The Real Estate Law Review

Eleventh Edition

Editor
John Nevin

The Law Reviews

THE REAL ESTATE LAW REVIEW

ELEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Nevin

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Isabelle Gray

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Felicia Rosas

SUBEDITOR
Caroline Fewkes

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-280-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AUMENTO LAW FIRM

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

CHANDLER MHM LIMITED

CHIOMENTI

CORDATO PARTNERS LAWYERS

DE PARDIEU BROCAS MAFFEI

ESTUDIO BECCAR VARELA

GUZMÁN ARIZA

HENGELER MUELLER

HERBERT SMITH FREEHILLS CIS LLP

KIM & CHANG

LOYENS & LOEFF

MAPLES GROUP

NIEDERER KRAFT FREY

NISHIMURA & ASAHI

OCAMPO MANALO VALDEZ LIM

PATRIKIOS PAVLOU & ASSOCIATES LLC

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU STOICA & ASOCIAȚII

SLAUGHTER AND MAY

TSMP LAW CORPORATION

URÍA MENÉNDEZ

VASIL KISIL & PARTNERS

CONTENTS

PREFACE

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

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

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

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

The covid-19 pandemic is a truly global issue affecting every jurisdiction and, of course, its real estate market. Although it has been overshadowed by the covid-19 pandemic, Brexit and the associated economic and political fallout from leaving the European Union has continued to be a concern for the UK economy and its property industry. Rising costs, a critical shortage of labour and materials as well as crippling supply chain issues have threatened to destabilise the post-pandemic recovery. On a positive note, investment volumes have bounced back and we are seeing increased interest from both overseas and domestic investors, underlining the continued importance of UK real estate as an investment asset. Although global real estate investment has picked up, the recovery has been uneven across countries, markets and sectors. The United Kingdom will be anxious to maintain its position at the top of global shopping lists. The world's growing cache of investment capital is likely to prompt a surge in investment activity once international travel and business confidence stabilises. The United Kingdom seems certain to remain attractive to overseas investors looking for a safe haven for their funds. The next few years will undoubtedly be challenging as we continue on the journey to recovery, but opportunities will arise, and real estate will remain a key part of global investment strategies.

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

John Nevin
Slaughter and May
London
February 2022

Chapter 5

BELGIUM

Ariane Brohez and Christophe Laurent[1]

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

The property rights under Belgian law are as follows:

a ownership;
b the right to build;
c long-term lease right;
d usufruct; and
e easements.

The mortgage, lien and pledge are secondary or accessory rights *in rem*, which do not have an independent existence and are attached to a receivable.

The parties cannot agree contractually to create, alter or otherwise extend the scope of property rights beyond what is legally provided or permitted by law.

Ownership is the most complete right of enjoyment of property, and it is a perpetual right. Ownership of land includes the ownership of all that is on and below the ground. Ownership can also take the form of an *indivision* – several owners jointly exercise the full ownership right over a property (e.g., two brothers who are transferred the family house by inheritance), or of a co-ownership – several owners enjoy exclusive property right over private parts and shared rights over common parts (e.g., an apartment building where each apartment as such is subject to an exclusive ownership right while the ground, entrance and lifts are subject to a shared ownership right).

A right to build is the right to own a building or a construction, existing or to be built, on, above or below the ground of another person. During the term of the right to build, the holder of the right shall be the owner of the building erected by it. The right to build is limited in time, with a maximum duration of 99 years. Upon termination, the owner of the land becomes the owner of the constructions erected.[2] A right to build, as well as any constructions built pursuant to it, is a transferable asset that can be sold or mortgaged.

A long-term lease right grants its holder the right to use a building and collect the income as if it was the owner. A long-term lease right can be granted on ground or on existing building, or both; when granted on ground, the long-term lessee shall be the owner of the

1 Ariane Brohez and Christophe Laurent are partners at Loyens & Loeff.
2 For property in volume or use public interest purposes, a right to build can be perpetual.

constructions erected by it until expiry of the long-term lease right. The long-term lease right is a temporary right, with a minimum duration of 15 years and a maximum duration of 99 years.[3] The long-term lease right is a transferable asset that can be sold or mortgaged.

The usufruct is the right to enjoy a property, which is owned by another person. The usufruct is a temporary right, which terminates upon the beneficiary's death (in case of an individual) or upon its dissolution (in case of a corporation); when granted to a corporation, the usufruct has a maximum duration of 99 years. A usufruct can also be transferred or mortgaged.

An easement is a right *in rem* vested on a property to the benefit of another property; it therefore presupposes the existence of two properties with two different owners. An easement is in principle a perpetual right but might terminate through prescription (i.e., if not used for 30 years) or uselessness. It is an indivisible and accessory right that cannot be sold, otherwise transferred, attached or mortgaged separately from the dominant property.

ii System of registration

To make the transfer of a property right enforceable against third parties, and more particularly against the creditors of the transferor, the title must be transcribed in the mortgage register of the judicial district where the asset is located. This transcription requires a Belgian notary since only authenticated deeds or acts can be transcribed. Before the transcription, the authenticated deed must be registered, which shall trigger the payment of transfer taxes. Consequently, there are two systems or sources of information in Belgium: the land register, which provides a status of current ownership (including the registration numbers of the parcels) and is based on the registration, and the mortgage register, which keeps track of transfer of property rights over the past 30 years.

There is no state guarantee on the title, and the registers cannot be held liable for registering inaccurate information. Because of this absence of state guarantee, we are seeing the development of 'title insurance' in the framework of real estate transactions.

iii Choice of law

Real estate transactions are, in principle, governed by the law of the location of the asset, here Belgian law. Note that share transactions and real estate finance transactions are sometimes governed by another law than Belgian law, such choice of law being valid. Note, however, that enforceability requirements are always governed by Belgian Law.

II OVERVIEW OF REAL ESTATE ACTIVITY

The appetite for real estate in Belgium remains high, due to the presence and demands of the European Union (which also attract corporates in Belgium) and thanks to the stable (indexed) rents. Competition, however, remains high, on price but also especially on the logistics sector (competition between local and international players). In terms of trends, major real estate developments are ongoing or have been announced; most of the time that includes residential; in the past months, appetite for residential has been noticed and this might become a new market.

3 For public interest purposes, a long-term lease can be perpetual.

Although uncertainty remained in 2021 due to the covid-19 pandemic, it is fair to say that the impact on the real estate market has been very limited considering the full year of activity. In terms of asset classes, the appetite remains high, as well as the prices, for logistics assets and core office assets. External financing for this type of transactions is also easily available. Most of the deals in the segment core are forward (commitment or funding) transactions.

The retail, hotel and leisure sectors are still suffering, although an increase of activity has been noticed in the hotel sector, with portfolios and assets in development being brought to the market at the end of the year. Retail transactions are rare but, notably, refinancing of existing assets and portfolios seems to operate quite smoothly.

III FOREIGN INVESTMENT

Under Belgian law, there are no restrictions on foreign investment in real estate. No specific incentive for foreign investment applies either.

One should, however, pay attention to EU rules on money laundering and on sanctions since economic operator and services providers (e.g., lawyers and notaries) might be prevented from doing business with certain parties that are subject to restrictive measures or for which the know-your-customer and client due diligence is not conclusive. This is, however, not typical for real estate and applies to any type of business.

IV STRUCTURING THE INVESTMENT

i Concept of real estate company

Belgian law does not know the concept of 'real estate company', being a company, whose main assets consist in real estate and which would be treated, mainly for tax purposes, differently from an ordinary company. Consequently, the tax regime applicable to share transactions is not subject to deviating rules. Share transactions are not subject to transfer tax or value added tax (VAT) (unless the tax administration demonstrates a tax abuse), and capital gain realised on shares should benefit from participation exemption in the hands of the seller.

ii Structuring of the acquisition

Transactions are structured via the acquisition of shares, the acquisition of ownership or the acquisition of a 99-year long-term lease right.

In a share transaction, the purchaser shall acquire the shares of a special purpose vehicle (SPV) and at the same time inherit all assets and (hidden) liabilities of the company. Extensive due diligence is therefore required upon acquisition. A share transaction might, however, be detrimental to the purchaser: the leverage shall be limited to the existing debt at the level of the SPV, and the asset value shall correspond to historical value (i.e., construction or acquisition cost less the depreciation already taken) without step-up. This type of transaction sometimes proves to be difficult to finance, as the bank requires a mortgage on the asset, and the up-stream security interest to guarantee a financing of shares is prohibited by financial assistance rules. Solutions can be found in the conversion of the SPV into an ordinary partnership or a specialised real estate investment fund. From a pricing and negotiation standpoint and since the seller should realise a tax-exempt capital gain, it is market practice to negotiate a discount for tax latency.

The sale of ownership shall allow, in the hands of the purchaser, to record a step-up on the asset value (i.e., the asset shall be recorded, and depreciated,[4] for its acquisition value by the purchaser) and to easily set up a full collateral package, without restrictions. It is, however, subject to 12[5] per cent (in Flanders) or 12.5 per cent (in Brussels and Wallonia) transfer tax.

The granting, by the owner, of a 99-year long-term lease right over a property is common practice. In the hands of the purchaser, the advantages of this structuring are the same as for the acquisition of ownership,[6] and the tax cost is reduced since this transaction shall be subject to 2 per cent transfer tax. In order to guarantee the liquidity of the investment, parties can also agree that the transferee of the long-term lease right shall benefit from an option to acquire the residual property rights, such option being exercisable after the 15th anniversary of the entry-into-force of the long-term lease right to comply with the minimum 15-year duration of such right.

iii Investment vehicle

Foreign investors can acquire directly the ownership or the long-term lease right. In such a case, the revenues and capital gain shall be subject to tax in Belgium, at the ordinary rate of 25 per cent. No profit branch tax applies. Such a structure allows a direct appropriation of all revenues and the absence of 'cash trapped' (i.e., the revenues corresponding to the depreciation taken on the asset) in Belgium.

The investor can also choose to structure its acquisition via a Belgian acquisition vehicle: a corporation (SPV), an ordinary partnership or a specialised real estate investment fund.

The SPV shall be subject to regular Belgian accounting and tax rules. The revenues and capital gain shall be subject to tax in Belgium at the ordinary rate of 25 per cent. The disadvantage of an SPV lies with accounting treatment and capital protection rules. The building shall be automatically depreciated, and this depreciation shall reduce the accounting (and tax) result and therefore, the profits available for distribution. It is common practice, but requires enough leverage capacity, to have an intragroup loan granted to the SPV to allow the upstream of this 'cash trapped'. Specific attention must be paid to transfer pricing rule when fixing the conditions of this intragroup loan.

To tackle this issue as well as to put a full collateral package in place, the SPV might be converted into an ordinary partnership. This type of company has legal personality under Belgian law and shall be subject to the same tax regime as the SPV. It is, however, not subject to capital protection rules, including the prohibition of financial assistance.

Investors might opt for a specialised real estate investment fund or FIIS,[7] by either setting-up a FIIS as acquisition vehicle (of the shares or the asset) or by converting a SPV into a FIIS. The main advantages of a FIIS reside in its accounting regime and its tax regime. The FIIS must draw up its financial statements in accordance with International Financial Report Standards and the investment income (e.g., rental income and capital gain) is not subject to corporate income tax. For certain investors, the FIIS also allows the qualification of the investment as 'real estate' in accordance with the Solvency II Regulation. However a tax cost is associated to this structure:

4 The acquisition value allocated to the land is not depreciable.

5 With a reduced rates of 1 per cent or 3 per cent applying to the purchase of only owner-occupied dwellings.

6 Part of the first instalment paid for the granting of the long-term lease right is to be allocated to the land, which is not depreciable.

7 Fonds d'Investissement Immobiliers Spécialisés.

a entering into this FIIS regime triggers the 'exit tax' being the taxation of the latent gain on the asset at a rate of 15 per cent; and
b the FIIS is subject to a yearly dividend distribution obligation, which will trigger withholding tax based on applicable tax treaty.

In this respect, note that dividends distributed to foreign pension funds that are exempt from income tax should benefit from a withholding tax exemption based on Belgian tax law. From a regulatory standpoint, the FIIS is an alternative investment fund, either by option if it only has one investor (this investor not being an alternative investment fund) or is a joint venture, or by law in case of multiple investors. The regulatory burden for a FIIS by option is limited to a yearly compliance questionnaire.

V REAL ESTATE OWNERSHIP

i Planning

Each region is competent regarding the general legal framework within its territory. Deriving from this general legal framework, zoning plans are the main source of planning rules and regulations and contains binding conditions on the nature of buildings and activities that can be authorised in the concerned area; these plans exist at the level of the municipality, the province and the region. In a nutshell it can be said that construction, modification, renovation and extension require a building permit, as well as the change of the use of a property (e.g., from office to residential). The first condition to be granted a permit is that the contemplated development complies with the zoning plan. Other conditions apply as well depending on the facts (e.g., results of the public inquiry, environmental impact assessment and fire safety). The operation of certain installations, which may have an adverse impact on the environment or health, or both, also requires an environmental permit, or when possible and relevant, a combined permit that merges the building and environmental prescriptions and authorisations.

ii Environment

The (most relevant) trigger event of soil formalities and sanitation is the 'transfer of a risk land'. Although the concept might differ depending on the region concerned, a transfer or granting of property right and corporate restructuring shall most of the time qualify as a 'transfer'. The activities effectively carried out (with or without environmental permit) in the premises will determine the qualification of 'risk land'; if an environmental permit has been delivered for a risk activity, it shall lead to the qualification of 'risk land', but the environmental permit is not the sole or determining criterion (e.g., if a tenant is operating a risk activity without a permit, the owner will nevertheless have to comply with soil formalities in the event of a transfer).

In terms of liability, two situations must be distinguished:

a the compliance with soil formalities lies with the transferor and can be shifted to the transferee where certain conditions are met; and
b the liability for soil pollution and sanitation measures lies with the operator.

Note that in each of the regions a waterfall system is in place, with the operator as first in line in terms of liability but also with a possible recourse against the owner. This is especially true in the event of bankruptcy of the operator. It is therefore highly recommended, for example, when letting a property, to have a clear view on the soil status, a monitoring of the tenant's activity and specific provisions with respect to soil in the lease agreement.

iii Tax

Share deals are not subject to transfer tax, stamp duty or value added tax (VAT), unless the tax administration demonstrates an abuse.

Asset deals are either subject to transfer tax or VAT. When the real estate qualifies as 'new building' for VAT purposes, the transfer of a property right may (when the owner is not a professional developer and opts for VAT taxable transaction) or must (when the owner is a professional developer) be subject to 21 per cent VAT. A building is deemed new for VAT purposes until 31 December of the second year following its first use or occupancy. Heavy refurbishment allows the qualification as 'new building' either when:

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

b modifications for which the cost of the works (excluding VAT) equals at least 60 per cent of the market value of the building (excluding ground) at the end of the works are executed.

When VAT does not apply, the purchase of an asset or the granting of a usufruct is subject to 12 per cent (in Flanders) or 12.5 per cent (in Brussels and Wallonia) transfer tax computed on the higher of the agreed price or the market value. Long-term lease rights and rights to build are subject to 2 per cent transfer tax computed on the total of the fees paid to the owner over the full duration of the right increased by the charges contractually borne by the beneficiary.

iv Finance and security

The collateral package includes mortgage, pledge of receivables (e.g., rent receivable and insurance receivables) and pledge of bank accounts. The parent company shall usually pledge the shares in the SPV and subordinate any intragroup loans. A few points must be kept in mind:

a a mortgage is subject to 1 per cent transfer tax and 0.3 per cent inscription duty computed on the amount for which it is inscribed. Considering this tax cost, the practice – mostly with Belgian banks but never with *Pfandbrief* banks – is to inscribe a mortgage for a limited amount and to grant a mortgage mandate for the remainder. A mortgage mandate is not a security but an irrevocable power of attorney to inscribe a mortgage;

b general banking terms and conditions usually include a right of pledge and set-off provisions in favour of the account bank, which could interfere with the pledge of bank accounts in favour of the lender. Therefore, it is common practice to require from the account bank a waiver of these rights and provisions. This should be disclosed and discussed with the account bank ahead of the closing; and

c subordination of intragroup loans is most of the time only partial in the sense that the SPV can still use excess cash to reimburse the intragroup loan.

VI LEASES OF BUSINESS PREMISES

Depending on the type of business, commercial premises can be rented via a common lease or a retail lease.

i Retail leases

Retail leases concern a specific group of professionals that are in direct contact with the public in the leased premises, the premises being primarily used for retail activities. These leases are governed by the Commercial Lease Act of 30 April 1951, which includes a wide raft of mandatory legal provisions, mostly for the benefit of the tenant:

a term: Retail leases must be concluded for at least nine years, the tenant being entitled by law to request three renewals of nine years each. This right to request a renewal is, however, not absolute as it can be refused by the landlord, for cause or not. The justification of the refusal shall determine the indemnity to be paid to the tenant, as determined by law;

b break option: The tenant is entitled by law to terminate the retail lease every three years. An anticipated waiver of this termination right is not valid;

c rent: The parties are free to negotiate the rent level and the type of rent. The most frequent form remains a fixed rent, but hotel businesses and shopping centres also frequently apply variable rent based on turnover subject to a minimum guaranteed rent; and

d rent review: Under a retail lease each party can, during a period of three months prior to the end of each three-year period, file a request to review the rent provided that the rent value of the leased premises has changed by at least 15 per cent due to new circumstances.

ii Common lease

Contrary to retail leases, the legal provisions applicable to common leases are not mandatory meaning that the parties can accommodate the different terms and conditions. Except for the prohibition of a perpetual lease (i.e., a lease exceeding 99 years), no restriction applies regarding the term of the lease.

iii Indexation

Lease agreements may contain different types of price variation clauses, including the traditional indexation clause that provides for an adjustment of the rent to the costs of living on a yearly basis. For traditional indexation, the formula is set out in Article 1728 *bis* of the old Civil Code. Where the formula chosen by the parties differs, the indexation amount can be reduced if the result of the contractual formula is higher than the result of the legal formula.

iv Maintenance, repairs and taxes

Concerning maintenance and repairs, the default rule is Article 1754 of the old Civil Code, a tenant-friendly provision where the tenant will only be liable for small maintenance and repair works, leaving all other maintenance works, including obsolescence, in the charge of the landlord. Parties however frequently derogate, providing that the rule of Articles 3.154 of the Civil Code will apply, where the landlord shall only support the structural repairs but also the repairs whose costs manifestly exceed the revenues of the asset. Considering this modification of the Civil Code, the parties would be well advised to detail their mutual obligations in the agreement. In sale and lease back transactions, and retail and hotel transactions, we have seen lease agreements where all maintenance and repairs, including structural repairs, are met by the tenant.

It is common practice that the taxes linked to the property (e.g., the annual property tax) are recharged to the tenant.

v Rental guarantee

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

vi Registration, fixed date, transcription

Registration of the lease is a legal obligation, which usually lies with the tenant based on contractual provision. Registration gives the lease a 'fixed date', limiting the eviction possibilities by a third party claiming property right on the leased premises, such as the purchaser of the asset.

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

VII DEVELOPMENTS IN PRACTICE

i Transfer taxes in Flanders

The Flemish Government decided in September 2021, in the context of rising house prices, to reduce the registration fees on the sale of dwellings. The rate is conditionally reduced to 3 per cent (instead of 6 per cent) and even 1 per cent (for a major energy renovation or demolition and rebuilding of the dwelling). As a counterpart to the rate reduction, the general rate for the purchase of other buildings, such as a second property, commercial buildings and land, increased from 10 per cent to 12 per cent. The measure entered into force for all purchase agreements signed as from 1 January 2022.

ii Renovation obligation in Flanders

The Flemish government has been striving for years to optimise the use of energy in buildings in the Flemish Region. Initially, this was carried out with all kinds of premiums and incentives. However, at the end of 2020, the government changed tack: renovation has now become an obligation. By 2050, houses must have an average energy label A, and even non-residential buildings must be carbon neutral.

To this end, the government developed a long-term renovation strategy, a large part of which can be found in a Flemish Government Decree of 9 July 2021. We focus below on the renovation obligation of non-residential building that applies as from 2022. The renovation obligation applies to every non-residential building unit that has been 'transferred' from 1 January 2022, either by transfer of full ownership or by granting a long-term lease right or a right to build. The renovation obligation does not have to be met if the unit is part of a building that will be demolished within five years. The obligation also does not apply if the transfer is the result of a corporate restructuring.

The renovation obligation makes the following measures compulsory within five years from the transfer:

a if the minimum R-value of $0.75m^2K/W$ for roof insulation is not achieved, roof insulation with maximum U-value of $0.24W/m^2K$ must be installed;

b if there is single glazing, it must be replaced with glazing with a maximum U-value of $1W/m^2K$;

c all central generators for space heating that are older than 15 years must be replaced, unless it can be demonstrated that the installation meets the minimum installation requirements for renovation. If there is a natural gas network in the street, a fuel oil boiler may not be replaced by a new fuel oil boiler; and

d all cooling systems older than 15 years that use cooling agents based on ozone-depleting substances or cooling agents with a GWP (global warming potential) value of 2500 or higher must be replaced by cooling systems that do not use these harmful cooling agents.

In addition to the renovation obligation, from 1 January 2022, a small non-residential building[8] must achieve Energy Label C or better. This only applies if the building is sold in its entirety. If it appears that this energy label has not been obtained after five years, an administrative penalty of €500 to €200,000 may be imposed. This penalty is not exonerating: the competent authority sets a new deadline by which the obligation must be met. For large non-residential buildings, from 1 January 2023 onwards and within five years of the transfer of the building, the building must achieve a minimum renewable energy share of 5 per cent.

For non-residential buildings, the government also aims to achieve a carbon-neutral building stock for heating, sanitary hot water, cooling and lighting by 2050.

iii European taxonomy in the ESG regulatory framework

The Taxonomy Regulation establishes four conditions for an activity to be considered sustainable, one of them being that the activity must comply with the technical screening criteria established by the EU Commission (the TSC).

Draft TSC are available for the following real estate activities for which it is therefore possible to assess under which conditions these activities are EU taxonomy aligned:

a construction of new building;

b renovation of existing building;

8 *A small non-residential building is defined as a building unit with a main non-residential use and a usable floor area no greater than $500m^2$, where the contiguous assembly of non-residential building units within the same building of which the building unit is a part has a usable floor area no greater than $1000m^2$ and contains no non-residential unit greater than $500m^2$.*
The EPC for small non-residential units is intended for non-residential buildings or building parts that frequently occur with a residence or are housed in a residential building, such as a pharmacy, a small bakery, ,... The useful floor area of the non-residential unit is therefore not greater than $500m^2$.
Small units located in a large non-residential building, such as a shop in a shopping centre, do not belong to the target group. In these larger buildings, the construction, installations and (building) techniques used can be complex and unique, which requires a different approach and calculation method.
For this reason, the contiguous non-residential unit, of which the unit to be sold or let is a part, may not exceed $1000m^2$.

c acquisition and ownership of buildings; and
d installation, maintenance and repair of some specific energy-related infrastructure such as:
- energy efficiency equipment;
- charging stations for electric vehicles in buildings (and parking spaces attached to buildings);
- instruments and devices for measuring, regulating and controlling the energy performance of buildings; and
- renewable energy technologies.

We expect these measures to gain significant importance in the coming years, accelerating the renovation of old buildings and boosting sustainable real estate developments.

VIII OUTLOOK AND CONCLUSIONS

Despite the circumstances around the covid-19 pandemic, 2021 has been a great year for the real estate sector, certainly for the logistics assets and core assets in general; the same is true for real estate developments. Three questions should dominate 2022:
a How will the financing market evolve and would it be correlated to the indexation that is currently increasing due to energy prices?
b How will the residential market, which seems to be rapidly growing, evolve?
c How will the investors react to ESG and what will be the requirements imposed on the asset managers, the developers and the tenants in this field?

We believe that climate change mitigation and adaptation will be high on the real estate agenda for the coming years.

Finally, anticipated legislation on contract law may further impact the real estate sector since a major reform is expected, which might, for instance, introduce hardship in Belgian law.

Appendix 1

ABOUT THE AUTHORS

ARIANE BROHEZ

Loyens & Loeff

Ariane Brohez is partner of the real estate practice group in Belgium. During the past 15 years, she has developed particular experience in structuring real estate funds, real estate investments (acquisition and disposals) and real estate financing. Ariane assists clients in real estate transactions (portfolios, share deals, asset deals, sale and lease back and (re)financing), negotiating deals from initial offer or term sheet until closing and advising on all tax, regulatory and legal aspects. She has also specialised in Belgian corporate tax law and withholding taxes, including international tax developments and GAAR (general anti-avoidance rule), as well as in European law and constitutional law.

CHRISTOPHE LAURENT

Loyens & Loeff

Christophe Laurent is a partner and heads the Belgian division of the Loyens & Loeff real estate practice group. Christophe advises on real estate investment structuring and leads negotiations on real estate transactions (both asset and share deals), including sale and lease back and real estate asset management (e.g., leases and all real estate related contracts). He has acquired a reputation for excellence in tax aspects of real estate investments in Belgium, at fund level (e.g., efficient fund structuring, tax forecasts, financing) as well as at local level (due diligence, deal structuring), including tax and accounting aspects related to developments.

LOYENS & LOEFF

Avenue de Tervueren 2
1040 Brussels
Belgium
Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
christophe.laurent@loyensloeff.com
ariane.brohez@loyensloeff.com
www.loyensloeff.com

ISBN 978-1-83862-280-0