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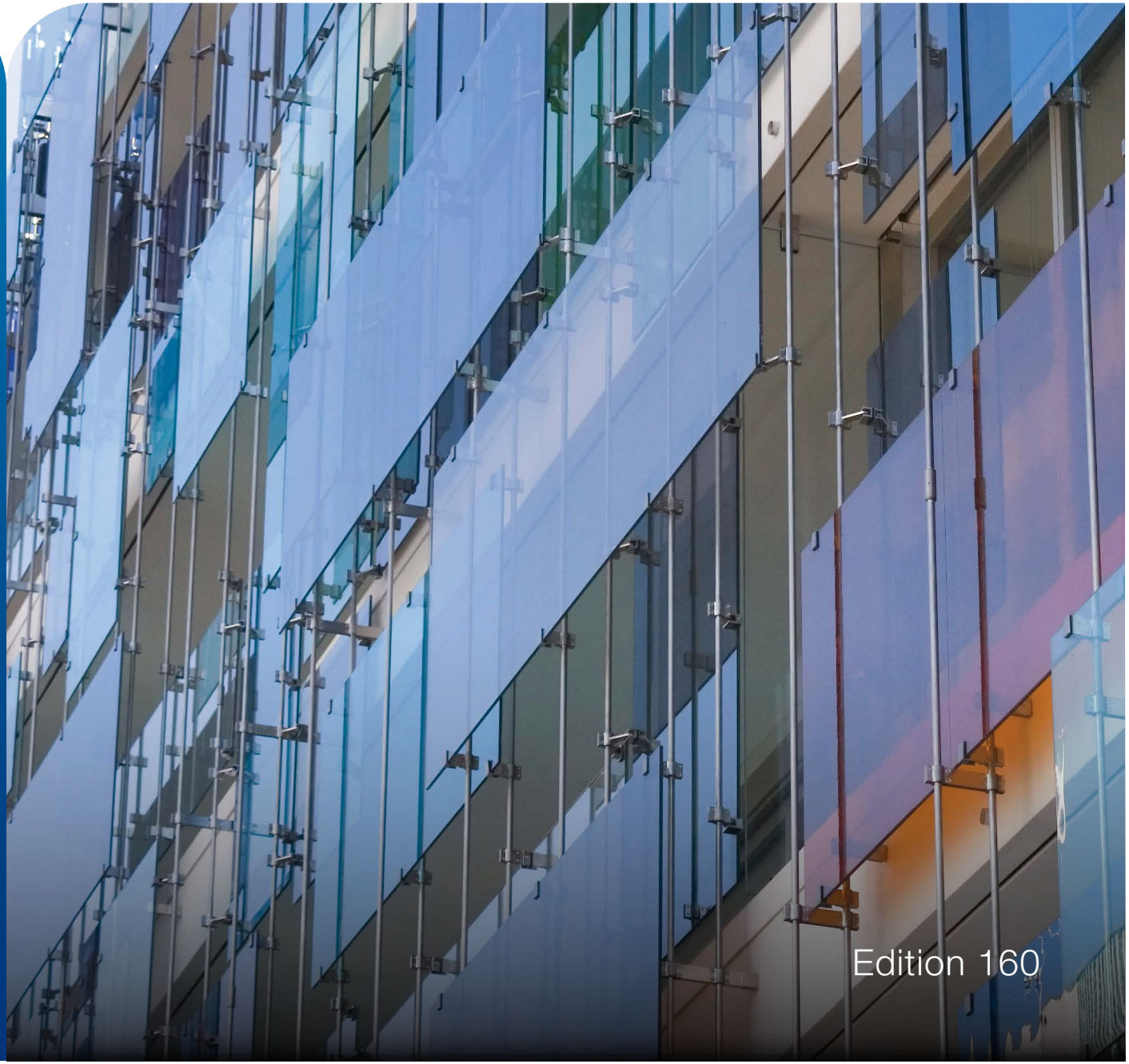

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In this edition

1. Introduction

The Dutch government has taken a range of measures in recent years that intervene in the housing market. These measures focus on tackling slumlords ('*huisjesmelkers*') and protecting tenants. Since 1 January 2021, the rate of transfer tax has been differentiated: since then there has been only one reduced rate (2 per cent) for homes designated for personal occupation as one's principal residence. Acquisition of a home to let is taxed at the regular rate, currently 10.4 per cent. A year later, buy-to-let protection ('*opkoopbescherming*') was included in the Housing Act. This offers municipalities the possibility to encourage cheap and mid-market housing to remain available for the sales market. Currently, a new measure is being debated: further regulation of rents. Where until now only the rents for (relatively) cheap housing were regulated, the recently announced Affordable Rent Act (*Wet betaalbare huur*) will also regulate the prices in the mid-market rental segment. Only homes with a rent above a monthly rental value of more than EUR 1,100 will homes will fall in the 'high segment' meaning that the tenant and landlord are free to determine the rent.

In this *Quoted* we will discuss rent regulation on the one hand, and buy-to-let protection on the other hand. What do these look like and what can we expect of these schemes in the near future?

2. Residential rents

2.1 Current system

Residential tenants have enjoyed rent protection since the First World War. For a long time this protection covered virtually all residential accommodation, but since 1994 there has been the option to agree rents above a rent-control ceiling ('*liberalisatiegrens*'). The reason for this relaxation of the rules was that scarcity in the housing market, and with it the need for rent regulation, had decreased. The main aim of statutory rent protection was to limit the harmful effects of scarcity. Since there was no longer any scarcity, the government no longer felt the necessity to regulate the rents.[1]

Since 1994 there have been two housing segments: one segment in which rents are regulated, and one segment in which the parties are free to agree to the rent between them. Since shortages on the housing market have escalated enormously in recent years, the government now once again believes it to be very important again for tighter regulation of rental market. The current Minister of Housing, Minister De Jonge, announced that a third - regulated - rental segment will be added to the existing two segments: the mid-market rental segment. The bill regulating this was passed by the House of Representatives on 25 April 2024 and will soon be debated in the Senate. In this chapter we will discuss in greater depth the intended regulation in this new mid segment. First we will explain how the rental market currently works (focusing on rents), and then how the intended regulation will work.

2.1.1 Two segments

The Dutch housing rental market today can be divided into two categories: (i) the 'regulated' or 'social' rental sector and the (ii) 'liberalised', 'non-subsidised' or 'private' rental sector.

The answer to the question to which sector a home belongs, is based on the rent agreed upon at the commencement of a lease agreement.[2] If this rent is above the rent-control ceiling, a lease agreement is liberalised. If the rent is below this ceiling, the lease agreement is regulated. The majority of rental homes (approx. 80%) in the Netherlands fall in the

1 Tenancy Law Green Series (*GS Huurrecht*), art. 7:247 DCC, annotation 1.3.

2 And therefore not the question whether it is a 'social' or private landlord.

regulated sector. The difference between the two sectors is that stricter regulations apply to regulated rented housing, including a maximum rent.

2.1.2 WWS points system

As a general rule, freedom of contract applies when entering into a lease agreement. This is no different for leases relating to housing. The difference, however, is that where it regulated housing is concerned, this freedom is limited by a number of statutory provisions of mandatory law.

Since 1 January 2024, the rent-control ceiling is set at EUR 879.66 a month. This means that if the commencement rent of a home for which a lease agreement has been entered into on or after 1 January 2024 is higher than EUR 879.66, this rent is liberalised. If the initial rent in 2024 is lower or equal to EUR 879.66, the rent is regulated; a maximum rent applies to these lease agreements. The purpose of this regulation is to ensure that no excessive rents can be asked for these homes, which generally speaking will be of poorer quality than liberalised homes.

In order to determine the maximum rent for a regulated home, the WWS (*Woningwaarderingsstelsel*, or housing evaluation system) applies. This system is a points system, based on which the quality of a specific home can be valued. Each number of points corresponds to a particular maximum rent. Points are allocated to all kinds of aspects of a home, such as the size of the rooms, the kitchen, the toilet, basin and shower, outside space, the length of the kitchen worktop, energy performance, heating and the WOZ value (*Wet onroerende zaken*, the value of immovable property under the Valuation of Immovable Property Act).

> With regard to the number of points allocated on the basis of the WOZ value, for the last two years there has been a new item to take into account. In May 2022, a new Act entered into force, according to which homes with 142 points or more are subject to a cap on the number of points that can be allocated to a home based on the WOZ value of that home. For these homes, the number of points based on the WOZ value may not exceed 33% of the total number of points attributable to such. This rule was introduced to prevent homes from being liberalised purely on the basis of the WOZ value (whereas this should be a regulated home on the basis of its further qualities).

Where it concerns housing in the regulated segment, the landlord must ask for a rent that corresponds to the number of points the home has been valued at. The tenant of a regulated home has the right to request the Rental committee (*huurcommissie*) to establish how many points apply to its home, and by doing so to check that the landlord is not asking for a rent that is too high. Should the Rental committee value a home at a lower number of points than the number of points to which the initial rent corresponds, the rent must be reduced to the maximum rent that corresponds to the number of points that the home is actually worth. If the tenant of a regulated home does this within six months of the start of the lease agreement, the rent will be reduced with retrospective effect to the commencement date of the lease agreement. The second option is that the tenant submits a request for a rent reduction to the landlord. If the landlord does not agree to such a proposal, the tenant has up to six weeks from the moment that the reduction should have taken effect according to the proposal to ask the Rental committee to deliver an opinion on the reasonableness of the proposal and then to reduce the rent as of the date on which the reduction should have taken effect.

Only during the first six months following the start of a liberalised lease agreement, a tenant paying a liberalised rent may also submit a request to the Rental committee to assess whether a rental home should have been subject to regulation after all. If the tenant does not submit this request on time and the initial rent is above the rent-control ceiling, the home will remain liberalised, regardless of the number of points, and the WWS points system does not and will not apply to it. If the Rental committee decides that the rental home has a number of points that correspond to a regulated lease agreement (with effect from 1 January 2024, this number of points is up to and including 147), it will set the

maximum rent. If it is established that the rental home has 148 points or more, the rent will not change (due to the full freedom of contract that applies to liberalised rental homes).

Both the amounts under the WWS (the maximum rent per number of points) and the rent-control ceiling are indexed annually based on the CPI. The rent-control ceiling is indexed annually on 1 January, while the points system is indexed annually on 1 July. This means that the minimum number of points that a home must have to be liberalised changes twice a year. As already mentioned, with effect from 1 January 2024, the rent-control ceiling is EUR 879.66. This amount lies between 147 (maximum rent of EUR 878.27) and 148 points (maximum rent of EUR 884.54). Therefore, between 1 January 2024 and 1 July 2024 a home must have at least 148 points to be liberalised. Since the amounts in the points table will also be indexed with effect from 1 July, the rent-control ceiling will also be at a lower number of points with effect from that date.

2.2 Indexation

Rents for housing are indexed no more than once a year, usually on 1 July. The indexation of the rents is important for investors to preserve the value of property. A different regime applies for regulated and liberalised lease agreements. We will therefore explain below for each regime how the rent can be indexed. For liberalised housing, freedom of contracts always used to apply, but this freedom has been limited since 2021 (we will discuss this further in this paragraph). Where indexation to preserve the value of rental flows for an investor is an important issue, we see that economic and social developments are resulting in more rules to protect tenants.

2.2.1 Regulated housing

Landlords of rental housing in the regulated segment have a statutory right to index the rent each year. Caps apply: for a sole tenant with an annual income up to EUR 52,753 or a multiple household with a joint annual income of up to EUR 61,046 and if the rent is more than EUR 300, the rent may be indexed annually by a percentage to be fixed by the Minister. For the period from 1 July 2023 to 30 June 2024 a cap of 3.1% applies, and from 1 July 2024 the rent may be increased by up to 5.8%.

If the rent is lower than EUR 300, it may not be raised by more than EUR 25. With higher incomes, a maximum indexation of EUR 50 or EUR 100 a month applies. The aim of this regulation is for tenants with higher incomes to reach a reasonable balance more quickly between the rent amount and the quality of the home.

However, even after the indexation, the rent may never exceed the maximum rent that corresponds to the number of points for applying to the relevant home.

2.2.2 Liberalised housing

For liberalised housing, until 30 April 2021 - in line with the above-mentioned freedom of contract - the parties were free to make their own arrangements in the lease agreement with regard to indexation as well (except that indexation is also only possible once a year for liberalised housing). Unlike lease agreements relating to regulated homes, it is required for this type of lease agreement that the parties have agreed in the lease agreement that the landlord may index the rent, for the landlord to be able to do so.

In general, rents are indexed according to the CPI, possibly increased by a certain maximum percentage.[3] For the period from 1 May 2021 to 30 April 2024, however,

3 Since the spring of 2023, a line in case law has emerged where certain indexation clauses (CPI + maximum …%) have been judged unfair under European law, and should therefore be annulled. For details of this case law we refer to the memorandum we published on the issue (in both Dutch and English) and which can be found using the following link: Residential rental price indexation clauses, analysis of judgements by the Amsterdam District Court | Loyens & Loeff (loyensloeff.com).

temporary rules have applied, following from which the indexation of liberalised housing is also capped. Initially indexation was capped at CPI + 1%, but from 1 January 2023 the cap has been based on the lower of wage index + 1% or CPI + 1%. For the period from 1 January 2024 to 1 May 2024, indexation is capped at 5.5%, which percentage is based on the inflation rate of 4.5%.[4] The cap on rent increases was set to expire on 1 May 2024. However, in April 2024, a bill extending the cap on rent increases for another five years has been passed by the Senate. In first instance, it was proposed to base the cap on the wage index + 1%. However, due to an amendment, the bill has been changed to the current system to remain applicable, being: the lower of CPI + 1% or the wage index + 1%. Therefore, the rents in the liberalised sector remain capped from 1 May 2024 until 1 January 2025 at 5.5%.

2.3 Intended legislative changes

The shortages on the housing market have caused steep rent rises (since 2013, commencement rents for homes in the liberalised sector have risen by around 25%), which means that there is an ever wider gap between rents of housing in the regulated sector and those in the liberalised sector. Since the rent of a liberalised home has continued to rise more, the step for tenants to move from a regulated home to a liberalised one has become a lot more complicated. This is the reason why the government has decided that a form of rent protection has become necessary for the 'lower end' of the liberalised segment: the mid-market rental segment. These are homes with a number of points between the rent-control ceiling and up to 186 points (from 1 January 2024 this corresponds to a rent of EUR 1,123.13).

Regulation of the mid-market rental sector was announced in October 2022.
On 27 February 2023 the Affordable Rent Act was published, containing the intended changes. In November 2023, the Council of State published its recommendations on the Affordable Rent Act and on 6 February 2024 the amended Act was published.

On 25 April 2024, the house of representatives has passed the Affordable Rent Act. If the Senate also passes the Act, it is the intention for the new Act to enter into force on 1 July 2024. If the Act does indeed enter into force, it will be evaluated every five years. Based on the evaluations, the government can decide to what extent the regulation of rents in the mid segment needs to be maintained.

According to the Minister, the regulations described below can lead to lower rents for more than 300,000 homes. It is estimated that rents for these homes will fall by an average of EUR 190 per month. This issue of *Quoted* will set out the intended new regulation of mid-market rental housing.

2.3.1 New mid-market rental segment

The most important thing that will change for the above-mentioned mid-market rented housing is that the rents for these homes will also become regulated. Rents for homes with 187 points or more will remain 'liberalised', while homes with up to and including 186 points will all become regulated. From 1 July 2024 the housing market will be divided into the following three segments:

i. the low segment (the current social segment), applicable to homes up to the 'maximum low-rent threshold'. This threshold will be equal to the rent for which individuals are entitled to a rent allowance (*huurtoeslag*) and as per 1 July 2024 will be at 143 points, if the Affordable Rent Act is passed (which is the number of point that will correspond with EUR 879.66);
ii. the mid-segment (the new, regulated mid-market rental segment), applicable to homes between the maximum low-rent threshold (so 144 points or more) and the new 'maximum mid-rent threshold', which will be at 186 points; and
iii. the high segment (the current liberalised segment) for homes with 187 points or more.

4 If the indexation cap were to be based on the wage index, it would be 5.8% + 1%, therefore 6.8%.

Homes for which a lease agreement commences as from 1 July 2024 with a number of points between the maximum low-rent threshold and the maximum mid-rent threshold will therefore fall under the newly created mid segment. Just as housing in the low segment, the rents for these homes will be regulated as from 1 July 2024.

For housing in the mid segment, the rents will also be capped based on the points system that is currently only enforceable for regulated housing. In addition, indexation of housing in this mid segment will be capped at the wage index + 1% (whereas indexation of homes in the high segment will remain capped at the lower of CPI + 1% or the wage index + 1%).

The maximum low-rent threshold does not correspond to a fixed number of WWS points, but to the rent under which tenants are entitled to a rent allowance. This is the same amount as the amount to which the current rent-control ceiling is linked ('the amount, referred to in Article 13(1)(a) of the Housing Allowance Act (*Wet op de huurtoeslag*))', currently set at EUR 879.66. If the Affordable Rent Act is passed, this amount will correspond with a number of points between 143 and 144 points.

2.3.2 Importance of WWS points system is increasing

The intended regulatory changes will shake up the WWS points system in other areas as well. For example, from 1 July 2024 onwards, the landlord will be required to include in any new lease agreement the number of points for the home concerned, together with the corresponding maximum rent. It is therefore recommended that landlords record the number of points for all their properties in so far as these are not yet known or up to date in their records, and to adjust their letting processes accordingly.

Also important to note is that the WWS points system will become mandatory. Where in the current system the points system is *enforceable* (which means that in principle the landlord can demand a rent that is too high, but the tenant can challenge this), in the new system the WWS points system will become *mandatory* for the regulated segment, i.e. the low and mid segments. This means that it will become prohibited to lease out rental homes with a number of points in the regulated segment at a rent that exceeds the maximum rent. If a landlord demands a higher rent than the maximum rent corresponding to the points for that home, the municipality can enforce this, which may also mean imposing a fine. What will also change is that tenants in the high segment (also if their lease agreement has lasted longer than six months) can apply to the Rental committee if their landlord does not agree to a rent reduction. Should the Rental Committee conclude that the rental home does indeed come within the regulated segment, the rental home will revert to the regulated segment and the rent will become maximized.

In general, the Act will apply to new lease agreements. Existing leases for homes with a number of points in the new mid segment will therefore not be regulated when the Act enters into force. The introduction of the Act, however, does have consequences for existing lease agreements for homes with a number of points in the regulated low segment (as are applicable when the Act enters into force). For all homes with a number of points below the maximum low-rent threshold as applies on 1 July 2024 (therefore below 144 points) the WWS points system will become mandatory instead of enforceable. That means that from that point on, the landlords of these homes can be fined if they demand a rent that is higher than justified by the number of points. Consequently, landlords can be fined under existing lease agreements, if they demand a rent that is too high for: (i) homes that were let before 1 July 2024 with a current rent below the maximum low-rent threshold; and (ii) homes that were let before 1 July 2024 with a current rent above the maximum low-rent threshold, but with a number of points below the maximum low-rent threshold. These landlords can be divided into two categories:

1. landlords who let the home 'lawfully' for a liberalised rent, therefore where the number of points at the start of the lease agreement was above the rent-control ceiling that applied at that time; and
2. landlords who let the home 'unlawfully' for a liberalised rent, therefore where the number of points at the start of the lease agreement was below the rent-control ceiling that applied at that time, but where the tenant had not applied to the Rental Committee within from the commencement date of the lease agreement.

From 1 July 2024, landlords of housing in category (i) (with rents below the maximum low-rent threshold), can be fined if they demand too high rents. Landlords of housing in category (ii) (with a rent above the maximum low-rent threshold but with a number of points below the maximum low-rent threshold), are required to reduce the rent no later than 1 July 2025 to an amount that corresponds to the applicable number of points. It means that a transitional year applies in these cases. Landlords who have not yet reduced the rent after this year are also punishable.

2.3.3 Modernising the WWS points system

Apart from the WWS points system being made mandatory, the system will also be 'modernised' For example, from 1 January 2025, the maximum low-rent threshold will correspond to a fixed number of points. In the current system - in which the rent-control ceiling is indexed on 1 January and the amounts in the WWS points system are indexed on 1 July - this still fluctuates, but in the new system all amounts will be indexed in the same manner on 1 January. As per 1 July, the maximum low rent threshold will correspond with 144 points or more, if the Act is passed.

As indicated above, points will also be attributed to the WOZ value (the higher the WOZ value, the more points allocated). If a rental home has 142 points or more, the share of the WOZ value of the total number of points may not exceed 33%. Under the new regulations for the mid-rent segment, this threshold will rise to 187 points, so homes with a high WOZ value will still fall within the regulated segment. This is in line with the purpose of the cap: to prevent homes falling within the liberalised sector simply due to their high WOZ value. In the amended Act of February 2024, the Minister did include that homes to which the WOZ cap applies and which therefore fall from the high segment into the regulated segment will always fall back to 186 points (instead of to the actual number of points that corresponds to a cap of the WOZ value to 33% of the total WWS points; this is therefore a concession by the Minister to the landlord). It means that the rental home will still remain in the regulated segment, but the landlord can demand the maximum rent that applies to the regulated segment.

In addition, the Minister wishes to introduce two measures to modernise the points system, so that the quality of modern homes can be better valued. Firstly, homes with a high energy label will be valued higher, and homes with a lower energy label (E or lower) will have points deducted. In the worst case, this will mean that a home will have fifteen points deducted (multifamily home with energy label G). Second, more points will be allocated for outside space. Under the current system, outside space is valued at 2 points per 25 m^2. In the new system, homes without outside space will have 5 points deducted. In addition, for private outside space, in any case 2 points will be allocated and thereafter 0.35 points per m^2. For communal outside space, certain minimum dimensions will apply and residents must have access to the space without using rooms, other spaces or circulation spaces that are available only to other tenants or the landlord. For each sq. m. a valuation of 0.75 points will apply, which will be shared between the number of addresses that have access to the outside space. It has also been announced that listed buildings will be valued differently.

Alongside the aforementioned changes to the points system, the Minister has made some further announcements. The most important one is that landlords of new-build homes yet to be delivered (where construction has begun before 1 January 2028 and which will not be taken into occupation until after 1 July 2024) that fall within the mid segment will have the option to increase the maximum rent by 10%. The House of Representatives has passed an amendment, according to which the landlords will only be allowed to increase the rent for a period ending twenty years after the date on which the residence has been taken into occupation. The reason for this option is that new build homes are regarded as essential for increasing the existing stock of rental homes. The fear is that the announced regulation will cause parties to reconsider the plans to build new houses, which would result in a delay in building output. For homes for which building work begins after January 2028, the Minister believes it reasonable that parties will have anticipated the regulation and so no mark-up will apply.

This option is an example of the Minister's efforts to reach a compromise between keeping new housing affordable and accessible, and avoiding the situation where investors in new builds pull out, which would result in rising housing shortages. In an attempt to drive down shortages in the market for owner-occupied housing, the Act to protect homes from being purchased for letting purposes (the Buyout Protection Act, '*Wet opkoopbescherming*') entered into force on 1 January 2022. The following section deals with these rules.

3. Buyout protection two years after its introduction

3.1 Introduction

In 2014, the then Housing Act was reviewed and replaced by the Housing Act 2014 (the **Housing Act**) and since then has been regularly amended. One of the most recent additions to the toolkit under the Housing Act is buyout protection. Below, we will discuss its background and contents and outline what developments have taken place in the first two years since its introduction.

3.2 The nature and purpose of the Housing Act

The idea behind the Housing Act is that the government must be able to intervene in the housing market if certain groups of house hunters (due to their financial position in the housing market) are struggling to find sufficient (affordable and suitable) housing. The legislator assumes that it can best be assessed at local level whether, and if so to what extent, there is a housing problem and what measures are necessary (and proportionate) to deal with this.

As a result of more and more new forms and causes of the housing problem, the set of tools available under the Housing Act has been consistently added to over the years.

Municipal councils are authorized to impose rules on a number of aspects such as (i) allocation of social rented housing, (ii) housing creation and (iii) withdrawal of homes from the housing stock. Among these rules, one should think mainly of the introduction of prohibition and licensing systems on dividing or merging living spaces, room rentals, tourist rentals and short stays, including the corresponding enforcement measures (as well as the possibility of imposing administrative fines). Buyout protection,[5] which will be discussed below, is one of the most recent additions to this legal 'toolkit'.

3.3 Buyout protection

3.3.1 Contents of the buyout protection

With effect from 1 January 2022, municipal councils have had the option of imposing buyout protection on areas within their boundaries. This can be done for two reasons, namely if it is considered necessary and appropriate to (i) tackle the shortage of cheap and mid-priced owner-occupied housing, or (ii) maintain the liveability of the residential environment. In these cases, municipal councils have the ability in their housing regulations to include a ban and a corresponding licensing system, the aim being to prevent *cheap and mid-market owner-occupied homes from being withdrawn from the owner-occupied housing stock*.[6] In doing so, the legislator has intentionally chosen not to define when a home is cheap or mid-priced. Municipalities themselves will therefore have to explain, based on their local situation, up to what WOZ value the owner-occupied homes in their municipality can be considered as falling within the cheap and mid-priced segment.[7] Furthermore, municipal councils themselves must decide in what part of the municipality such rules are necessary and appropriate. In practice, we therefore see considerable differences in the scope of the buy-to-let ban. We will return to this in paragraph 3.4.1.

5 By means of the Dik-Faber amendment to the Housing Act 2014.

6 Article 41 Housing Act.

7 Explanatory note to Dik-Faber amendment, Parliamentary Papers II, 2020–2021, 35 517, no. 53, p. 8.

Besides the fact that the municipal council can declare the buy-to-let ban applicable only to (scarce) cheap and mid-priced housing, and therefore not to 'expensive' houses, the housing accommodation must also meet the following conditions:

1. the accommodation is with vacant possession;
2. the accommodation had been let for a period of less than 6 months, or
3. the accommodation had been let on the basis of a buyout protection licence.

These conditions are checked on the date of registration in the public registers when the deed of title of a home is transferred to the new owner, with the proviso that only homes delivered after the moment when buyout protection is included in the housing regulations can be subject to the buy-to-let ban. With regard to these conditions, it can be noted that the legislator has failed to provide a clear explanation of them. We will discuss the 'demarcation problem' resulting from this in paragraph 3.4.2 below.

3.3.2 Cases In which it is obligatory for a letting licence to be granted

There are three situations in which the Housing Act requires municipalities to grant a licence for letting a home that has been sold, namely if:

1. the home is being given in use to a house hunter who is related to the owner by blood or affinity to the first or second degree;
2. the owner, after the date of registering the deed of transfer of that home to him, has been registered as living at that address for at least 12 months and has occupied that home for the duration of that period (other than for a tourist letting), or
3. the home is an inseparable part of retail, office or business space.

Besides these 'obligatory' exceptional situations, the Housing Act also gives municipality the scope to include specific exceptions in their housing regulations. We will discuss several common examples of this in paragraph 3.4.3.

3.3.3 Sanctioning of violations

If a home is let in violation of a buy-to-let ban, the municipal council of the municipality in which the home is located may in principle impose all customary administrative sanctions against such a violation, such as: an order subject to a penalty (*last onder dwangsom*), an administrative enforcement order (*last onder bestuursdwang*) or an administrative fine.

In view of the character of the buy-to-let ban, it will often be enforce by imposing an administrative fine, On the one hand this is because of the deterrent effect of fines on buyers and owners. On the other hand, the intention of orders subject to a penalty or administrative enforcement orders must be to have the home that is already let vacated, which makes these tools more complex from a practical and legal point of view, and therefore a less attractive option for a municipality. In that case a municipality, or rather the offending party, will be faced with the situation that tenants of residential accommodation enjoy statutory security of tenure. Furthermore, in that case a way must be found around the fundamental right to respect for one's home, which among other things is protected in Article 8 of the European Convention on Human Rights (**ECHR**). This is not an easy thing to do, certainly not if a tenant can rightfully argue that it will be very difficult for him or her to find alternative cheap or mid-priced rented housing.[8] An argument that we feel has or should have a high chance of success precisely in areas where the municipality has declared a buy-to-let ban applicable.

With regard to an order subject to a penalty or an administrative enforcement order, a municipality will always have to assess, based on the available facts and circumstances, whether an administrative sanction (for example, with regard to the amount of a penalty), is in reasonable proportion to the gravity of the interest violated by the offence, as follows amongst other things from Article 5:32b(3) of the General Administrative Law Act (*Algemene wet bestuursrecht*, **Awb**).

8 Supreme Court 12 January 2024, ECLI:NL:HR:2024:25 (*mobile home dweller/Municipality of Haarlem*).

For administrative fines, the maximum amount of these in the Housing Act is linked to the level of the criminal fines of the fourth and fifth category. For a first violation of a buy-to-let ban, a maximum fine of the fourth category (EUR 25,750 as of 1 January 2024) can be imposed. For a repeat offence within four years of the first offence, a fifth-category fine may be imposed (EUR 103,000 as of 1 January 2024). Many municipalities have adhered to these maximum statutory fines in their housing regulations. As we will explain below in paragraph 3.4.4, it is questionable whether this approach is always legally tenable.

3.4 Two years following the introduction: situation and sticking points in practice

3.4.1 Many municipalities have introduced buyout protection, considerable differences in scope

As expected, the situation in practice shows many differences on the scope of the buy-to-yet bans that have been introduced. Regarding the upper limit of the WOZ value used, it can be observed that many municipalities have chosen to link this limit to a WOZ value that corresponds to the maximum price, below which the National Mortgage Guarantee (*Nationale Hypotheek Garantie*, **NHG**) can still be claimed. As of 1 January 2024, the NHG limit is EUR 435,000. At the same time, there are also many municipalities where this limit is considerably lower, or much higher. The Municipality of Eemsdelta, for example, takes a WOZ value of EUR 216,250 as the upper limit, while this limit on Ameland has been set as high as EUR 619,174, and in Amsterdam at EUR 641,000. Especially when using a higher limit, more may be required of the municipal council's justification and reasons for it. At the same time, we are not yet aware of any cases where a price limit has not stood up in court.

There are also clear differences in terms of geographical scope. Some municipalities, such as Amsterdam, have chosen to impose the buy-to-let ban across the entire municipality. In other municipalities, only certain parts have been designated, such as in Rotterdam where only sixteen of a total of ninety-one districts have been designated for such a ban.

Although there is as yet no case law in which the Administrative Jurisdiction Division of the Council of State (the **Division**), as the highest administrative court, has considered the scope of a ban, we expect that it will generally be difficult to successfully challenge the geographical scope of a ban. Indeed, similar disputes have already been settled by the Division in relation to the licensing systems for the merging, withdrawal and/or conversion of homes (under Article 21 of the Housing Act). It follows from that case law that it is considered sufficient if scarcity is carefully and objectively determined and that, for example, it is not obligatory to be able to specify at district level with respect to which types of segments of housing there is scarcity.[9] In the only court decision so far that specifically dealt with a buy-to-let ban, the District Court of Rotterdam followed that approach and ruled that if there is scarcity in the entire municipality, the entire stock of cheap and mid-market housing in that municipality can be brought under buyout protection.[10] We expect other lower courts to follow that line where appropriate, and also see no reason why such an approach would not be approved by the Division. In our view, this makes it difficult to successfully challenge a buy-to-let ban and its scope in court. The latter perhaps with the exception of the fact that explicit attention has not been paid in all municipalities to the question whether other less restrictive measures are possible that would achieve the same objective, while the Housing Act (but also, for example, the European Services Directive) does require such an assessment. It could therefore be potentially possible in the case of a judicial review to successfully contest the scope of a buy-to-let ban after all.

9 See Administrative Jurisdiction Division of the Council of State (ABRvS) 8 February 2023, ECLI:NL:RVS:2023:484.

10 See District Court of Rotterdam 16 February 2024, ECLI:NL:RBROT:2024:1224.

Another interesting aspect of the above-mentioned judgment of the District Court of Rotterdam is that the court ruled that the moment of transfer of title of a home as the time of assessment may conflict with legal certainty if the municipal council does not provide for a transitional period or protective transitional law for purchase agreements that were entered into before a buy-to-let ban came into effect, but for which the transfer of the home in question had not yet taken place.[11]

3.4.2 Demarcation problem: no distinction between owner-occupied and rented housing

Examination of the various buyout protection schemes introduced shows that the majority of municipalities have chosen to base their housing regulations on the model made by the VNG Association of Netherlands Municipalities. The standard definition used by the VNG (incidentally the Housing Act as well) for residential property makes no distinction between owner-occupied and rented housing. As a result, in most municipalities rented housing has also been brought under the scope of buyout protection, while this was not the legislator's intention.

A second 'demarcation problem' we have seen arise in practice stems from the lack of clarity about the criteria of 'with vacant possession' and 'in let condition for a period of less than six months'. The legislator has not provided further clarification of these terms, and it is our experience that the municipal councils have not considered them either when imposing buy-to-let bans. In combination with the generic definition of residential accommodation, this leads to uncertainty, especially in the case of rented housing that is temporarily vacant or has only recently been let, as to whether buyout protection applies to such housing after a sale.

As far as we are concerned, the main point is that the legislator clearly did not intend buyout protection to apply to rented housing as well.[12] In our view, this means that if a sanction is imposed in respect of rented housing for acting in breach of buyout protection, an owner/landlord has good grounds to challenge such a sanction in the administrative courts.

3.4.3 Exemptions, dispensation and licensing options

In paragraph 3.3.2 we outlined the cases in which under the Housing Act licences must be granted for housing that comes under buyout protection. With the exception of the (relatively rare) case where a home is an inseparable part of retail, office or business space, legal entitles cannot by definition claim these exception categories. After all, a legal entity does not have 'relatives by blood or affinity to the second degree', nor is it in a position to live in the property itself for 12 months. When the first buy-to-let bans were introduced, this resulted - particularly in Amsterdam and some larger cities - in arguments about the inclusion of exemptions and dispensation and/or licensing options that businesses could indeed rely on. Following on from this, many municipalities included exceptions to the buy-to-let ban for sales to, or on behalf of, municipalities or housing associations. In Rotterdam, for example, a housing permit is granted if a home is purchased by a market party on behalf of the Municipality of Rotterdam, or is purchased by a care provider and is intended for clients with a care needs assessment (*zorgindicatie*).[13]

Of particular interest to market participants here is the 'complex sale' exception provided in many larger municipalities. Those regulations mean that homes that are part of a cluster of (often) at least 10 properties that are transferred simultaneously by one owner to one successive owner are (or can be) exempted from buyout protection, either by the granting

11 See District Court of Rotterdam 16 February 2024, ECLI:NL:RBROT:2024:1224.

12 See again the explanatory note to the Dik-Faber amendment, Parliamentary Papers II, 2020–2021, 35 517, no. 53, p. 4.

13 See Article 3.6.3 preamble and under e and f of the Verordening toegang woningmarkt en samenstelling woningvoorraad 2021 | Lokale wet- en regelgeving (overheid.nl)

of a licence (as in The Hague[14]) or by a generically applicable exemption (as in Amsterdam). Amsterdam has adopted probably the most detailed regulation with respect to this aspect. This includes, for example, explicit exemptions for homes for which agreements on their use have been made in the ground lease conditions or an anterior agreement.[15] In our opinion, it would pay for many municipalities to critically re-examine their established housing regulations on this point in order to prevent, for example, transactions involving rented housing from being unnecessarily (and even unlawfully) obstructed by established buy-to-let bans.

In so far as a municipality has no, or less detailed, exceptions in its housing regulations, buyout protection will often be impossible to circumvent, for example in the case of a complex sale. Even in these cases, however, practice has shown that, fortunately, municipalities are alert to the demarcation problems outlined in paragraph 3.4.2 and that, by extension, solutions can be sought for cases in which an unintended applicability of the buy-to-let ban leads to problems.

3.4.4 Sanctions

As already noted in paragraph 3.3.3, many municipalities take the maximum statutory fines as 'standard fines'. This seems to us an approach that in many cases is vulnerable, to say the least. As a result of the childcare allowance affair (*toeslagenaffaire*), the Division has in recent years become more alert to the answer to the question whether administrative sanctions that automatically follow from an established policy framework are sufficiently proportionate. Specifically with regard to the Housing Act, it has become apparent that municipalities cannot impose the maximum fine in full for every violation. It has become established case law that the fact that the amount of an administrative fine is set by a statutory provision does not discharge the competent authority from the obligation (under Article 5:46(3) of the General Administrative Law Act) to impose a lower fine if it is plausible that the amount of the fine imposed is too high due to special circumstances.[16] The Division has already ruled that merely the scarce housing stock and the immense pressure on the housing market as such are insufficient circumstances to justify the imposition of the maximum fine amounts. The latter is all the more pertinent if the housing regulations does not, or not sufficiently, differentiate between cases because it does not take account of aspects such as reduced culpability, the severity of the violation and/or the limited financial resources of an offender.[17]

Although the Division has not yet ruled on fines imposed for violations of buy-to-let bans, we see no reason why the case law outlined above should not apply equally to such fines. Moreover, we can still imagine that the 'demarcation issue' outlined in paragraph 3.4.2 is an additional argument for challenging the administrative fine imposed by the municipality, as well as the amount of the fine. We therefore believe that many municipalities would do well to take another critical look at the housing regulations on this point as well. In Amsterdam, the aforementioned case law has since led to fines being adjusted downwards.

4. What now?

Both the Affordable Rent Act and buyout protection assume a five-year evaluation by the government. If the need for or relevance of the measure is then insufficiently proven, the measure will be amended or dropped. The first evaluation of buyout protection is scheduled for 2027. Based on initial experiences, the enthusiasm with which municipalities

14 Beleidsregel ontheffing verbod verhuur opkoopbescherming Den Haag 2022 | Lokale wet- en regelgeving (overheid.nl) in conjunction with. 5:31 Huisvestingsverordening Den Haag 2023.
15 Huisvestingsverordening Amsterdam 2024 | Lokale wet- en regelgeving (overheid.nl)
16 Cf. e.g. ABRvS 18 May 2022, ECLI:NL:RVS:2022:1435.
17 Cf. e.g. ABRvS 10 August 2022, ECLI:NL:RVS:2022:2315, and ABRvS 19 October, ECLI:NL:RVS:2022:3008.

have embraced these powers, and the fact that the situation on the housing market does not appear to be improving in the short term, we do not expect an evaluation of buyout protection to lead to limiting or dropping the possibilities for its introduction.

By far the most likely scenario seems to us to be that buyout protection will become a permanent part of the toolkit available to municipalities to manage the housing market. In view of this, we do not think it would do any harm for municipalities to reconsider carefully the sticking points and concerns we have outlined above, while market parties should not be too quick to accept a municipality's assumptions in any discussion about the applicability of a buy-to-let ban on rented housing.

In our opinion, those evaluations should already draw attention to the question of what is needed to preserve good-quality housing in the mid-market rental segment. One possible effect of buyout protection on the one hand, and regulation of mid-rents on the other hand, is that these homes would be withdrawn from the rental market altogether by selling them to an owner-occupier. Economists are already pointing this out: investors sold a record number of rental homes to individuals in 2023, and they themselves are still buying mainly properties that fall outside buyout protection and may be let at market prices. Those who rely on rented housing in the mid segment are therefore finding it harder to find a home. Also, since 'buyout starters' tend to live in homes with fewer household members than renters, there is a danger that this development could backfire on solving the housing shortage in the Netherlands. The solution cannot wait until the evaluation of the Affordable Rent Act which, if implemented on 1 July 2024, should take place in 2029.



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