LOYENS & LOEFF

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Real Estate Update

In this edition

LOYENS & LOEFF

Reform of property law

Introduction

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

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

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

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

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

Ariane Brohez
Lien Bellinck

Building rights in real estate developments

The new book 3 contains important changes about the right to build (opstalrecht / droit de superficie). As building rights are frequently used in the context of real estate development, we analyse their impact below. In addition, we discuss two case studies on the use of building rights in real estate development projects.

The right to build under the new Book 3

1. Concept

The new Book 3 defines the right to build as a right of use giving **a temporary right of ownership on the volumes**, whether built or not, located on, above or under another person's land, with a view to have or build constructions within that volume. During the term of its right, the holder of the right to build is the owner of these constructions.

Consequently, building rights are henceforth expressed in terms of "right of ownership of volumes". By doing so, the legislator emphasizes that building rights are rights in rem allowing horizontal property divisions. Contrary to long-term lease rights and usufruct rights, building rights are not primarily intended to grant a right of use and enjoyment, but aim to separate the ownership of the land from the ownership of the volumes located on, above or under the land. It is therefore a splitting of ownership.

Building rights can be established on both unbuilt and built-up volumes. But what is the applicable property law regime in case a building right is established on a built-up volume? The new Book 3 answers this question by stating that the holder of the building right on a built-up volume must be considered as the temporary owner of the constructions located within that volume, which assumes a transfer of ownership of these constructions.

2. Maximum duration

Just as it is today, the split ownership resulting from the establishment of a building right is temporary. Its maximum duration is however increased from 50 to 99 years. This maximum duration of 99 years is mandatory. There are however two exceptions. A perpetual building right is possible:

- if it is established by the land owner for public domain purposes; and
- when it concerns (i) a complex and heterogeneous immovable unity, (ii) consisting at least of two volumes, (iii) without shared common parts and (iv) where each volume is autonomous and used independently for a different purpose.

3. Rights and obligations of the parties

The holder of a building right can transfer or mortgage his building right. He can also transfer or mortgage the constructions temporarily owned by him together with his building right.

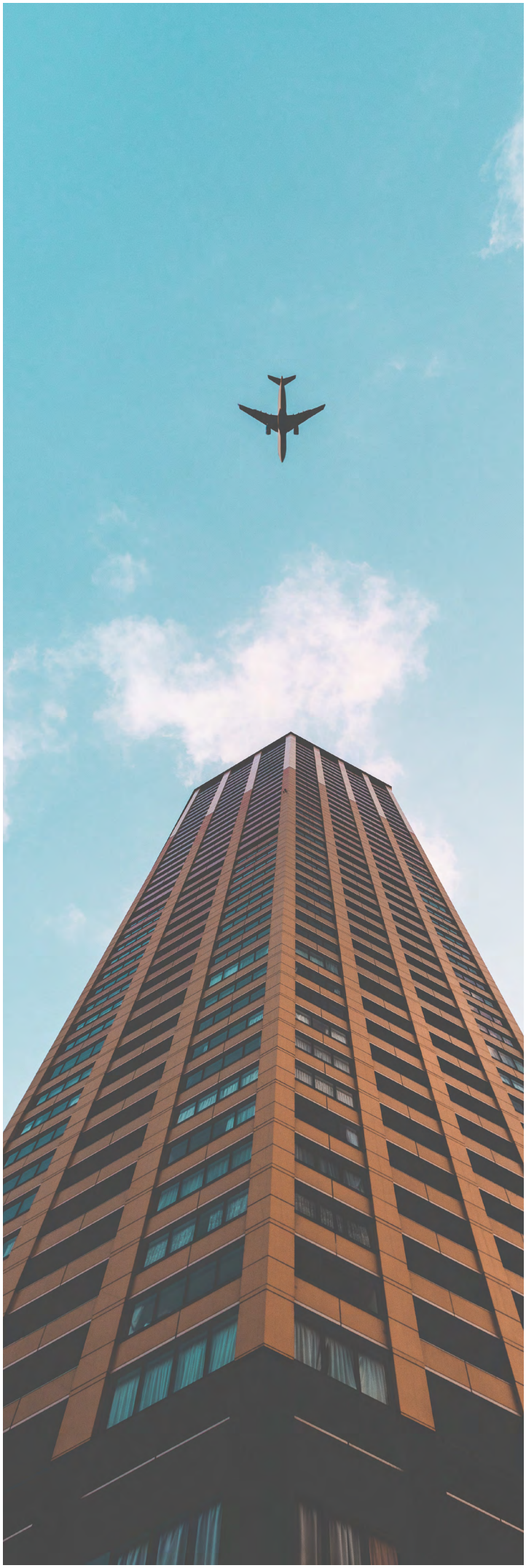
Since the holder of a building right is the temporary owner of the volume covered by the building right, he may have constructions or build them within that volume. As owner, the holder of the building right may sell, rent out, keep, remove,… these constructions, unless otherwise agreed. If the holder of the building right was however obliged to build certain constructions, he is not entitled to remove them.

With regard to maintenance and repair, the new Book 3 provides that the holder and the grantor of the building right must each carry out the maintenance repairs and major repairs that they are legally (within the volume they each own) or contractually bound to do. With regard to the payment of taxes during the term of the building right, the new Book 3 provides that the holder of the building right and the grantor must each pay the taxes related to the constructions owned by them.

4. End of the building right

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

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



Case studies in the context of project development

1. Case study 1: Building rights granted with a view to demolish and redevelop

Facts:
Situation 1: a project developer is granted a building right on a plot of land on which a building is located that must be demolished before it can be redeveloped.

Situation 2: a project developer is granted a building right on a plot of land, on which a building is located. As part of the redevelopment, only the façade will be retained.

Analysis:
In both situations, the project developer acquires a building right on a built-up volume. As a result, he becomes the temporary owner of the existing building in the volume. Since the project developer becomes the temporary owner of the existing building, there is a transfer of ownership of an immovable property subject to transfer tax (10% in Flanders or 12.50% in Brussels and Wallonia). The basis on which the registration duties are calculated is the higher of (i) the agreed value or (ii) the market value. In practice, parties often agree that a building to be demolished has no value. Consequently, it should be determined what is the market value of such building, which is not an easy task.

If the intention is to demolish the entire building (situation 1), we believe that the market value is 0. If only the façade of the building is retained (situation 2), we believe the market value is not 0 but very limited.

In addition to transfer taxes due for the transfer of ownership of the existing building, 2% registration fees are due for the establishment of the building right. In this context, it is important to note that if the building right agreement provides that the holder of the building right has the obligation to demolish the existing building, this qualifies as a charge and the demolition costs have to be included in the calculation of the 2% registration duties. On the other hand, it gives good argument for a valuation at 0 for transfer tax purposes.

2. Case study 2: Building rights in "forward transactions"

Facts:
A company that owns a plot of land on which a warehouse is located, grants a building right to a project developer with the obligation to build a second warehouse next to the existing one. The intention is that the holder of the building right builds a new warehouse and then sells it, together with his building right, to the company-land owner.

Analysis:
Since the building right is established on (the volume located above) a part of a plot of land, parties must proceed with pre-cadastration prior to the establishment of the building right.

Regarding the duration of the building right and the (amount of the) building right fees, the parties are free to determine this themselves. In practice, we often see that building rights are granted for a period longer than the period required for the construction of the building (in this case: the warehouse). Note that if the building right agreement provides that the project developer has the obligation to build a new warehouse, this qualifies as a charge subject to 2% registration duties.

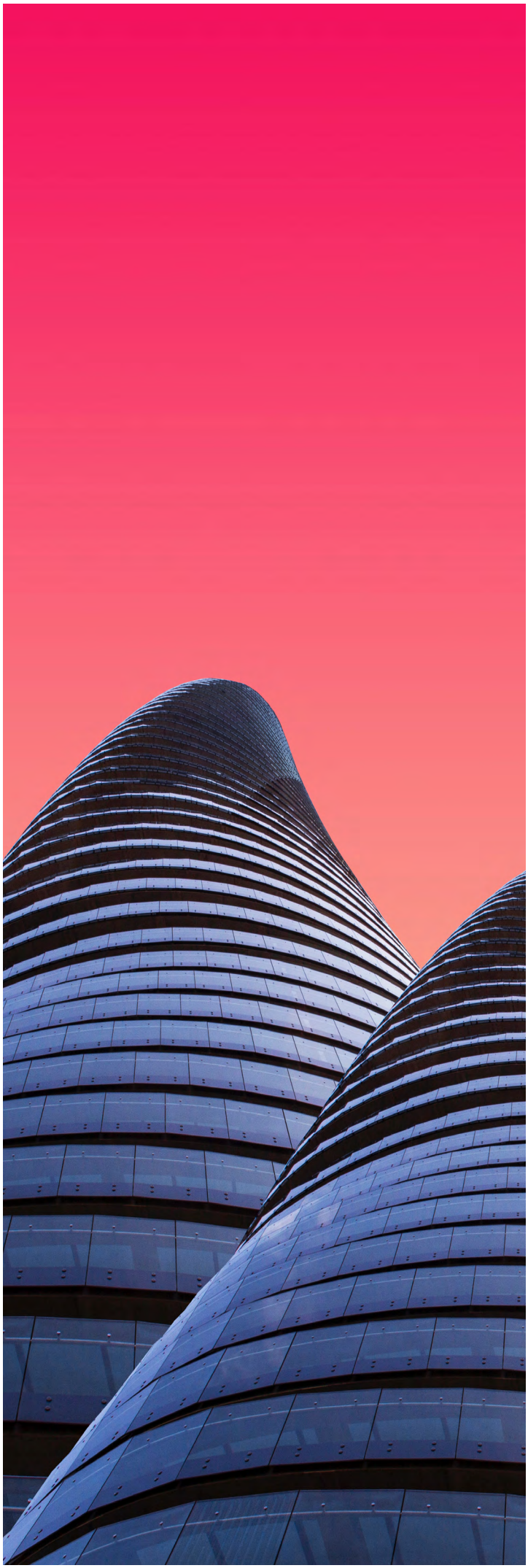
If the project developer has built the warehouse in accordance with the provisions of the building right agreement, he shall subsequently sell it, together with his building right, to the company-landowner. This sale should be subject to VAT, either based on the status of the developer or by option, since it concerns a new building. However, if the project developer does not (continue to) build the warehouse during the construction phase, the company-landowner is entitled to terminate the building right for breach of contract. A sufficiently serious breach of contract is required to justify such a termination.

It should be noted that termination for breach of contract is an abnormal ground for termination which only has relative effect (see our previous article). As a result, termination of the building right is not enforceable against bona fide third parties who have a competing right, e.g. the bank that has granted financing to the project developer and obtained a mortgage in return. Since, in practice, the fact that the project developer does not (continue to) build the warehouse is often due to the fact that he no longer has the funds to finance the project, he will probably also not have the means to repay the bank. In that case the bank may proceed to enforce his mortgage. This is not a favourable situation for the company-landowner as it. To avoid this, we recommend stipulating in the building right agreement whether or not the project developer may allow a mortgage on his building right. In addition, prior to the establishment of the building right, parties could conclude a tripartite agreement with the bank to regulate this type of situations. Finally, instead of having to seek for termination, parties may agree to include a condition subsequent according to which the building right shall terminate by law at a certain point in time based on the non-occurrence of a specific event (e.g. provisional acceptance of the construction). Such condition subsequent is enforceable towards third parties.

Conclusion

The new provisions on building rights are important in the context of real estate developments. Parties should draft their building right agreements properly and also regulate the situation of the developer who does not finish (on time) the buildings he was going to erect within the framework of the building right agreement. When drafting the building right agreement, the tax consequences must always be kept in mind.

Ariane Brohez
Lien Bellinck



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In the spotlight

Commercial lease loans in the Regions

After the Flemish and Brussels Capital Regions, the Walloon Region recently also introduced a commercial lease loan scheme. The basic principle is always the same in the three systems, but the rules differ on some points.

Waiver in exchange for security

The basic principle of commercial lease loans is that the tenant borrows one or more months' rent from a public authority, after which the authority immediately transfers the loan amount to the landlord as beneficiary for the payment of the rent. To this end, the tenant must sign a contract with the landlord in which one or more months' rent are waived.

The tenant benefits from a (partial) waiver and, via the loan scheme, from a deferred payment corresponding to the reimbursement scheme of the principal under the loan. On the other hand, the landlord is immediately paid for the rent amount corresponding to the principal of the loan. But as said, there are important regional differences. You can find a summary overview at the end of the article.

Flemish Region

The Flemish Region was the first to introduce the commercial lease loan with a Decree of 29 May 2020. In the meantime, the system has been extended once, whereby the conditions and modalities were relaxed.

1. Who can apply?
The Flemish commercial lease loan is only available to tenants who were also entitled to the Flemish corona nuisance premium. In concrete terms, these are the entrepreneurs who were obliged to close all or part of the premises they rent. Companies active in the event sector can also take out such a loan.

The lessee is either a self-employed person in main occupation, or a company with at least one working partner or one full-time employee (or equivalent) or an association with an economic activity with at least one full-time employee (or equivalent).

The tenant has an active exploitation or operating seat in the Flemish Region and is an active enterprise according to the Crossroads Bank for Enterprises, so that e.g. companies in the process of liquidation are excluded.

2. Other general conditions
The commercial lease loan is granted upon the conditions that (i) the commercial lease agreement has been registered, (ii) there were no rent arrears due for the period prior to 15 March 2020, and (iii) the property is located in the Flemish Region. Note that this loan scheme is also available for legal structures like a commercial lease such as long lease, usufruct, building lease, brewery lease, etc.

3. Waiver
The commercial lease loan is granted if the landlord waives one or two months of rent, including charges. The tenant and landlord must conclude a contract about this according to a model contract that is available on the Flemish website of Vlaio.

4. Modalities
The tenant applies for a loan for the payment of the rent under the commercial lease. If the application is approved, the Flemish government pays the sums directly to the landlord. In the hands of the landlord, this payment counts as payment of the rent.

The lease loan cannot exceed 4 months of rent per premises with an absolute maximum of EUR 60,000. A tenant cannot borrow more than EUR 150,000 in total for all rented premises together.

The reimbursement of the commercial lease loan takes place over 24 months after the granting of the credit, but the reimbursement only starts 6 months after the granting of the commercial lease loan so that the reimbursement is effectively spread over 18 months.

The interest rate is 2% per year.

The legislative framework of the Flemish commercial lease loan initially ran until 3 January 2021 but it has been extended. As a tenant, you can still submit an application until 1 July 2021. The application must be confirmed by the landlord before 8 July 2021. The waiver can be applied for rent as from April 2020.

Brussels Capital Region

The Brussels Capital Region also introduced a commercial lease loan in early 2021. The Brussels regime is more modest than the Flemish one in many respects, but the system was extended and widened by Ordinance of 6 May 2021.

1. Who can apply?

In principle, all businesses (self-employed, companies or associations) that rent commercial premises in the Brussels-Capital Region are eligible for the loan. Unlike the Flemish scheme, there exists no condition that the tenant was obliged close all or part of the premises they rent. The enterprise must be registered as an active enterprise in the Crossroads Bank for Enterprises and have an operating seat in the rented premises at the time of the loan application.

2. Other general conditions

The commercial lease loan is granted upon the conditions that (i) the commercial lease agreement has been registered and came into effect before 19 March 2020, (ii) at the time of the loan application, there were no rent arrears due for the period prior to 18 March 2020 and (iii) the property is located in the Brussels Capital Region. Note that short-term commercial leases or legal structures such as long-term lease, building lease, usufruct, or brewery contract, etc. also qualify for this loan scheme.

3. Waiver
The landlord grants a waiver of 1 to 4 months of rent (including charges) and accepts that the payment of 1, 2, 3 or 4 other months' rent (including charges) derives from a loan from the Brussels-Capital Region.

4. Modalities
The tenant takes out a loan for the payment of the commercial lease. If the application is approved, the Brussels authorities will pay the sums directly to the landlord. This payment counts as payment of the rent in the hands of the landlord.

The amount of the commercial lease loan may not exceed
– 1 or 2 months of rent (including charges) per premises if the landlord has waived only 1 month; or
– 1 to 4 months of rent per premises (including charges) if the landlord waived more than 2 months of rent.

However, the maximum amount a tenant can borrow may not exceed EUR 75,000 for all premises together.

Under the first scheme, the loan had to be repaid after 24 months, with no payment for the first 6 months. Under the system that came into force on 4 June 2021, the reimbursement period is 5 years, of which nothing has to be paid in the first 2 years.

The interest rate is 2% per year.

5. Intermediation
The commercial lease loan is based on an agreement between the tenant and the landlord. If the parties fail to reach an agreement, the Brussels-Capital Region can, at the tenant's request, take part in mediation between the tenant and the landlord. This mediation is free of charge.

Walloon Region

Since the end of May, the Walloon Region also provides for a commercial lease loan. The system is limited because the Walloon Region provided many other direct subsidies for entrepreneurs. **Note that at the time of finalising this update, and although applications can already be filed, the decree had not yet been published.**

1. Who can apply?
The "Prêt Loyer COVID-19" is open to self-employed persons and SMEs renting commercial premises located in the Walloon Region. If the company has been in existence for more than three years, it must not have had any rent arrears or payment difficulties on 31 December 2019. It must also be an active company: it must not be bankrupt or in liquidation.

Just as in the Flemish region, the regime is only open for tenants who were obliged to close all or part of the rented premises. But the Walloon region limits it to closures resulting from decisions taken by the Federal Government following the second corona wave (i.e. the Ministerial Decrees of 28 October 2020 and 1 November 2020). In addition, the closure must last until 1 February 2021.

2. Other general conditions
The commercial lease loan is granted upon the conditions that (i) the commercial lease agreement came into effect before 31 December 2020 at the time of the loan application, and (ii) the premises are located in the Walloon Region.

3. Waiver
The tenant and the landlord must have reached an agreement whereby the landlord waives at least one month of rent.

4. Modalities
The tenant can take out a loan from the Walloon government for one to four months of rent (charges included). The amount of the loan is paid directly to the landlord and counts as payment of rent. Tenant and landlord can go back in time but not beyond the month of April 2020.

The maximum amount a tenant can borrow is 4 months of rent (including charges) without exceeding EUR 25,000 for all premises togetherThe loan must be repaid after 24 months, with the reimbursement starting after 6 months.

The interest rate is 2% per year.

	Flemish Region	Brussels Capital Region	Walloon Region
Applicant	Active Flemish enterprise with leased premises in the Flemish Region and who was obliged to close leased premises	Active enterprise with leased premises in the Brussels Capital Region	Active enterprise with leased premises in the Walloon Region who was obliged to close leased premises
Conditions	registered lease agreement – no rent arrears prior to 15 March 2020 – property is located in the Flemish Region – landlord waives 1 or 2 months of rent (incl. charges)	registered lease agreement that came into effect before 19 March 2020 – no rent arrears prior to 18 March 2020 – property is located in the Brussels Capital Region – landlord waives 1 to 4 months of rent (incl. charges)	registered lease agreement that came into effect before 31 December 2020 – no rent arrears prior to 31 December 2019 – property is located in the Walloon Region – landlord waives at least 1 month of rent (incl. charges)
Modalities	lease loan cannot exceed 4 months of rent (incl charges) per building with an absolute maximum of 60,000 EUR, – total maximum of 150,000 EUR for all premises together – reimbursement over 24 months including 6 months grace period – interest rate is 2% per year	– lease loan cannot exceed 1 or 2 months of rent (incl. charges) per building if the landlord waived only 1 month or 1 to 4 months of rent per building (including costs) if the landlord waived 2 months or more, – total maximum of 75,000 EUR for all premises together – reimbursement over 5 years, including 2 years grace period – interest rate is 2% per year	– lease loan cannot exceed 4 months of rent (incl. charges) – total maximum of 25,000 EUR per entrepreneur for all premises together – reimbursement over 24 months, including 6 months grace period – interest rate is 2% per year.
Website	Handelshuurlening | Agentschap Innoveren en Ondernemen (vlaio.be)	Handelshuurlening | Brussel Economie en Werkgelegenheid (economie-werk.brussels) Prêt sur le loyer commercial | Bruxelles Économie et Emploi (economie-emploi.brussels)	Prêt Loyer Covid - sowalfin.be

Olivia Oosterlynck

VAT on student accommodation? Belgian legislator wants to set the record straight.

Although it is generally assumed that the rental of student accommodation is exempt from VAT, the Belgian Ruling Commission recently ruled otherwise. This was however not to the Belgian legislator's liking. The Minister of Finance has intervened by submitting a draft of law that henceforth should explicitly exempt the letting of student accommodation from VAT.

Legal background

Under article 44, §3, 2° of the Belgian VAT Code, the letting of immovable property is exempt from VAT. It is noteworthy that a VAT exemption must be interpreted strictly, since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.

Despite the general VAT exemption for the letting of immovable property, the European Directive provides for a list of services that are always subject to VAT. This list includes e.g. the provision of furnished accommodation in the hotel sector or in sectors with a similar function. This Directive has been transposed into Belgian VAT law according to which furnished accommodation in hotels, motels and establishments by which shelter is provided to paying guests is subject to VAT.

The question that arose is whether the letting of student accommodation can also fall within the scope of "furnished accommodation in hotels, motels and establishments by which shelter is provided to paying guests" even though it is generally assumed that such letting falls within the scope of a VAT exempt immovable letting.

Ruling Commission confirms

In this respect, the Ruling Commission has confirmed that the letting of student housing is a provision of furnished accommodation. For this reason, the letting should be subject to VAT and the services provider concerned was entitled to a deduction of the input VAT (ruling no. 2020.1867 dd. 6 October 2020).

This decision was merely based on the administrative guidelines that describe that, in order for the service to qualify as VAT taxable hotel service, the following conditions must be met:

- the provision of furnished accommodation of all kinds (room, appartement, chalet,..);
- reception;
- at least one of the following additional services
  - the regular maintenance and cleaning services; or
  - the provision and the changing of bed linen; or
  - the provision of breakfast.

Since besides the mere letting of the student housing, the services provider also foresees for cleaning services and the presence of a (digital) reception for the students, the Ruling Commission ruled that the letting of student housing, in the case at hand, qualifies as VAT taxable hotel services, and that the services provider could deduct the input VAT.

Belgian legislator intervenes

As stated above, it is generally assumed that the letting of student housing is exempt from VAT since it generally relates to a mere passive letting.

The Belgian legislator now explicitly does not want to place the letting of student housing on equal footing with hotel services. Therefore, an amendment of the aforementioned article 44, §3, 2° of the Belgian VAT Code has been submitted.

The amendment foresees in a specific reference that the provision of furnished accommodation in establishments normally used to accommodate students is not considered to be a form of VAT taxable furnished accommodation. Hence, the Belgian legislator wants to set the record straight by explicitly exempting student housing from VAT.

In case the proposed change actually gets implemented in the Belgian VAT Code, it will, like other changes in law, impact the aforementioned ruling. Indeed, a ruling has in principle a 5-year validity period and provides legal certainty however subject to conditions, one of them being the absence of change in law. This would mean, in the case submitted to the Ruling Commission and subject to any transitory measures that would be enacted, that the services provider will not anymore perform a VAT taxable activity. Consequently, a Vat clawback shall apply with a partial reimbursement of the VAT previously deducted.

Samira Moujahid

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Last month in short

Late tax return

In Belgium for corporate income tax purposes, a tax return must be submitted within 7 months after the balance sheet date, or any other later date communicated by the tax administration. If the deadline for submission falls on a Saturday, Sunday or public holiday, the next working day will be the deadline for submission. Due to the special circumstances created by the health crisis, balance sheet dating from 31 December 2020 to 28 February 2021 will benefit from an additional filing period until 28 October 2021.

At the beginning of June, the government submitted a draft law containing various tax provisions. Among other things, the draft provides that those who submit their income tax returns too late can incur a tax increase in addition to a fine. A tax increase was already possible in theory, but without object, because the increase related to “undeclared income”. This is not the case with late returns. The bill now provides that the tax increase shall also apply on “income declared late”. Depending on the severity of the offence and the repetition, the tax increase can be from 10% to 200% of the corporate income tax due.

TVA - Démolition et reconstruction : FAQ

The tax administration has just published an FAQ on the reduced VAT rate for the demolition and reconstruction of buildings. This new FAQ replaces an earlier FAQ from December and the circular letter of 25 February 2021. The FAQ provides answers to numerous concrete situations. In particular, it addresses the issue of the link between the demolished building and the newly constructed building.

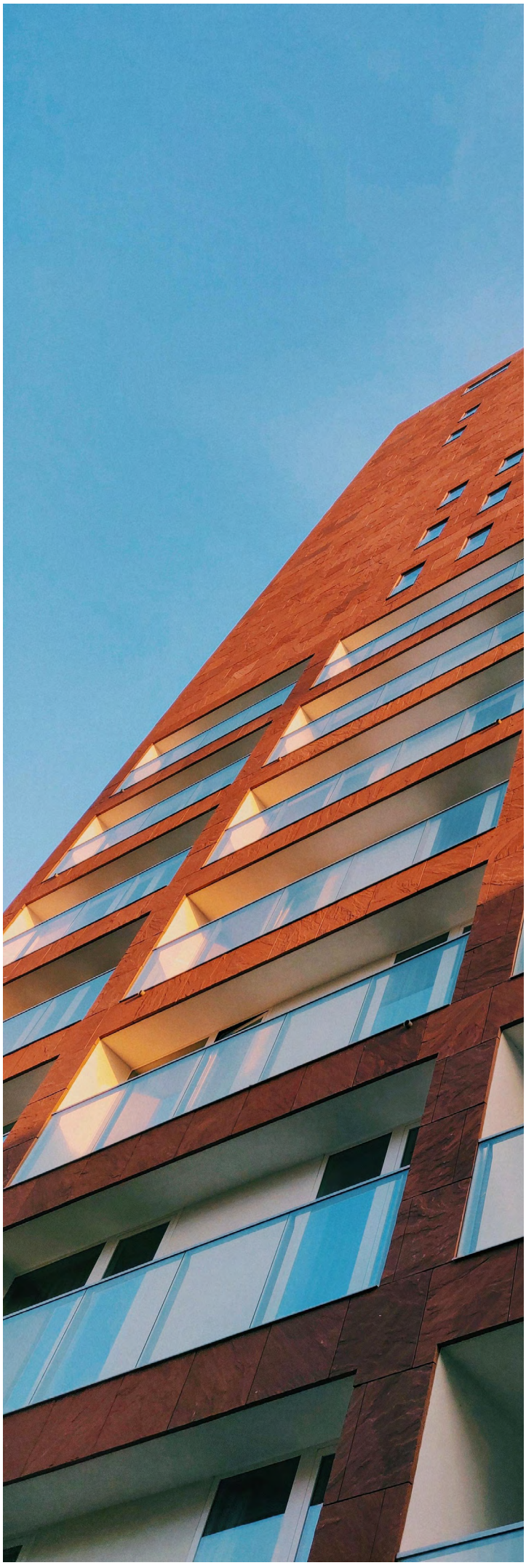
According to the FAQ, the construction of additional floors does not qualify for the reduced rate. The demolition of several constructions on different plots of land in order to build several residential units on the same and other annex plots of land must be assessed on a case-by-case basis.

Negative interest payments and withholding tax

How should negative interest payments in principle be qualified?

In a recent circular letter, the Tax Authorities confirm, as expected, that a negative interest cannot be considered as an interest. Interest is a consideration for putting an amount available (e.g. a loan). But that is not the case with negative interests.

However somewhat surprising, the Tax Authorities also conclude from this, that a compensation between negative interest and positive interest is not possible (this is more relevant for individuals than for corporations). The circular letter states that “negative interest cannot be deducted”. We believe as most authors do, that this is an unfortunate statement and can only be read as “not deductible as cost for collecting the income” (costs imposed by the financial institution). There is no argument whatsoever to exclude negative interest payments as tax deductible professional expenses.



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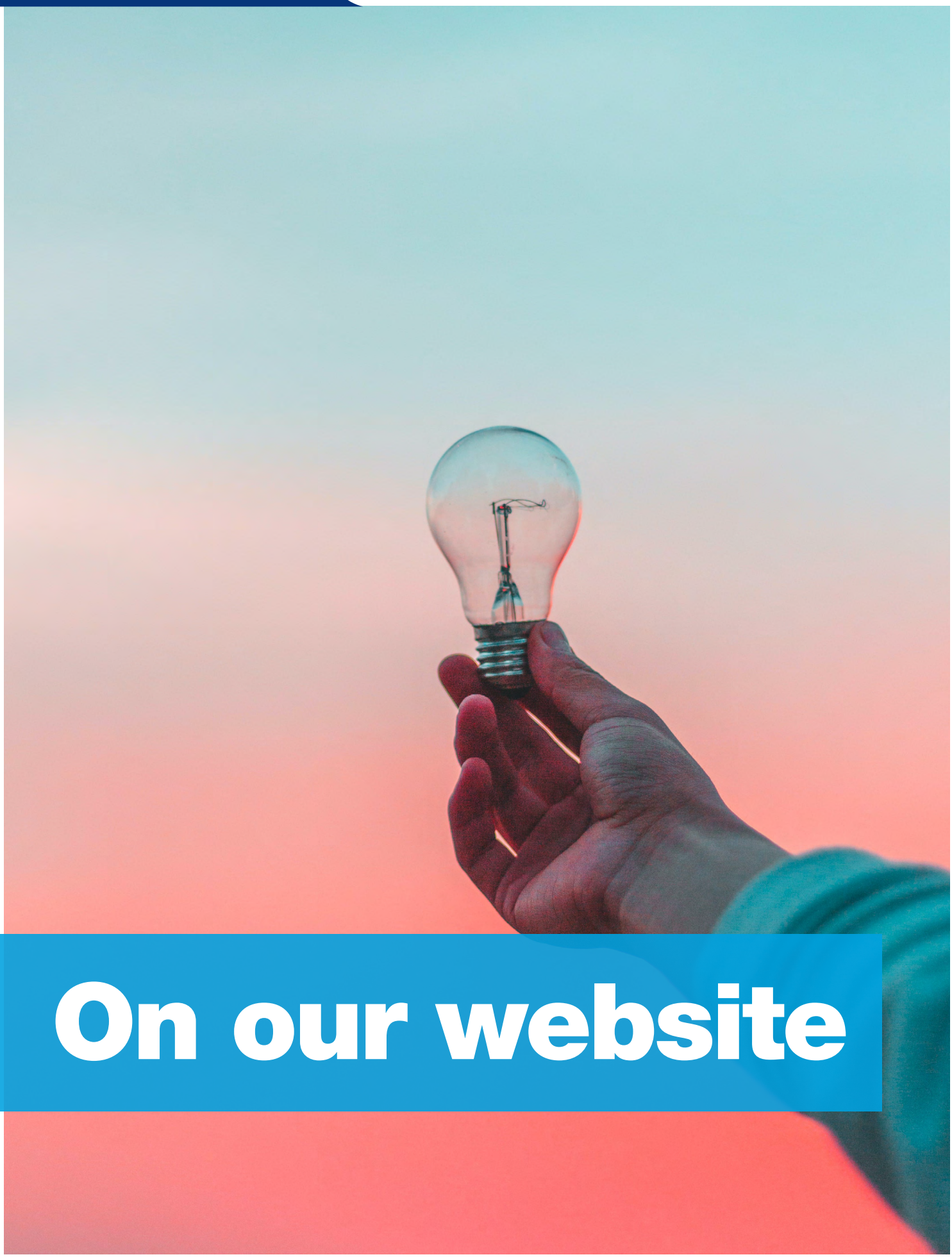

On our website

Reform of property law

Read more about the reform of property law (Book 3 Civil Code) with useful infographics, reports on the different webinars and even the possibility of a full replay of our popular webinars.

Infographics

Reform of property law

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Long-term Lease

Building rights

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Long-term lease vs (retail) lease

Heavy repairs

Mortgage in case of split ownership

Building rights in real estate developments

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A unique approach

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

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