LOYENS & LOEFF

REAL ESTATE

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Dear Reader,

We produce a quarterly newsletter to keep you updated on legal developments and important trends in the real estate sector. In this issue, we address the following topics:

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We hope this will be useful to you.

Christophe Laurent and Ariane Brohez

Real Estate Investment and Taxation

Investing in real estate in the Netherlands

Mila Plasmans and Arthur Smeijer

Introduction

The Dutch real estate market is by far the favorite (foreign) investment market for Belgian real estate funds, so was recently published in one of the Dutch real estate journals. The total investments of Belgian funds in the Netherlands amount to approximately EUR 2.8 billion and Belgian investors are active in various asset classes, such as logistics, healthcare assets, student housing, retail and holiday housing. We organised a seminar for Belgian clients in February. In view of the foregoing, in this newsletter we would like to address some of the tax and civil law considerations regarding investing in real estate in the Netherlands, that were also discussed during the seminar.

Tax aspects

Asset deals and share deals

Different than in Belgium, real estate transactions in the Netherlands are often structured as asset deals. The acquisition of a Dutch real estate asset is subject to 6% real estate transfer tax (RETT) (2% for residential real estate). No VAT is due upon acquisition of a real estate asset, unless the parties opt for a transfer with VAT or the property qualifies as "new property" (in which case an exemption of RETT should apply). The (rental) income generated by the entity holding the property is taxed with corporate income tax (CIT) against a rate of 20-25%[1] which can be set off against (interest) expenses and depreciation (to which certain limitations may apply). As from 2019 up to and including 2021, the Dutch CIT rate will in annual steps be lowered from 20%-25% to 16%-21%.

The acquisition of Dutch real estate may also be structured as a share deal. Just as the direct acquisition of a real estate asset, the acquisition of shares in an entity holding largely real estate (and at least 30% Dutch real estate) is subject to 6% RETT (2% for residential real estate), unless less than 1/3 of the shares will be acquired. However, the acquisition of shares in a real estate entity is in principle exempt from RETT if the real estate asset qualifies as "new property" and would have been subject to VAT in case of an asset deal. The acquisition of shares in a real estate entity is not subject to VAT. As in Belgium, upon acquisition of the shares in a company, a potential deferred CIT liability (or deferred CIT asset) might need to be taken into account (reflecting the difference between the value in the commercial accounts and the tax book value). As set out above, the income generated by the Dutch entity is taxed against 20-25% CIT.

Dividend withholding tax

Profit distributions by Dutch entities are in principle subject to 15% Dutch dividend withholding tax (DWT). As from 1 January 2018, an exemption applies for distributions to EU companies and tax treaty resident entities with a shareholding of at least 5%, but the exemption is subject to an anti-abuse rule. The exemption does not apply if the structure is considered to be set up with (one of) the main purpose(s) to avoid DWT (Main Purpose Test) and the structure is considered artificial (Artificiality Test). The main purpose is in principle deemed to be the avoidance of DWT if the DWT position in the actual structure is better than in the situation that the ultimate beneficial owners would have held the interest in the Dutch entity directly. If valid business reasons are reflected in the structure, it cannot be considered artificial. This would for example be the case if the direct or indirect 100% shareholder of the Dutch entity carries on an active business enterprise (e.g. as top holding entity) and an active business enterprise is carried on below in the structure. If the active business above the Dutch entity is carried on by an indirect shareholder in a country with which the Netherlands has not concluded a tax treaty, the direct shareholder of the Dutch entity should meet at least certain substance requirements (including EUR 100,000 salary expenses and having an own office). In the view of the Dutch tax authorities, 'hold and lease' real estate should not be regarded as carrying out an active business, whereas developing real estate generally is considered sufficiently active. Although we believe that there may be good

[1] The first EUR 200,000 is subject to 20% CIT, the exceeding amount is subject to 25% CIT.

arguments to take a different position, hold and lease investments may be subject to discussions with the tax authorities about the DWT exemption. If the conditions for the DWT exemption are met, this exemption should be actively claimed by the distributing entity, i.e. the Dutch entity should explicitly confirm that all conditions for the exemption are met within a month after the profit distribution.

The intention of the Dutch government is to abolish the DWT altogether per 1 January 2020. On the other hand, the Dutch government announced that it wants to introduce a new withholding tax on distributions to low-taxed jurisdictions and in abusive situations. There is no further guidance on this yet.

Multilateral Instrument

The Netherlands signed up for the multilateral instrument (MLI). As a result of the MLI, various amendments will be included in existing bilateral tax treaties automatically if the other relevant country signed up for the same amendments. Note however that, as far as it concerns Belgian investors, the Belgium-Netherlands tax treaty is not targeted by the MLI, since neither States wish this treaty being covered by the MLI. One of the measures adopted by the Netherlands is the implementation of a principal purpose test (PPT) in treaties. As a result, treaty benefits, such as a decrease of the DWT rate, will not be granted if the principal purpose of an arrangement is obtaining a treaty benefit. The Netherlands may explain the PPT in tax treaties along the lines of the Main Purpose Test in domestic tax legislation (see above). When the MLI becomes effective depends on the ratification process in the Netherlands and the other country involved (entry into force per 2019 at the earliest).

General interest deduction limitation rule (EBITDA rule)

Further to an EU initiative, a general interest deduction limitation rule will be implemented as per 1 January 2019. As a result of this, deduction of 'exceeding interest' (i.e. interest expenses minus interest income) will be limited to the highest of (i) 30% of the EBITD (earnings before interest taxation and depreciation) or (ii) EUR 1 million. The final legislative proposal is expected to be released within the next few months.

Dutch REIT regime

A Dutch REIT (*fiscale beleggingsinstelling*) is subject to CIT at a rate of 0%. A Dutch REIT is obliged to annually make profit distributions. These profit distributions are in principle subject to 15% DWT[2]. A REIT is subject to certain requirements, such as debt levels, governance requirements and shareholder requirements.

In October 2017, the Dutch government announced that it intends to abolish the Dutch REIT regime per 2020 for direct investments in Dutch real estate. Reason for this is that, with the intended abolishment of the DWT, Dutch REITs would not be subject to Dutch CIT or DWT at all. Various interested parties are currently raising objections against the announcement to abolish the REIT regime and propose alternative regimes.

Future real estate structures

As a result of the changes in Dutch tax law, especially the introduction of an anti-abuse rule in the DWT act, certain adjustments may need to be made to the typical Dutch real estate investment structures. For example, the following options could be considered:

a) Increase the substance in the entity that holds the shares in the Dutch entity;
b) Invest directly in Dutch real estate through a non-Dutch entity;
c) Hold the Dutch real estate in a Dutch cooperative.

General civil law aspects

Belgian civil law and Dutch civil law with respect to real estate are similar on certain subjects but there are also differences between the two systems. In this newsletter we would like to highlight some specifics of the Dutch right of leasehold, which differs from the Belgian right of leasehold, and to address the various types of Dutch leases and the standard model for contractual leases that is frequently used in the Netherlands.

Right of leasehold

Under Dutch law, a right of leasehold is the right to hold and (exclusively) use the real estate owned by another party. The leaseholder does not legally

[2] The DWT rate may be reduced under prevailing tax treaties.

own the buildings and works it constructs in or on the land. The owner of the land is the legal owner of any such building as a result of the Dutch legal principle of vertical accession (*verticale natrekking*). The bare owner in the Netherlands is usually a local government authority. Such authority retains ownership of the property so that it can control the purposes for which the property is used by imposing certain standard leasehold conditions on the leaseholder. Such leasehold conditions are included in the deed of issuance of leasehold and certain rules are included in the Dutch Civil Code and can for example state quite specifically which kind of use of the land is allowed. As another matter of control, the leasehold conditions can also stipulate that consent of the bare owner is required in case of transfer or encumbrance. A leaseholder is usually required to pay a periodic remuneration called the ground rent (*erfpachtcanon*), which may also be paid in advance for a specific period or in perpetuity. Finally, the tax treatment of the transfer of a leasehold right is the same as for transfer of a freehold assed, RETT upon transfer is calculated as 6% over the value of the property as if it is held in freehold. The fact that a right of leasehold in Belgium and the Netherlands is so different is interesting given that various other rights in rem under Belgian and Dutch law are structured similarly.

Dutch types of contractual leases and ROZ model

As in Belgium, Dutch law knows three different types of contractual leases, being office leases, retail leases and residential leases. The office lease regime is the most flexible regime with only very few statutory provisions that apply. The retail leases are less flexible than office and know semi-mandatory statutory provisions on specific subjects that do not allow deviations detrimental to the tenant. Finally, the residential leases are least flexible with mandatory or semi-mandatory statutory provisions on a lot of subjects, residential tenants being very well protected under Dutch law. Many Dutch leases (office, retail and residential) are based on a standard model of the Dutch Council for Real Estate (*Raad voor Onroerende Zaken or ROZ*), which consists of a standard form of contract with a set of standard conditions. Different models exist for office, retail and residential leases and for each lease type the model is updated every few years.

The ROZ model addresses the main rights and obligations of both the landlord and the tenant, although the standard conditions do tend to favor the landlord. The ROZ standard conditions deviate from (non-mandatory) statutory provisions for the benefit of the landlord on several points. The ROZ model is a practical tool since all parties involved in real estate in the Netherlands are familiar with this model and it has been accepted as market standard, it can therefore also ease negotiations on certain topics. Nonetheless, it is not uncommon to agree on tailor made amendments from the ROZ standard conditions or to enter into tailor made agreements which are not based on the ROZ model.

Should you be interested in further information regarding investing in real estate in the Netherlands, we would be happy to provide you with a copy of our book *Investing in real estate in the Netherlands, edition 2016 – Some civil law, public law and tax aspects of investing in real estate in the Netherlands.* If you wish to receive a PDF or ePub, please send an email to communication@loyensloeff.com.

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Real estate transfer taxes reform in Flanders

Nikolaas Backaert and Antoine Béchaimont

The rules regarding transfer taxes on the sale/purchase of immovable property located in Flanders have been reformed significantly, with entry into force as from 1 June 2018. In a nutshell, the standard rate of 10% remains applicable, but a reduced rate of 7% applies in the case of an individual purchasing a sole dwelling dedicated to his own domicile. Below an overview of the most relevant aspects of the reform.

7% real estate transfer taxes in the case of a purchase of a sole dwelling

The purchase of a dwelling by an individual who does not yet own a dwelling or building land shall be subject to real estate transfer taxes of 7% (as opposed to 10% before 1 June 2018) should this individual register such dwelling as his domicile in the population registry within two years.

In order to benefit from the exemption, the following conditions have to be fulfilled:

- the immovable property is located in the Flemish Region;
- the purchaser is an individual / natural person;
- the immovable property is or will be mainly dedicated to housing (to the exclusion of building lands);
- the transaction has to be a purchase in the strict sense (to the exclusion of transfers which do not strictly constitute a sale, but are considered as such for the application of real estate transfer taxes, e.g. an exchange);
- the purchaser acquires 100% of the full ownership of the immovable property;
- the purchaser registers the dwelling as his domicile in the population register within two years;
- the purchaser does not yet own a dwelling or building land, unless that dwelling or building land is sold within one year; and
- the purchaser has to include the required "pro fisco" declarations in the notarial deed of purchase.

If there are multiple purchasers, these conditions are to be assessed at the level of each purchaser, it being understood that a purchaser can pro parte benefit from the real estate transfer tax of 7% even if his co-purchasers do not meet the above conditions.

Moreover, the rate of 7% is reduced to:

- 6% in case the purchaser commits to perform substantial energetic renovations; or
- 1% in case the dwelling is considered as a protected monument and the purchaser commits to reinvest the resulting advantage (6% of the purchase price) in the conservation of this monument.

In case the value of the dwelling being transferred with application of the real estate transfer taxes of 7% or 6% is not higher than 200,000 EUR (or 220,000 EUR if the immovable property is located in specific areas with high-density housing), the individual can benefit from an additional tax allowance of 5,600 EUR (7%) or 4,800 EUR (6%).

10 % real estate transfer taxes in all other cases

In principle, all purchases of immovable property which do not qualify for the reduced rate, remain subject to the rate of 10%. This is amongst others the case for purchases:

- by legal entities such as companies or associations (unless they benefit from the rate 4% due to qualifying as a "professional purchaser");
- by individuals, if it concerns the purchase of (building) land, a forest, a garage, a property destined for professional use, an investment property, a second residence, etc.

Reduced rate for "modest" habitations and tax allowance ("abattement") abolished

Note that pursuant to this reform, the previously applicable reduced rate of 5% (as opposed to 10%) when purchasing a "modest" house (i.e. a house with a cadastral value below 745 EUR) has been abolished. This is also the case for the tax allowance ("abattement"), which provided for a reduction of the taxable base of the real estate transfer tax in an amount of 15,000 EUR or 25,000 EUR.

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Belgian UBO register effective soon

Barbara Albrecht and Nicolas Bertrand

All companies and other legal entities incorporated in Belgium have already the obligation to collect and hold information on their Ultimate Beneficial Owners (UBOs). It is expected that the Belgian UBO register will be effective in the course of the third quarter of 2018 and that the UBO information will have to be reported before the end of 2018. Directors will be responsible for submitting this information to the Belgian UBO register in a timely manner, and may be sanctioned if they fail to comply with this obligation.

Recent legislative developments

On 20 May 2015, the Fourth Anti-Money Laundering Directive was adopted by the European Parliament and Council (hereafter 4th AMLD). Among the provisions in the 4th AMLD is the requirement for EU Member States to set up a UBO register that lists the UBOs of companies and other legal entities. The 4th AMLD lays down minimum requirements, Member States can impose more stringent requirements.

The Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the limitation of cash payments (hereafter AML law) implements the 4th AMLD in Belgium and introduces the Belgian UBO register.

The AML law includes the framework for the Belgian UBO register. The incorporation of the UBO register itself will be laid down in a Royal Decree. This Royal Decree will include the modalities of the UBO register, such as the way information needs to be reported to the UBO register, the exact content of this information, the access and use of the UBO register, etc. The Royal Decree will be published in the course of the third quarter of 2018.

In the meantime, on 30 May 2018, the Fifth Anti-Money Laundering Directive (hereafter 5th AMLD) has been adopted. The 5th AMLD amends the 4th AMLD with respect to the UBO register on certain aspects, such as the obligation for the Member States to grant public access to essential information on UBOs.

For the moment, it is not clear yet whether the expected Royal Decree will already take into account the amendments laid down in the 5th AMLD or not.

Who are UBOs?

As a rule, UBOs who must be reported in the Belgium UBO register are the natural persons who ultimately own or control the legal entity in question, and/or on whose behalf a transaction is executed or a business relationship is entered into.

Natural persons who hide behind intermediaries also count as UBOs. They are broadly defined as natural persons who benefit, or will benefit, from a transaction or business relationship and who, *de iure or de facto*, directly or indirectly, have the power to decide on the execution of the transaction or the business relationship and/or to determine or agree to the modalities involved.

The AML law contains four definitions of UBOs, each of which refers to one of the four categories of legal entity identified by the legislator:

1. UBOs of companies

The natural persons who directly or indirectly own a sufficient percentage of voting rights of or a sufficient ownership interest in a company, being:

- The natural persons who directly hold more than 25% of the voting rights, the shares or the share capital of a Belgian company. Belgium aligns with the threshold of the 4th AMLD, but extends its scope to voting rights (the 4th AMLD does not foresee a threshold for voting rights);
- The natural persons who control the holding company or companies, in cases where the Belgian company is indirectly held through one or more holding companies that hold more than 25% of the shares or the share capital of the Belgian company. Therefore, in the case of multi-layer structures, control over the ultimate holding company appears to be the decisive factor in determining who is a UBO;
- The natural persons who control the company by other means. Control by other means may be assessed on the basis of the notion of “control” specified in Article 5 of the Belgian Companies Code, such as the right to appoint the majority of the directors of the company, and joint control;
- The natural persons who hold the position of senior managing official in cases where no natural persons can be identified on the basis of the guidelines above, or if there is any doubt that the identified persons are the ultimate

beneficiaries. According to the explanatory memorandum, in most cases the person who holds the position of senior managing official will be the CEO or the chair of the executive committee.

2. UBOs of foundations and (international) non-profit organizations ((I)NPOs)

The following natural persons are considered as the UBO's of foundations and (I)NPOs:

- The directors;
- Natural persons who are entitled to represent the NPO;
- Natural persons in charge of the daily management of the foundation or the (I)NPO's;
- Founders of the foundation;
- Either the natural persons, or the category of natural persons when these have not yet been appointed, in whose interest the foundation or the (I)NPO has been established;
- Any other natural person who controls the foundation or the (I)NPO through other means.

3. UBOs of trusts and fiduciaries

Settlors/founders, trustees, protectors (if any), beneficiaries and any other natural persons who ultimately control a trust or fiduciary through direct or indirect ownership or other means are considered UBOs of trusts or fiduciaries. If the beneficiaries have not yet been appointed, the category of persons in whose interest the trust or fiduciary has been set up or operates must be reported. According to the explanatory memorandum, only express trusts are targeted for now.

This will remain without consequence for the time being, as trusts and fiduciaries do not exist under Belgian law, but this should change with the announced modification of the Civil Code.

The 5th AMLD specifies however that UBOs of trusts and fiduciaries will need to be reported in the Member State where the trusts or fiduciary is effectively managed.

4. UBOs of legal entities similar to trusts and fiduciaries

Natural persons with functions equivalent to those of UBOs of trusts and fiduciaries will be considered UBOs of entities that are similar to trusts and fiduciaries. It is expected that the Royal Decree will include a list of legal entities similar to trusts.

What type of information should be reported in the UBO register?

Adequate, accurate and current information on the UBO needs to be reported.

The Belgian UBO register will list at least the name, date of birth, nationality and address of each UBO. This is more than the minimum information required under the 4th AMLD (name, month and year of birth, nationality and country of residence).

For UBOs of companies, detailed information on the nature and extent of the beneficial interest they hold should also be included in the UBO register.

Regarding foundations and (I)NPOs, only information relating to the UBOs in whose interest the entity has been set up and the UBOs who control the entity through other means should be included in the UBO register, as the information of the other UBO's is already publicly available in the Crossroads Bank for Enterprises (KBO/BCE).

The Royal Decree will lay down further specifications on the information that needs to be disclosed.

Directors are personally liable for reporting UBO information

All Belgian legal entities (companies, foundations and (I)NPOs) are required to collect and hold information on their UBOs. The 4th AMLD requires that the information is adequate, accurate and current.

Directors of companies, foundations and (I)NPOs must report the UBO information required within one month after it becomes known or is changed. The information must be reported electronically. The Royal Decree will include the modalities involved.

Apart from the sanctions that already exist for infringing the Belgian Companies Code, administrative fines of between 50 EUR and 5,000 EUR may apply to directors who do not comply with these obligations.

Will the UBO register be publicly accessible?

The Belgian UBO register will be established within the Ministry of Finance. The service responsible within the Ministry will be in charge of collecting, managing and controlling the quality of the information reported. The conditions regarding access to the UBO register will be laid down in the Royal Decree.

The explanatory memorandum of the AML law indicates that access to the Belgian UBO register will be granted only for anti-money-laundering and anti-terrorist-financing purposes.

The 5th AMLD, however, requires the Member States to grant public access to essential information on UBOs, including at least the name, month and year of birth, country or residence, nationality and the nature and the extent of the beneficial interest held. Member States can make the access subject to prior registration and/or the payment of a fee. Access to the information on UBOs of and fiduciaries requires for the applicant to demonstrate a legitimate interest.

It is not clear whether the Royal Decree will immediately grant public access to the Belgian UBO register or not.

Entry into force

On the basis of the AML law, entities already have the obligation to gather and keep adequate, accurate and current information on their UBOs.

The reporting of the information to the Belgian UBO register by the directors will only be possible until after the publication of the Royal Decree (expected in the course of the third quarter of 2018).

By 10 March 2021, the registers of the different Member States should be interconnected.

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Real Estate Management

Biddit.be – A new transparent and safe online platform for public auction

Olivia Oosterlynck

On 8 May 2018, Biddit.be was launched by the Federation of Belgian Notaries (Federatie van Belgische Notarissen - Fednot), an online platform for public auction of real estate.

Since many years, public auctions of real estate assets are executed by notaries and are organised in the public auction sales hall or sometimes in the local café (well yes, welcome to Belgium).

In a judgment dated 9 June 2016, the Belgian Supreme Court confirmed the legal monopoly of a notary public to organise and sell real estate assets through a public sale. If the asset was sold through a public auction website, such sale was not considered valid and could even be annulled. In response to this case law, the legislator has created a legal basis to organise and sell real estate assets through a public auction website in the new Insolvency Law of 11 August 2017.

Since 8 May 2018, making a binding offer can be simply done from your computer at home (with use of an e-ID reader) or even from your mobile phone (with use of the app Itsme). You can make an offer manually or automatically by pre-setting a maximum amount for your bid. From the perspective of the seller, the major advantage of such online auction is that you reach more people, which means more bidders.

Moreover, each offer you make on the online platform is visible for every visitor on Biddit.be, which makes the use very transparent. The identity of the bidder is however not disclosed. The periods to make an offer consist of 8 to 10 days. Once the bidding period is terminated, you immediately receive a notification. In case you are the highest bidder, the notary in charge will contact you to finalise the acquisition.

And above all, the sale will be completed much quicker via Biddit.be compared to a classic sale, where it takes approximately between 3 to 4 months to finalise the notarial deed. With an online sale at Biddit.be, the notary performs all real estate searches in advance, limiting the timing and process of finalising the notarial deed up to 2 or 3 weeks.

After a whole series of IT projects and collaborations with the government, Biddit.be is a new step in the digitalisation of the notary sector.

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Flemish Decree on housing leases

Lien Bellinck

Introduction

Until 1 July 2014, tenancy law was a federal competence meaning that all lease regimes were governed by federal Law.

The Special Law of 6 January 2014 concerning the 6th State Reform, which entered into force on 1 July 2014, transferred the legislative competences regarding retail lease, housing lease (which includes but is not limited to residential lease) and agricultural lease from the Belgian federal level to the regional level.

- Brussels: On 27 July 2017, the Brussels-Capital Region made use of these new competences by adopting an Ordinance on housing leases which entered into force on 1 January 2018.
- Wallonia: A few months later, the Walloon Region also adopted a Decree on housing leases which shall enter into force on 1 September 2018.

On 18 May 2018, the Flemish government also adopted a project Decree on housing leases.

The present contribution aims to provide an overview of the most important changes and innovations brought by the Flemish Decree on housing leases.

Structure

The Flemish Decree on housing leases includes, on the one hand, general provisions applicable to all housing leases and, on the other hand, provisions specific to two types of housing leases which were previously governed by the general principles of common lease law, i.e. student housing and co-lease ("*medehuur*").

The general provisions applicable to all housing leases is clearly divided into the following categories:

i) General provisions
ii) Provisions related to the start of the lease
iii) Provisions applicable during the term of the lease (e.g. provisions related to the term of the lease, sublease, transfer of lease right, rent, costs and charges, indexation, rent deposit, transfer of the leased premises)
iv) Provisions related to the end of the lease
v) Provisions applicable in case of disputes

General provisions

The most important changes can be summarised as follows:

a) The Decree provides that the landlord can only require "information that is necessary to verify whether the candidate-tenant can comply with its tenant obligations" from a selected candidate tenant;
b) The Decree sums up the information that should be included in a residential lease agreement (e.g. identity of the parties, start date, duration of the lease, description of the leased premises, rent, charges and costs);
c) The Decree provides that the Flemish Government shall adopt an "explanatory note" ("*vulgariserende toelichting*") to which all residential lease agreements must refer. This "explanatory note" ("*vulgariserende toelichting*") shall contain information on a number of regulatory topics, such as information on the safety, health and habitability requirements leased premises are required to meet; the importance to draw up a survey report of the premises at the beginning of the lease; the obligation to have a fire insurance; etc.
d) The landlord is obliged to maintain the leased premises in such a way that the leased premises can be used by the tenant for its designated use;
e) The tenant is responsible for all minor repairs. The Decree provides that the Flemish Government shall make a list of repairs which shall always be considered as minor;
f) The tenant is obliged to take out an insurance which covers its liability for fire and water damage. The tenant can either take out his own insurances or, in case the landlord takes out such insurances, pay an indemnity to the landlord. The amount of this indemnity is capped;
g) The Decree clearly provides that the tenant is liable vis-à-vis the landlord for damages and losses caused by its housemates or sub-lessees;
h) The rent deposit cannot be higher than three months of rent.

Student housing

As mentioned above, the Decree creates a new mandatory legal framework for student housing.

The most important provisions of this new regime are:

a) Student housing lease agreements must be concluded in writing;
b) Sublease and transfer of lease is prohibited, unless a prior written consent from the landlord is obtained. An exception is made for sublease or transfer of lease to a student who participates in an exchange program or is doing an internship. In such cases, the landlord can only refuse to give his approval on the basis of valid grounds. The Decree provides that the tenant remains liable vis-à-vis the landlord in case of sublease;
c) The Decree provides that the rent will include all costs and charges, safe for the costs and charges related to the use of energy, water and telecommunication;
d) The rent deposit may not be higher than two months of rent.

Co-housing

The Decree also contains specific provisions for co-housing in order to ensure legal security for both the occupants of the premises and the landlord.

The Decree provides that the tenant's spouse or the person with whom he entered into a legal cohabitation ("*wettelijke samenwoning*") is considered as a tenant, even if the lease agreement has been concluded prior to the marriage or the start of the legal cohabitation. The tenant has the obligation to provide the landlord with the name of his spouse / the person with whom he entered into a legal cohabitation.

The Decree provides that all co-tenants are jointly and severally liable towards the landlord for the obligations resulting from the lease.

In case the marriage or legal cohabitation comes to an end, the co-tenants must agree on who will continue the lease and provide the landlord with the name of that person. In case of disagreement between the co-tenants, the judge shall determine who will continue the lease and the date on which the other tenant is no longer considered as co-tenant.

In case of factual cohabitation ("*feitelijke samenwoning*"), the tenant and the other person who has his main residence in the lease premises can request the landlord to consider the other person as a co-tenant. If the landlord does not reply on this request within three months, the tenant and the other person who has his main residence in the leased premises can request the judge to recognize the other person as a co-tenant. The judge can only recognize that other person as a co-tenant in certain circumstances set out in the Decree.

Entry into force

The entry into force of the Flemish Decree on housing leases is expected on 1 January 2019.

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Real Estate Development

New Ordinance on construction sites in Brussels

Julie De Meester and Sophie Van Berkel

The new Ordinance on construction sites on public roadway ("*Ordonnance relative aux chantiers en voirie publique*" / "*Ordonnantie betreffende de bouwplaatsen op de openbare weg*") dated 3 May 2018 has been published in the Belgian Official Gazette on 18 May 2018. Its entry into force is yet to be determined by the Brussels Government. Transitional rules will apply to pending files.

The objective of the new Ordinance is to reduce the inconveniences due to construction sites on public roadway, to provide for a proper framework and control of the construction sites, to anticipate and coordinate multiple interventions and to better take the safety of the users and the accessibility of the affected areas into account.

To achieve these objectives, the Ordinance introduces following mechanisms:

- **Hyper-coordination** – In order to ensure a better coordination between all parties involved, institutional applicants (i.e. all applicants depending on a federal, regional provincial or municipal administration and other major actors such as Vivaqua, STIB/MIVB, Bruxelles Environnement / Leefmilieu Brussel, Beliris, Infrabel) shall insert their construction projects in *Osiris*, the online platform for notifications, 5 years in advance. This planning has to be updated each year. When planning information indicates that a project or a significant concentration of construction sites is likely to cause major disturbances, an "hyper-coordination zone" can be defined where special rules will be applicable in order to mitigate the inconveniences.
- **Commission for construction sites coordination** –The Commission for construction sites coordination is given a more extended role. Next to its coordination function, the Commission can advise i.e. with regard to execution permits for municipal roads with important bus or tramlines or propose and supervise hyper-coordination zones.
- **Information** – The applicants shall inform the neighbours and merchants i.e. about the characteristics of construction site (e.g. commencement of the works, possible delays), relevant contact details and the modalities to file a complaint, suggestion or remark. The authorities need to be notified about the commencement date or the cancellation of the works, as the case may be.
- **Compensation for merchants / Extension of working hours** – A more advantageous compensation will be granted to merchants and the authorised working hours will be extended. Both items will be further developed in the execution decree. We will certainly keep you informed.

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New Soil Decree in Wallonia – First analysis

Julie De Meester and Sophie Van Berkel

On 1 March 2018, the Walloon Region has adopted a new soil decree ("*Décret relatif à la gestion et à l'assainissement des sols", the "new Soil Decree*"), published in the Belgian State Gazette on 22 March 2018. Most of the provisions of the new Soil Decree shall enter into force on 1 January 2019 and will repeal and replace the previous soil decree dated 5 December 2008 which never fully entered into force. The provisions related to new soil remediation thresholds for new contamination, which are more flexible, can however already be taken into account since 1 April 2018, and as already mentioned in our previous Quarterly, the data already contained in the soil data bank are available to all for information purposes since 9 April 2018.

The text of the new Soil Decree is long and quite technical but it addresses the shortcomings of the 2008 soil decree by allowing a more complete implementation of its principles. In this way, the new Soil Decree introduces a series of changes focused on eight main axes.

First axe: better articulation between the obligations, the person responsible therefor and the derogations

The system currently applicable has been reviewed and harmonised to provide clear provisions with regard to operative events. Four situations are considered as operative events which lead to the performance of a mandatory orientation soil survey:

- applications for a building permit, a single permit or an integrated permit with regard to a plot of land which is indicated as polluted or potentially polluted in the soil data base;
- permits applications for installations or activities which present a risk for the soil;
- an environmental damage; and
- the administration can impose an orientation soil survey in case of serious contamniation indications, as it is already the case.

But the most important modification, but also difference with Brussels and Flanders, is that the *transfer of land*, no matter whether risk activities took place on that land does, as such, **no longer trigger the performance of an orientation soil survey**. This modification is to be approved as this burdensome formality often slowed down or even blocked the transaction process. Note that the provision of the 2008 soil decree containing this obligation never entered into force.

Next to the mandatory orientation soil survey, an orientation soil survey can also be performed on a voluntary basis. The new Soil Decree expressly provides that the person voluntary performing the survey may at any time request from the administration to be given discharge.

Second axe: revision of the sanitation objectives in order to control costs and ensure proportionality

Currently, in case of new contamination exceeding a certain **threshold value**, a soil remediation has to be performed in order to restore the soil at the level of applicable **reference values** (weighted by the concentrations or, failing that, as close as possible of the level of these values that the best techniques available allow to reach).

The new Soil Decree sets the sanitation objectives at 80% of the threshold value and no longer refers to reference values. Threshold values depends on risk levels for which it is recommended to investigate the contamination of the plot of land in more detail. These redefined sanitation objectives still allow a safety margin equal to 20%, in order to ensure enough protection to human health, ecosystems and groundwater.

In line with the above, with regard to historical contamination, when there is a need to implement remediation works, the works shall restore the soil at the level determined by the administration on proposal of the expert, which now solely aims to remove the serious threat to human health, ecosystems and groundwater and no longer require to reach certain reference values.

Third axe: revision of the standards

A revision of certain standards (as provided in Annex I of the new Soil Decree) has been implemented in order to allow a better management of the files. Ilt establishes a proportionate approach based on a more limited number of obligations triggers.

Fourth axe: securing the demarcation between waste and soil legislations

The purpose of the new Soil Decree is to ensure better coordination of the administrative policies of the soil legislation, on the one hand, and waste legislation, on the other hand, by providing a clearer definition of their scope of application.

Fifth axe: the basics of differentiated land management

Land management is since more than 15 years subject to waste legislation. As soil and waste legislations contain different standards i.e. with regards to land valuation, it leads to major environmental and administrative inconsistencies and to legal uncertainty.

In order to address this problem, a provision related to (differentiated) land management has been added in the new Soil Decree.

Sixth axe: major simplification of the procedures

In addition to some simplifications made within existing procedures, several mechanisms have been inserted to ensure an operational character of the new Soil Decree.

First of all, it is now possible to conclude with the administration, on a voluntary basis, a soil management convention in certain circumstances, aiming to better regulate works planning and to better organise the management of polluted soils in function of the urgency of the intervention and the availability of financial means.

Next to that, the person responsible for the performance of the obligations under the new Soil Decree can, in certain circumstances, opt for an accelerated procedure for soil remediation. As a result, delays in obtaining administrative authorisations can be considerably reduced.

Finally, a new procedure for emergency situations has been inserted, i.e. immediate management measures.

Seventh axe: simplified implementation of the soil data bank

As already mentioned in our former Quarterly, the new Soil Decree implements the soil data base, which is accessible to all since 9 April 2018 and contains for each cadastral parcel the available data related to a potential soil contamination. Although already foreseen in the 2008 soil decree, its implementation has been blocked by a long and burdensome data validation process.

Eighth axe: the confirmation of the mission of public interest carried out by SPAQuE in soil management

The new Soil Decree provides for a specific status and missions for SPAQuE with a view to giving it a particular legal existence apart from waste legislation. In this respect, SPAQuE can be charged by the Government of investigation, remediation, monitoring or management missions of public interest.

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