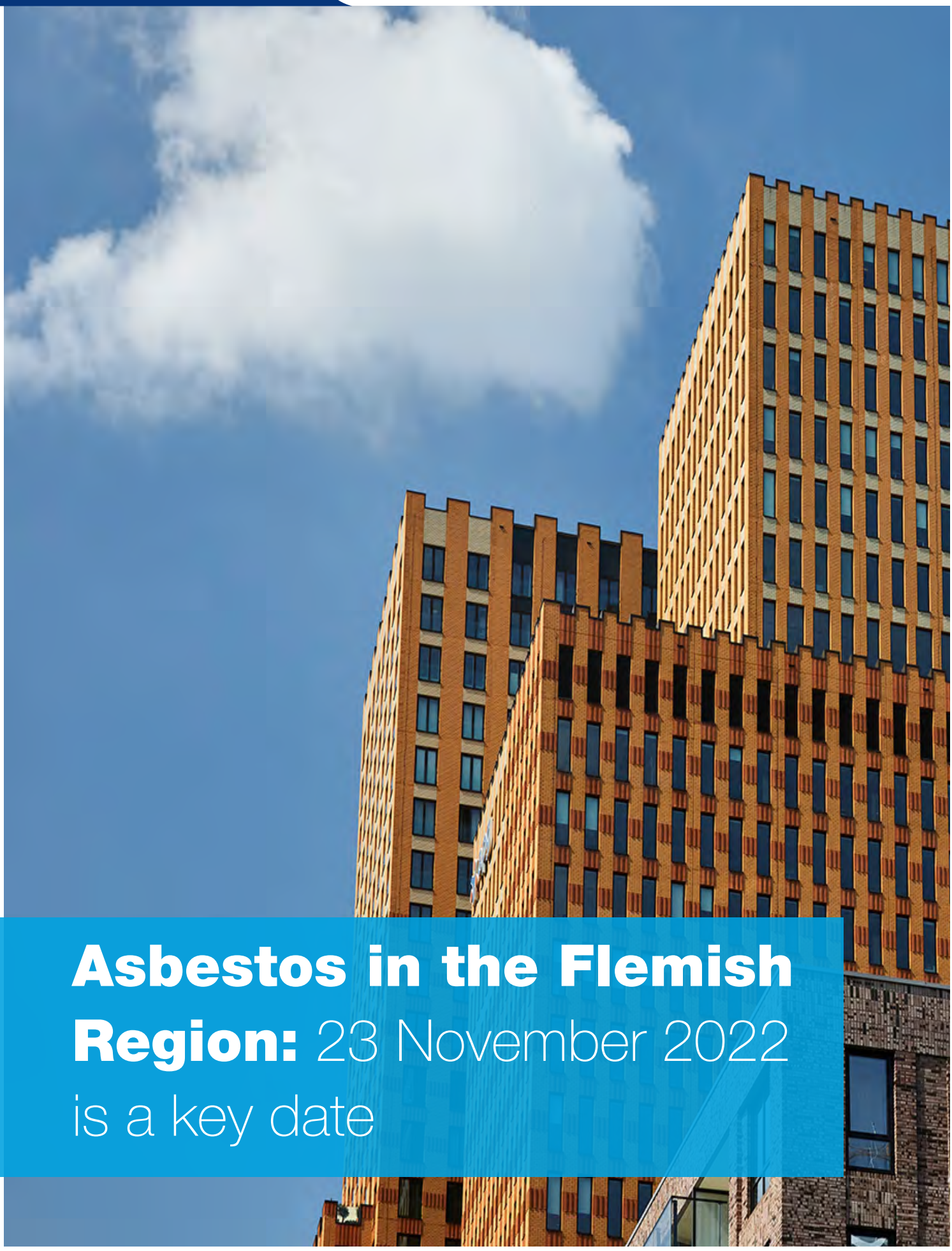

Asbestos in the Flemish Region: 23 November 2022 is a key date

Asbestos in the Flemish Region: 23 November 2022 is a key date

On 29 March 2019, the Flemish Parliament approved a decree on asbestos management (**the Asbestos Decree**) as part of global action plan to make Flanders 'asbestos safe' by 2040. The most important new provision is the obligation of the seller of a building located in the Flemish Region that was constructed before 2001, to provide the purchaser with an asbestos certificate prior to the sale as from 23 November 2022.

The new Asbestos Decree of 29 March 2019

Under Belgian law the use of asbestos substances is prohibited since 1998 and totally banned from the sale of construction materials since the Royal Decree of 23 October 2001. However, studies show that asbestos materials are still present in 70 to 90% of the buildings in Flanders (both residences and public buildings).

Asbestos certificate

Today, every employer in Belgium is, based on the Royal Decree of 16 March 2006, obliged to draft an asbestos inventory in a building where employees are employed. If such asbestos inventory indicates the presence of asbestos substances, an asbestos management plan to reduce the risk of asbestos exposure should be drawn up and annually updated.

The Asbestos Decree of 2019 imposes a broader inventory obligation. The seller or transferor of a right in rem on a building located in the Flemish Region that was constructed before 2001 is obliged to provide the purchaser or transferee with an asbestos certificate in relation to the building as from 23 November 2022 (regardless of the type of building: residential, office, logistics etc). This certificate must be provided before entering into the private sale agreement related to the transaction.

The notarial deed relating to the transaction must contain a provision in which the certificate's date and conclusions are mentioned, and in which it is indicated whether or not the document was provided to the transferee. The mandatory presence of the asbestos inventory is comparable to the mandatory presence of a soil certificate in case of a sale.

By 31 December 2031 at the latest, all owners of buildings located in the Flemish Region that were constructed before 2001 will need to dispose of an asbestos certificate. Landlords that rent out such buildings will have to provide their tenants with the necessary asbestos certificate either (i) when the lease agreement is signed or (ii) within one month after the certificate is issued, if this issuance occurs after the lease agreement was signed.

What does the inventory look like?

This asbestos inventory must be executed by a specialised and OVAM certified consultant. OVAM is the Public Waste Agency The information from the inventories are stored in a central database managed by OVAM. On the basis of the asbestos inventories, the separate asbestos certificates will be delivered.

The cost for issuing a new or updated asbestos certificate is EUR 50. However, no fee is due if the asbestos inventory is modified within 30 calendar days after the asbestos inventory certificate was issued and the corresponding asbestos inventory certificate needs to be updated.

Buildings occupied by a public authority

For buildings located in the Flemish Region that were constructed before 2001 and that are occupied by a public authority, the Asbestos Decree states that by 1 January 2034 (i) all easily accessible and non-bound asbestos containing materials and (ii) all asbestos applications in the building's exterior elements (e.g. in roofing; at the façade or in chimneys) must be removed. By 1 January 2040 the building must be covered by a formal 'asbestos safe certificate'. Note: this is an obligation for the owner of the relevant building, and not for the public authority that occupies the building.

Preventing asbestos exposure incidents

Furthermore, the Asbestos Decree imposes several measures to prevent asbestos exposure incidents, including:

1. an obligation to remove easily accessible asbestos applications at the occasion of maintenance, repair or refurbishment works;
2. a prohibition on cleaning or de-mossing roofing or façade cladding that contains asbestos; and
3. a prohibition on covering, installing or attaching equipment (e.g., billboards or solar panels) to asbestos-containing roofs or façades.

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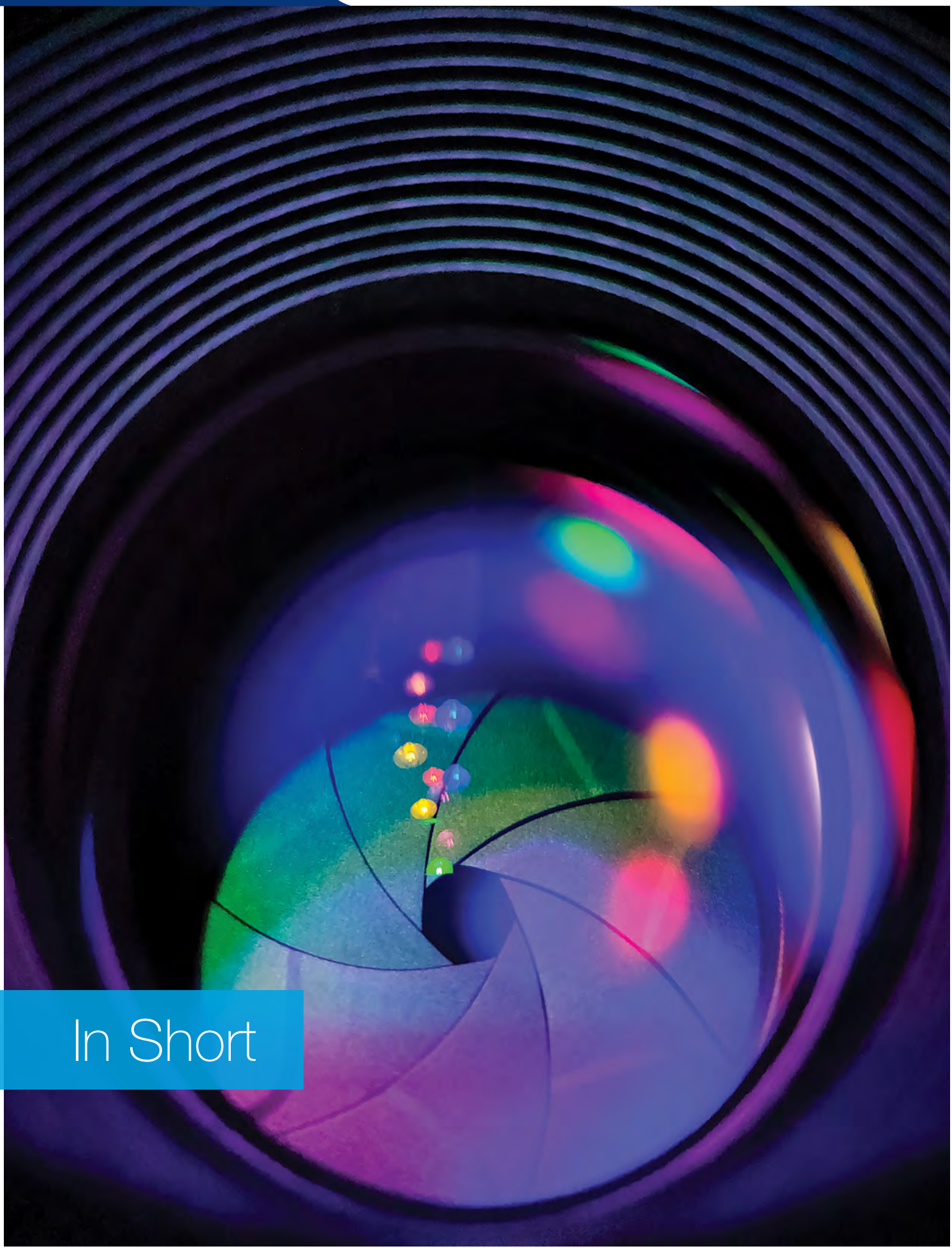

In Short

In Short

Immovable work: statements on the invoice

In principle, a contractor who performs work on an immovable property for a principal who is a VAT-taxable person, is not allowed to charge VAT on this work. The client however must include the VAT amount in his own VAT return and can subsequently deduct the VAT in the same return.

The contractor must, however, clearly state on the invoice that the VAT will not be charged but will be shifted to the principal pursuant to Article 20 of Royal Decree No. 1. At the Hasselt court, a case was presented where the contractor had not included this statement on the invoice for works he had carried out for a hotel. Instead of the obligatory mention, he had only mentioned “0% VAT” on the declaration. Subsequently, the hotel had not declared these works.

The tax authorities detected this infringement and demanded payment of the VAT (21%) from the contractor, plus a 10% fine and late-payment interest at a rate of 0.8% per month.

The court of Hasselt rejects the position of the tax authorities. The court recognises that the contractor made a mistake, but also notes that no tax revenue was lost. The client had not filed a declaration, but if the parties had followed the procedure correctly, the VAT would have been immediately and fully deductible. Based on the neutrality principle of VAT, the court concludes that the VAT levied on the contractor’s behalf is null and void.

(Court of first instance of Hasselt, 1 July 2021)

Transfer of unused property and property tax

In the Flemish and Walloon Regions, there is an exemption from property tax if the building has not been used for a maximum of 12 months. There are several other terms and conditions for this exemption (and they are different for the two regions), but the essence is that no property tax is due if the building has not been used at all.

According to the tax authorities, this 12-month period continues if the property is sold in the meantime. So, the buyer continues the term of the seller, as it were. If the seller has already “exhausted” the 12-month period, the buyer can no longer benefit from the exemption.

But the Constitutional Court disagrees. The Court considers that such an interpretation creates an unreasonable difference of treatment between that category of taxpayers and the category of taxpayers who acquire a property previously occupied by its former owner.

According to the Court, the provision in question must therefore be interpreted as meaning that the condition of 12 months’ vacancy is linked to the person liable for the real estate tax and, with regard to that person, only starts to run from the transfer of ownership of the real estate.

The Court adds, however, that this interpretation may not give rise to tax abuse.

The case brought before the court was about a property situated in het Walloon Region and therefore the judgment only applies to the Walloon legal framework. But the Flemish regulation is identical to the Walloon one in this respect. In the Brussels-Capital Region, the reduction of property tax due to unproductivity was abolished as from 2017.

(Const. Court. 16 December 2021).

Flemish Building Shift (*Bouwshift*)

On 22 February 2022, the Flemish government reached an agreement on the so-called Building Shift. The objective of this agreement is to reduce the additional land take to 3 ha/day by 2025 and 0 ha/day by 2040. Today, the daily additional land take still amounts to 5 ha.

To achieve this, the Flemish government first wants to create a legal framework for an open space policy. This legal framework consists of:

1. The "Instruments Decree": a harmonisation of various compensation mechanisms for owners and users.
2. The "Decree on residential reserve areas": limiting/hindering the use of so-called residential reserve areas.

Both proposals have already been submitted to the Flemish Parliament.

In addition to the legal framework, there is also a financial component. The Flemish Government will set up a fund to finance this building shift. The government will finance this fund with 100 Mio/annum. The damage for the owners of plots (damage because the plot can no longer be built on or divided up as a result of a zoning change) will be based on the venal value.

The building shift has important consequences, both for private individuals and companies. Deviations from zoning plans will become more difficult and probably also more expensive. A matter to be followed up.

Extinction of a commercial lease

A (owner) and B (lessee) conclude a commercial lease for a building and a warehouse in a shopping centre. B will operate a business in textile accessories as franchisee of a well-defined chain (V). The rental agreement explicitly states that the agreement is concluded **for the exploitation of a business according to the "V" formula.**

After 14 years, V. decides to terminate the franchise contract. B wants to terminate the commercial lease but A claims the termination fee.

The first court confirms the position of the landlord but on appeal the tenant is proven right: the contract has become without object because it specifically concerned the rental of premises "according to the V. formula".

There is a disappearance of the object of a lease contract if:

a. the performance in kind of the contract becomes permanently impossible, and
b. the event occurs after the agreement has come into being.

The court concludes that the commercial lease is void by operation of law.

(Court of first instance of Antwerp, 27 April 2021)

Wrong VAT rate is not the architect's liability

A married couple renovates their own home. Upon inspection, it turns out that the renovation is so extensive that they cannot benefit from the reduced VAT rate of 6%. They claim damages from the architect because he assured them that the reduced rate would apply.

The Ghent Court of Appeal rejected their claim notwithstanding that the architect had explicitly mentioned the application of the 6% rate in the commission contract. The reduced rate had also been mentioned each time in the initial cost estimate.

The court refers to the text of the law: if a 6% rate was wrongly applied, the " purchaser" is liable for the additional tax, interest and fines. Moreover, the principal must sign an attestation that all conditions for the reduced rate have been met.

In similar cases, other tax courts also concluded that the principal and not the contractor is responsible for tax supplements.

(Ghent Court of Appeal 11 January 2022)

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