



Real Estate Investment in Belgium

THE LEGAL PERSPECTIVE

Introduction

Our clients, whether they are Belgian or international, public or private, require the collaborative approach of a team of lawyers who are skilled in distinct but related domains. Our team advises on all legal issues relating to real estate, including:

- real estate investments;
- due diligence;
- contract negotiations;
- real estate securitization;
- planning and development;
- construction;
- structuring;
- litigation; and
- leasing.

This document is intended to serve as a comprehensive guide to the most relevant civil and tax law aspects of investing in Belgian real estate. We aim to use our practical experience as a valuable source of information for our readers. The guide does not claim to be exhaustive, so if you have any further questions relating to the material, our experienced Belgian real estate team will be happy to assist you.



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1. Ownership of real estate

1.1 Future law reform on the provisions relating to ownership of real estate

On May 4, 2018 a new bill aiming at the modernization and integration of the provisions relating to the ownership of real estate (Bill), was approved for by the Council of Ministers. On October 31, 2018 this Bill was submitted to the House of Representatives. Currently, the procedure to vote the Bill in the House of Representatives is still ongoing. However, for the sake of clarity, as well as by way of anticipation, both the current and future law on the ownership of real estate will be set out in this chapter.

1.2 Full ownership

Under Belgian law, the right of ownership is currently defined as the right to enjoy and dispose of assets **absolutely**, provided that no right is used in a way that is prohibited or that might jeopardize the rights of third parties.

Under the new Bill, the definition will be slightly amended as to put more focus on, on the one hand, the three powers of the owner, i.e. the ability to use, to enjoy and to dispose of the property and on the other hand, the limits to which these powers are subject, i.e. restrictions imposed by laws, regulations or by the rights of third parties. It will no longer be written that the owner has absolute powers over the property (see *supra*).

1.3 Rights in rem

The most extensive interest in real estate after full ownership is a usufruct, which is a right to use the property and to benefit from its profits and/or products.

This excludes the right to transfer or demolish the property. A usufruct is always linked to the property itself, and ends either on the death of the individual granted the right, or currently after 30 years if granted to a legal entity. However, under the new Bill this period will be prolonged from 30 to 99 years.

Other real estate rights currently include the right to use or to inhabit property. This is similar to the right of usufruct, but cannot be transferred since it is only granted to a specific individual.

Under the new Bill, the right to use is being abolished as it is being perceived as redundant. That is because the usufruct right and the right to use technically perform the same functions. After all, the usufruct right can be contractually adapted in such a way that it comes down to a right to use. The right to inhabit is integrated in the provisions concerning the right of usufruct and has become a specific type of the right to usufruct.

Long leases (*emphyteose/erfpacht*) can be granted, giving the right to use and build on property in return for the payment of an annual ground rent. A long lease is currently granted for a minimum of 27 years and a maximum of 99 years. Under the new Bill, the long lease can be granted for a period of minimum 15 years, up until a period of maximum 99 years.

A long lease can be perpetual when and as long as it is established for public domain purposes by the owner of the property.

Building rights (*superficie/opstal*) can also be granted, allowing buildings to be erected on a property. When the building rights come to an end, the property owner will acquire the rights to these, irrespective of whether there has been any payment. Building rights can currently be granted for a maximum renewable period of 50 years. However, under the new Bill, it will become possible to grant building rights for a period up until 99 years, instead of 50 years. Both long leases and building rights are commonly used in tax-driven agreements. The building right is currently governed by the Act regarding the building right of January 10, 1824 amended in 2014, but will nevertheless become integrated in the Civil Code, once the new Bill has passed. This creates a general legal framework for exercise of the right and leaves significant room for contractual freedom, save for a maximum duration of currently 50 years, but in the future, under the new Bill, 99 years.

Finally, the right of easement (*servitude/erfdienstbaarheid*) allows one property to be used in order to accommodate the use of another property. Easements can remain in force for unlimited or limited periods of time. The former are legally linked to the ownership of the property to which the easement is attached (for example, easements to refrain from building on real estate located next to airports, or to gain access to public roads). The latter can be agreed between parties.

1.4 Restrictions on ownership by foreigners

In Belgium there are no restrictions on foreign investors acquiring property.

2. Acquisition of ownership

2.1 Formal requirements

Deals are either structured as share purchases or asset purchases, the former being where a buyer buys the shares in the company owning the real estate, the latter being where a buyer purchases real estate directly. An asset deal must be completed by a deed executed in the presence of a notary within four months of the signing of the initial agreement. The deed must then be presented to the registration duties collector and the applicable registration duty paid within that four-month period.

Depending on the region where the real estate is located, the formalization of the deed by the notary public may be subject to prior compliance with requirements of land use planning, land contamination or energy performance legislation. In Belgium these obligations do not apply to share purchase agreements.

Common elements of contracts for both asset and share deals include:

- a description and identification of the parties and the subject of the contract (i.e. the real estate or shares being sold); and
- a clear description of the price.

If these elements are absent the contract is invalid.

Buyers can carry out due diligence, which is particularly important for assessing any environmental issues and liabilities. Due diligence also provides an opportunity to verify whether there are any liens on the real estate. Due diligence typically takes place prior to the execution of the contract, but the parties are free to agree that it will be carried out afterwards. The contracts will

normally contain specific protection measures for the buyer during the due diligence period, such as an exclusive right to purchase.

2.2 Registration

Real estate is registered in the Land Register (*cadastre*). In addition, asset deals and certain transactions relating to real estate, such as mortgages, leases with a duration exceeding nine years, and transfers of rights in rem, are registered in the Mortgage Register (*hypothèque*). The information contained in both the Land Register and the Mortgage Register is available to the public.

The Mortgage Law governs registration with the Mortgage Register when real estate is transferred.

The Registration Tax Code governs registration duties when real estate is transferred.

2.3 Asset deals

At the first stage of an asset deal, a private sale agreement (or *compromis de vente/verkoopcompromis*) is drafted and signed. This sale agreement in principle transfers ownership of the real estate. It is not the same as the notarial deed which must be executed within four months after the signing of the sale agreement and by which the transfer is completed. The actual transfer of ownership is often postponed until the date of signature of the notary deed. The transfer of ownership is only binding on third parties when the notarial deed has been registered on the Mortgage Register. Furthermore, it should be noted that the conclusion of a private sale agreement is not compulsory as parties may agree to execute the notarial deed immediately.

In an asset deal, the Belgian Civil Code provides that vendors must guarantee two conditions. They must warrant that:

- there is no restriction on goods being sold to the purchaser made either by the vendor or by third parties who might claim rights in the property; and
- the goods being sold are free from invisible defects.

Parties can extend or limit the vendor's obligations. The scope of such obligations is subject to decision of the courts. Some legislation provides for additional warranties to be imposed on vendors.

Action for breach of the guarantee that there is no restriction on use of the goods may currently be issued up to 30 years after completion. Under the new Bill, this can be ten years, depending on whether the persons at issue are acting in good faith or not. Claims based on a breach of warranty of no hidden defects are to be filed "within a short period of time." This is to ensure that the defect existed at the time of purchase and did not arise at any later time. The contracting parties may, however, specify a limit in the purchase agreement for bringing these claims.

Where one of these warranties is breached, the purchaser can choose between:

- a dissolution of the transaction with full reimbursement of the purchase price; and
- retaining the property right transferred but subject to partial reimbursement.

Additional remedies can be agreed upon.

2.4 Share deals

A share deal only transfers ownership of the shares of the company that owns or holds the real estate. A notarial deed is not required and a private contract is sufficient.

The agreement will be drafted to include representations and warranties regarding the shares in the company and their ownership. In practice, however, buyers often obtain additional representations and warranties regarding the real estate held by the company.

Any claim following a breach of a legal or contractual warranty will be a claim against the vendor (a claim *in personam*), which, must be brought within ten years. The share

purchase agreement can provide for a shorter period for claims. Remedies for misrepresentation will depend on the contract.

2.5 Public auctions

Public auctions can occur freely or in the case of an insolvency or enforcement procedure (forced sale).

Under Belgian law, public auctions can only be held by notaries, who also draft the sale conditions. The sale conditions cannot be negotiated.

The law of August 11, 2017 now also allows for public auctions to be held online. The advantage of this is that the property is offered for sale for a longer period of time instead of just

one day or a few hours compared to when a physical public auction is organized, which gives potential buyers more time to bid on the property. At the end of that period, one looks at whether it is possible to close a deal between the buyer with the highest bid and the seller. The process remains supervised by notary publics.

For the buyer, public auctions can have the advantage of an attractive price, although auction costs must be borne in mind. The forced sale option is costly. The costs associated with enforcement procedures include, among others: the costs and fees of the notary; registration fees; auction fees and publicity costs; court costs; and bailiff's costs.



3. Other rights to property

3.1 Mortgages and charges

MORTGAGE

A mortgage can be defined as the grant of a charge by the mortgagor (who may or may not also be the debtor) over property owned by that mortgagor/debtor in favor of the mortgagee (creditor), as a guarantee for the debt owed by the mortgagor/debtor. It must be created by a deed drawn up by a notary, and must be registered with the registration office and entered on the Mortgage Register in order to be valid against third parties.

The benefit of a mortgage for the creditor is that it gives them a preferential right over the debtor's mortgaged assets, against most secured and all unsecured creditors. In the event that several mortgages are granted over the same property, the ranking of the mortgages will depend upon the time of their registration (the first mortgage registered will rank first). The registration of a mortgage is valid for 30 years and is renewable.

Another benefit of a mortgage is that it remains attached to the property over which it is granted, and therefore remains unaffected by subsequent changes in ownership. The mortgage can only be removed after repayment of the debt to the mortgagee in accordance with the terms of the mortgage deed or with the agreement of the creditor. A mortgage does not only have to relate to the right of ownership, but can also have as its object the right to usufruct, a bare ownership right, a long lease right or a building lease right on a property.

The total secured amount must be specified in the mortgage deed.

Power to mortgage

In order to reduce the registration duties and fees involved in a mortgage, parties can agree to a mortgage mandate, which is not a security directly over the assets, but a means to acquire a mortgage.

A power to mortgage is an agreement between a borrower and representatives of the lender whereby those representatives (acting in their own name and not that of the lender) are granted the power to secure the lender's claim at a future date. This is done by establishing a mortgage against the property owned (or to be owned) by the borrower for the amount agreed in the mandate.

The power to mortgage is executed in front of a notary. However, as the power to mortgage does not constitute a security over the assets, if the debtor grants a mortgage on the same property to another creditor before the conversion of the mandate, the mortgage over the property first registered will rank first.

Any conversion of the mandate within a suspect period (which can be fixed by the commercial court as up to six months prior to bankruptcy) can be voided by the bankruptcy court.

It is customary in Belgium for lenders to take a mortgage for a portion of the secured obligations, and a mortgage mandate for the remainder, in order to:

- (i) secure ranking for the portion of the debt secured and raise awareness of other potential creditors as to the existence of outstanding secured financing; but also

- (ii) to reduce the costs that would be entailed by registering a mortgage for the full amount of the secured obligations.

3.2 Easements

The right of easement (*servitudel erfdiensbaarheid*) is a real right which burdens a parcel of land for the benefit of another property. An easement never involves an obligation to perform an action: it is always an obligation to tolerate something or someone. Easements can exist by law and so can last for an unlimited period of time, equal to the right of ownership over the land to which the easement is linked (e.g. an easement not to build on real estate located next to airports, or an easement to have a minimum degree of access to a public road), or they can be concluded by an agreement, in which case the easement will only exist for a limited period of time. An easement can be extinguished or created by acquisitive or extinctive prescription or in other ways, as is the case with all property rights.

3.3 Pre-emption rights

Depending on the location of the property, different regional pre-emption rights may apply, mostly in relation to areas designated for housing. Under certain circumstances social housing companies and certain public entities have pre-emption rights. Property that is empty or in poor repair may also be subject to pre-emption rights.

3.4 Options

Parties can agree options to sell or to buy property (right of first refusal), and the method by which it is to be exercised.

ZONING AND PLANNING

In Belgium, the regions regulate zoning and planning. The regions are the:

- Flemish Region;
- Walloon Region; and
- Brussels Capital Region.

Therefore, the Parliaments of the regions regulate the development and designated use of individual parcels of land in their region.

Local authorities (provinces and municipalities) apply the regional legislation, and can set their own local zoning and planning policies.

The main current zoning and planning legislation is:

- the Flemish Public Planning Code of May 15, 2009 (VCRO Flemish Region).

- the Code for Territorial Development of July 20, 2016 (CoDT Walloon Region) which came into effect on June 1, 2017.
- the Brussels Code regarding Public Planning of April 9, 2004 (CoBAT or BWRO, Brussels Capital Region) of which the amended rules for planning entered into force on April 30, 2018 and the amended rules for permitting will enter into force on April 20, 2019.

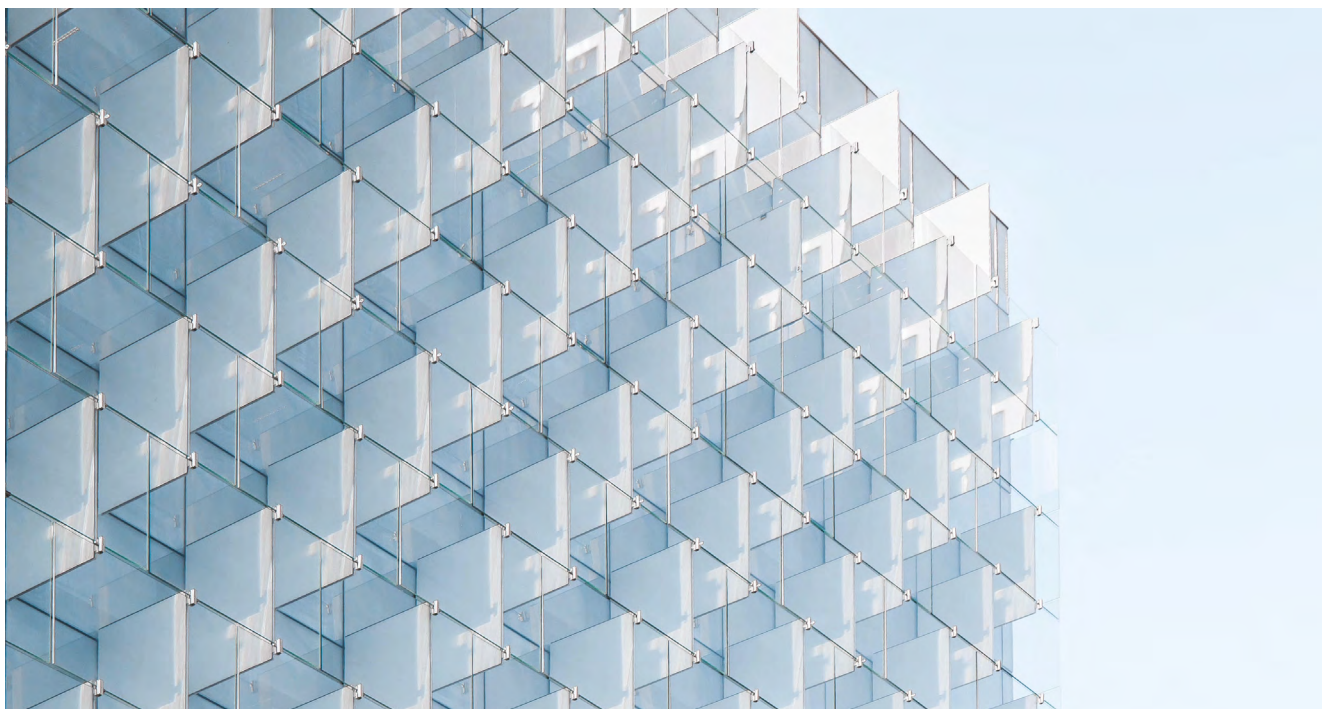
Additionally, the Flemish Parliament approved two new decrees. The first is a decree relating to complex projects – projects with a significant social and spatial impact, which require a zoning plan. For complex projects which comply with the conditions of this decree, a combined planning and permitting process can be followed. This decree entered into force on March 1, 2015.

The second is a more recent decree introducing an integrated environmental permit (*omgevingsvergunning*), covering

the current subdivision (allotment) permit, building permit and environmental permit regimes. This decree (entirely) came into effect on January 1, 2018.

Zoning and planning laws control:

- the construction of new buildings or the refurbishment of an existing building, through zoning plans and permits;
- the design, appearance, and method of construction of any new building. This is governed by planning policies at regional, provincial, and local level. The applicable related regulations are numerous; and
- the use or function of new buildings as well as existing buildings. Zoning plans determine which uses are permitted on a given piece of land.



5. Environmental liability

In Belgium, the regions regulate environmental controls.

Regulations concerning responsibility for contaminated land vary between the Flemish, Walloon and Brussels Capital regions.

Flemish region

According to the decree on remediation of land in the Flemish region, the following individuals are liable for cleaning up contaminated land (unless exemptions apply):

- a) anyone carrying out an activity on the contaminated land for which an environmental permit or an environmental notification is required;
- b) if no one carries out such an activity, or if the person carrying out such an activity is

exempt from land remediation requirements, the person who uses the contaminated land; and

- c) if no one carries out such an activity and if no one uses the land, the owner of the contaminated land.

Walloon region

In the Walloon region, the Remediation of Contaminated Land Act of March 1, 2018 holds the following people jointly liable for remediation of contaminated land:

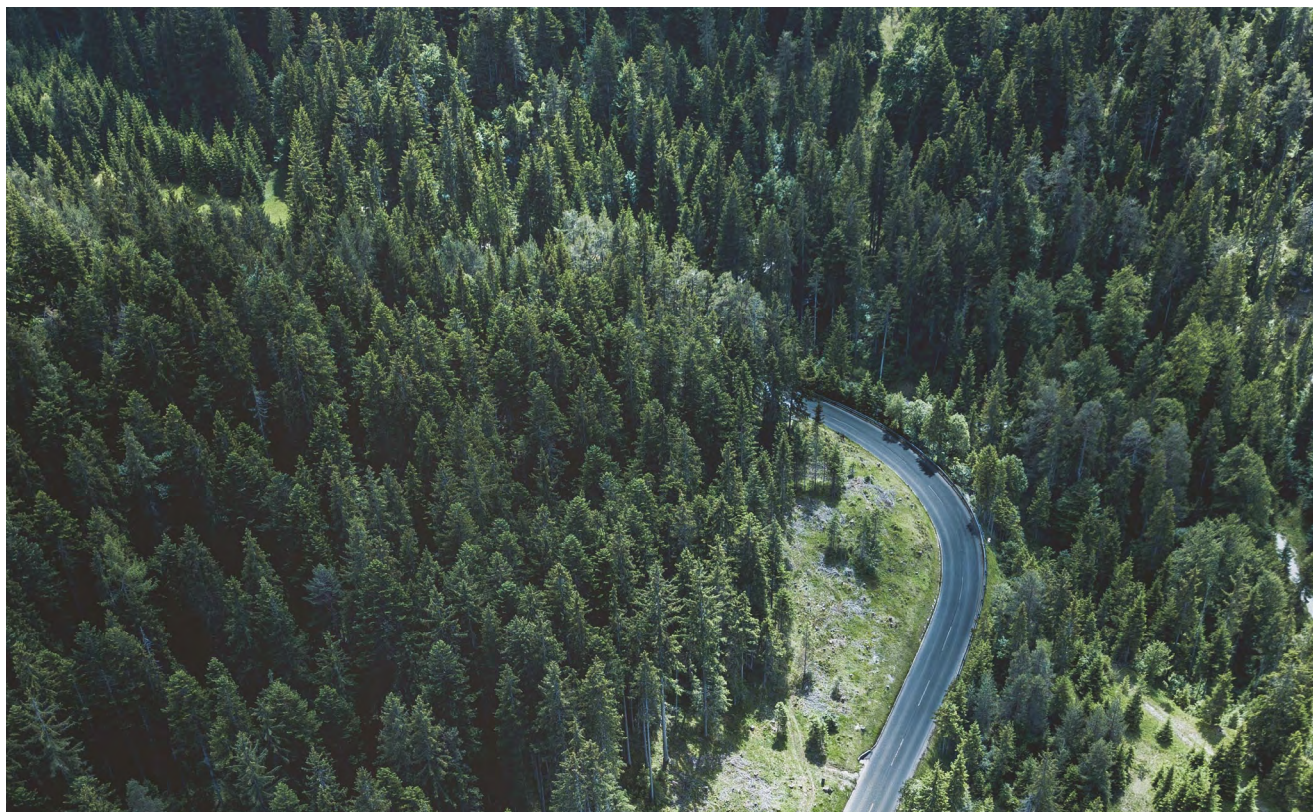
- a) the person who entered into an environmental agreement with the appropriate public agency; and
- b) the person who caused the pollution.

If neither of these people can be identified, or it is difficult to attribute responsibility, or if they are insolvent, then the liability rests with the operator or user of the site (exploitant).

If there is no exploitant, then liability rests with the owner or the holder of a right in rem.

Brussels Capital region

In the Brussels Capital region, the Remediation of Contaminated Land Act of March 5, 2009 as updated by the decree dated June 23, 2017 which came into effect on July 23, 2017, imposes the liability for land remediation on the person who undertook an assessment with a view to transferring the real estate or an environmental permit.



6. Leases

Under Belgian law, a distinction can be made between arrangements governed by the Belgian civil law on leases, and contracts with a similar purpose, which are governed by Belgian contract law.

There are four types of lease agreement:

1. Lease agreements subject to the general provisions of the Belgian Civil Code.
2. The lease legislation concerning principal places of residence, has been regionalized and now falls within the competence respectively of the Flemish, Brussels Capital and Walloon region, following the sixth state reform. Therefore, residential lease agreements are now governed by three different acts, i.e. the Flemish Housing Lease Decree dd. November 9, 2018 (*inzake woninghuur*), the Brussels Capital Housing Lease ordinance (*inzake woninghuur/sur le bail d'habitation*) dd. July 27, 2017 and the Walloon Housing Lease decree (*sur le bail d'habitation*) dd. March 15, 2018 depending in which region the premises are located.
3. Commercial lease agreements, protecting retailers or craft workshops governed by the law of April 30, 1951 (also referred to as the Commercial Lease Act). In the Flemish and the Walloon Region, short-term (pop-up) commercial lease agreements can also be concluded and are respectively governed by the provisions of the Flemish Decree of June 17, 2016 on the short-term lease of premises for commercial and artisanal purposes, which entered into

force on September 1, 2016 and the Walloon Decree of March 15, 2018 relating to the short-term commercial lease, which entered into force on May 1, 2018. The preliminary draft of the Brussels Capital ordinance related to short-term commercial lease agreements for pop-up stores in the Brussels Capital Region was approved by the government of the Brussels Capital Region on September 13, 2018 and is scheduled to enter into force in the first quarter of 2019.

4. Lease agreements relating to land leased to farmers, governed by the law of November 4, 1969.

The Commercial Lease Act provides for certain mandatory provisions which the parties cannot contract out of, generally for the protection of the tenant, as well as certain optional clauses which parties can adopt if they wish. The same applies to the Flemish Housing Lease Decree, the Brussels Capital Housing Lease ordinance and the Walloon housing lease decree.

Only general leases (offices, warehouses, industrial buildings) and commercial leases are considered below.

6.1 Duration

GENERAL LEASES (OFFICES, WAREHOUSES, INDUSTRIAL BUILDINGS)

There are few prescribed legal requirements affecting the term of general leases (as opposed to commercial leases which are used for retail premises). There is no legal minimum or maximum duration. The term can be fixed (as is most often the case) or indefinite. Break

clauses allowing termination of the lease after a certain period are permitted in fixed-term leases.

The most common arrangement for an office lease is what is known as a 3-6-9 lease, which is a nine year lease with an option for both parties to terminate the lease after the third and sixth year.

General lease agreements with an initial duration of more than nine years must be notarized as they require registration in the Mortgage Register for the locality of the leased premises.

COMMERCIAL LEASES (RETAIL AND WORKSHOPS)

Commercial leases are always agreed for a fixed term of at least nine years. If a commercial leases is entered into for less than nine years or the minimum term is not specified it is treated as having a minimum duration of nine years. This also applies to subleases, but subleases may not be entered into for a period exceeding the duration of the principal lease.

If the parties to a commercial lease specify a term of more than nine years the lease contract must be notarized, since it must be registered in the Mortgage Register for the locality of leased premises.

The Commercial Lease Act provides for very specific procedures allowing the tenant to request the renewal of its commercial lease.

COMMERCIAL LEASES (POP-UP RETAIL AND WORKSHOPS) IN THE FLEMISH AND WALLOON REGION

In the Flemish and Walloon Region, commercial lease agreements can also be concluded for a term not

exceeding the period of one year. Such short-term (pop-up) leases are governed by the provisions of the Flemish Decree of June 17, 2016 on the short-term lease of premises for commercial and artisanal purposes (Flemish Pop-up Lease Decree) and the Walloon Decree of March 15, 2018 relating to the short-term commercial lease (Walloon Pop-up Lease Decree).

Following both aforementioned Decrees, there is no possibility to renew the pop-up lease agreements. Parties are free to extend the pop-up lease in writing provided that its term does not exceed one year in total. In the event the term of the pop-up lease exceeds one year (following its possible extensions), it shall be considered as a lease agreement falling under the Commercial Lease Act with a term of nine years as from its entry into force.

6.2 Rent

Payment of rent is an essential element of a lease contract. Without an obligation to pay rent no lease exists, only a toleration of occupation (and the legal consequences of this are uncertain). Parties are free to determine the amount of the rent, and the frequency and the method of payment.

6.3 Rent review

Although not mandatory, parties commonly agree on indexation as a basis for reviewing the amount of rent. Where this is the case, the Civil Code imposes a binding method for calculating the indexation.

Indexation can only take place once a year, with the first review taking place a year after the lease came into effect (which may not necessarily be the same as the date the contract was signed). The index to be used is known as the health

index, which is a consumer price index excluding prices of products like alcohol, fuel and tobacco. This is published by the Ministry of Economic Affairs.

Indexation that is more favorable to the tenant than that provided for in the Civil Code is permitted, but any method of indexation less favorable to the tenant will not be accepted by the courts.

In leases governed by the Commercial Lease Act there are two additional mechanisms for rent review, which are as follows:

- At the end of every three years, either party to the lease can ask the court to revise the rent. A judge will not order any alteration in the rent unless the normal rental value of the premises has changed by at least 15% due to circumstances which could not have been foreseen when the lease was entered into. These changed circumstances must have had a continual influence for three years and the claim for revised rent must have been brought before the court during the final three months before expiry of the relevant three-year period.
- Proceedings can also be brought asking the court to set a fair level of rent where there is a disagreement between the parties about future rent on renewal of a lease governed by the Commercial Lease Act.

Under the Flemish and the Walloon Pop-up Lease Decrees, neither indexation nor revision apply since the term of the pop-up lease cannot exceed the period of one year.

6.4 Operating expenses

Most leases contain a clause providing that all costs and rental charges, including taxes, are to be covered by the tenant. According to the Flemish and the Walloon Pop-up Lease Decrees, the taxes affecting the leased premises are assumed to be covered by the rent, unless otherwise agreed in the pop-up lease.

Where the leased premises are part of a building with common areas (areas occupied by multiple occupiers), these costs generally include the maintenance and repair of common areas used by all tenants. The tenant will pay a percentage of these costs in proportion to the size of their premises in the building.

Contracts for telecommunication services are usually agreed with each tenant individually so several separate telecommunication agreements may exist for one property. Contracts for utilities serving multiple occupiers are usually entered into by the landlord but the lease would usually provide that the costs are transferred to the tenants. According to the Flemish and the Walloon Decree Pop-up Lease Decrees, said costs have to be borne by the tenant in the context of a pop-up lease, unless otherwise agreed in the pop-up lease.

In general leases provide that the landlord would insure the building, its use and relevant liabilities with the tenants paying a percentage of the insurance premiums as part of the service charge.

However, the tenant must insure all fittings and movable furnishings in the rented premises, including machinery, against the risk of fire, explosion and water damage at his own expense.

6.5 Maintenance, repair and renovation at end of lease

The landlord is obliged by law to provide the leased property to the tenant, to maintain the property in an appropriate condition for its intended purpose (unless it is agreed otherwise), and to allow the tenant the peaceful enjoyment of the premises for the duration of the lease.

The landlord is required to maintain the premises in a good state of repair in all respects, except for maintenance that explicitly remains the tenant's responsibility by law. The tenant is only liable for small maintenance repairs, meaning that major repairs and the repair of damage caused by an act of God remain the responsibility of the landlord.

Parties are, however, free to agree which repairs are the responsibility of each party.

6.6 Assignments/transfers and subleases

GENERAL LEASES

The tenant is entitled to sublet and to assign their lease to a third party, unless this right has been expressly excluded or limited. Standard leases would usually restrict this right and require the landlord's prior written consent to any assignment or sublet.

A tenant who is not using the property as their principal residence cannot sublet it, either in whole or in part, to a subtenant who would use it as their principal residence.

COMMERCIAL LEASES

A tenant is entitled to sublet and to assign their lease to a third party, unless this right has been expressly excluded or limited. Standard leases would usually restrict this right and require the landlord's prior written consent to any assignment or sublet.

Restrictions on the subletting or the assignment of leases do not apply to commercial leases governed by the Commercial Lease Act where the entire business is being transferred as a going concern. Formal notice of the proposed transfer must be given to the landlord, who may object on certain specific grounds.

COMMERCIAL LEASES (POP-UP RETAIL AND WORKSHOPS) IN THE FLEMISH REGION

Under the Flemish Pop-up Lease Decree, assignment and subletting of the pop-up lease are forbidden at any time. However, following the Walloon Pop-up Lease Decree, parties can agree that subletting the premises or transferring the agreement is allowed when express and written agreement is obtained.

6.7 Termination

GENERAL LEASES

A lease will expire at the end of the agreed term. In addition, a lease can be terminated if the lessee fails to comply with its obligations under the lease agreement. In such cases, however, the lease cannot be terminated by the landlord unilaterally, but must be dissolved by formal decision of the court.

If the lease is terminated due to tenant default the tenant must pay all outstanding amounts due under the lease plus compensation equal to the rent for the time it takes to find a new tenant, as determined by the courts. Additional damages may also be payable.

Any lease may also be terminated by mutual consent.

Finally, the lease will end automatically if the leased premises are destroyed by force majeure.

COMMERCIAL LEASES

The same principles apply to commercial leases.

The Commercial Lease Act also allows a landlord to terminate a commercial lease at the end of every three years if the following conditions are satisfied:

- there is express provision for this in the lease;
- the landlord (or certain connected persons) wants to start a business in the premises;
- the tenant is notified of the termination by registered letter or by a notice served by a bailiff at least one year before the end of the three-year period, which expressly mentions the reasons for termination; and
- depending on the nature of the business the landlord is intending to start, compensation is payable.

The tenant can terminate the lease at the end of every three years if they notify the landlord of their intention by registered letter or by a notice served by a bailiff at least six months before the end of the relevant three-year period. The tenant cannot waive this right.

COMMERCIAL LEASES (POP-UP RETAIL AND WORKSHOPS) IN THE FLEMISH REGION

Under the Flemish Decree and the Walloon Pop-up Lease Decrees, the tenant can terminate the pop-up lease at any time by registered letter or by a notice served by a bailiff with a prior notice of one month. The parties can also terminate the pop-up lease by mutual agreement before the end of the period of one year or less on condition that this is confirmed in writing.

6.8 Sale of Leased Property

GENERAL LEASES (OFFICES, WAREHOUSES, INDUSTRIAL BUILDINGS)

According to article 1743 of the Belgian Civil Code, the purchaser of a leased property cannot evict the tenant who benefits from a notarized lease (which is mandatory for leases with a term of more than nine years) or from a private lease with a so-called firm date (which occurs at the moment of the mandatory registration of the lease).

This principle can be derogated from by inserting a specific provision in the lease allowing the purchaser to evict the tenant if they sell the leased property.

COMMERCIAL LEASES

The Commercial Lease Act provides protections from eviction for the tenant.

Even when the lease reserves the option of eviction in case of the sale of the leased property, the purchaser (whether by gift or for consideration), may evict the tenant only under certain circumstances described in the Commercial Lease Act. One year's notice must be given to the tenant within three months of the purchase, stating clearly the reason for the termination. If this is not provided, the right to evict will lapse. The same rule applies when the lease does not have a so-called firm date prior to the sale, provided the tenant has been in occupation of the property for at least six months.

COMMERCIAL LEASES (POP-UP RETAIL AND WORKSHOPS) IN THE FLEMISH AND WALLOON REGION

Under the Flemish Decree and the Walloon Pop-up Lease Decrees, the purchaser must comply with the registered pop-up lease and cannot evict the tenant under said registered pop-up lease.



7. Tax

Registration duties (*registratierechten/droits d'enregistrement*) corporate income tax (*vennootschapsbelasting/impôt des sociétés*) or VAT (*Belasting over de Toegevoegde Waarde – BTW/Taxe sur la Valeur Ajoutée – TVA*) may be payable on asset purchases.

7.1 Registration duties

The transfer of ownership, or the creation or sale of a usufruct (a right to use the property concerned and to benefit from its profits and/or products) over an asset located in Belgium is subject to a 12.5% registration duty (10% in the Flemish region), calculated on the contract price or the market value, whichever is higher. In some circumstances, a reduced registration duty rate of:

- a) 4% in the Flemish region;
- b) 5% in the Walloon region; and
- c) 8% in the Brussels Capital region

applies to purchases by corporate entities or individuals whose business activities mainly consist of buying and selling real estate.

The creation or the acquisition of a long lease or a building right are alternatives to purchase. These can be granted for a long period (up to 50 years for building rights and up to 99 years for long leases). Where they are not subject to VAT (see below), these are generally subject to registration duties at the rate of 2%, calculated on the total price and any charges imposed on the beneficiary of the building right or long lease.

A contribution in kind of real estate into the share capital of a Belgian company (without liability), or the

transfer of such property through a merger or demerger, is generally not subject to normal registration duties or to VAT. In such cases only a fixed duty of EUR50 is payable upon registration of the notarized deed. This also applies to the acquisition by a company of a wholly owned subsidiary (the simplified merger procedure). An exception is made for buildings designated for private residential use, if the contribution is made by an individual (a 12.5% or 10% registration duty is payable).

7.2 Value added tax

The transfer or grant of rights in rem over new buildings can be subject to VAT (at 6%, 12% or 21%). A newly constructed building is considered to be new for VAT purposes until December 31 of the second year after it is first brought into use (this also applies to renovated buildings which have been structurally modified or which have been given a new use or function).

The purchase of land associated with a new building is subject to the same VAT treatment as the purchase of the new building, if that land and the new building are sold simultaneously by the same owner. No VAT is due on the part of the price attributable to the land if the building is not new or if these conditions are not met. Registration duties will, however, be payable on the sale of the land at a rate of 12.5% (10% in the Flanders region).

No VAT is payable on the transfer of a property which relates to a transfer of a going concern by means of a sale, contribution or otherwise, although in some cases registration duties may apply.

7.3 Other real estate taxes

REAL ESTATE WITHHOLDING TAX (*PRÉCOMPTE IMMOBILIER/ONROERENDE VOORHEFFING*)

Annually a real estate withholding tax is charged to the owner or beneficiary of a right in rem of real property in Belgium. This withholding tax is charged at rate of 1.25% or 3.97% (depending on the region) on the deemed rental income (*revenu cadastral/kadastraal inkomen*) that has been attributed to the real property as indexed on January 1 of the relevant tax assessment year.

Additional provincial and municipal surcharges are levied on top of the (regional) real estate withholding tax, which may increase the effective tax rate to around 30% to 50% of the deemed rental income, depending on the province and municipality where the real estate is located.

Belgian real estate withholding tax is not refundable and cannot be credited against corporation tax. However, it is fully deductible from a company's taxable profit.

LOCAL TAXES

There are a number of local taxes imposed by the regions, provinces and communes that are linked to the real estate itself or to the use of the real estate.

7.4 Taxation of rental income from real estate

Resident companies are subject to a standard corporate income tax rate of 29.58%. This rate will be reduced to 25% as from 2020. The first income band of EUR100,000 of small companies (see definition 7.5) is subject to a lower rate of 20.40% (20% as from 2020) if some additional conditions are fulfilled.

For companies using or exploiting real estate, taxable income is determined on the basis of the accounting profit or loss realized from such use.

Profit can be reduced by deducting the expenses associated with the property, such as the depreciation of buildings (depreciation of land is not possible), repairs, maintenance, renovation and similar costs, and interest on loans taken out to finance the acquisition of the real estate (with some exceptions).

Corporate income tax, advance payments and withholding tax on income included in the tax base are not deductible. This is also the case for interest on late payments, fines and any associated prosecution expenses.

Generally, taxes, fees and public service charges payable to the regions, as well as surcharges, penalties and other similar charges are not deductible, but immovable withholding tax, registration duties on the transfer of the real estate and mortgage duties are tax deductible.

7.5 Taxation of dividends from a company owning real estate

As a general rule, dividends paid by Belgian companies are subject to a 30% withholding tax. Subject to certain conditions, a reduced rate might apply.

Under the EU Parent-Subsidiary Directive, as implemented in Belgium, no withholding tax is payable on dividends paid by a Belgian company to another EU company or to a company resident in a non-EU state that has concluded with Belgium a double taxation treaty containing an exchange of information clause, provided that:

- the latter has held at least 10% of the share capital of the Belgian company for an uninterrupted period of at least 12 months;
- the shareholding company receiving the dividend is a tax resident in a qualifying state in accordance with that member state's domestic tax law; and
- the company receiving the dividend is subject to corporate income tax in its qualifying state of residence without benefiting from a regime that deviates from the normal tax regime.

Where the minimum holding period of 12 months has not yet expired, the distributor of the dividends must provisionally retain the withholding tax theoretically due on the dividends and the beneficiary must sign a declaration that the participation will be held for at least 12 months. If the beneficiary does not comply with this declaration, the withholding tax must be paid to the tax authorities. If the declaration is complied with, the amount withheld can be paid to the shareholder.

The withholding tax rate may also be reduced under an applicable double taxation treaty if the dividends are paid to foreign companies, or also under domestic legal provisions in some cases.

7.6 Taxation of capital gains on real estate

Capital gains realized on the sale of a real estate asset held directly (buildings as well as land) are subject to normal corporation tax. However, a system of deferred taxation applies if the proceeds are entirely reinvested within three or five years in depreciable intangible or tangible fixed assets that are used for business purposes in Belgium or in any other member state of the EEA. Losses related to real estate can be offset against other income. Tax losses may be carried forward indefinitely.

Capital gains realized by non-resident companies on the sale of immovable property in Belgium are subject to a withholding tax retained at source by the notary public. Afterwards the companies may offset any relevant charges and losses carried forward against this income through their annual tax return. As such, the withholding tax only results in a pre-financing cost.

Capital gains realized by individuals on the sale of real estate assets held for business purposes are normally taxed at the general progressive income tax rates (plus municipal surcharges). This system of deferred and spread taxation also applies to individuals. A separate tax rate of 16.5% (plus municipal charges) applies if these real estate assets are held for more than five years, in which case the system of deferred taxation will not apply.

Capital gains realized by individuals on the sale of real estate assets that are not held for business purposes are taxed at a separate rate of 16.5% (plus municipal charges), if they are sold within five years (in the case of buildings) or eight years (in the case of land) from their acquisition.

7.7 Taxation of capital gains from the disposal of shares in a company owning real estate

In principle, capital gains realized by a Belgian company on shares in a property company are exempt from Belgian corporate tax provided that:

- (i) the property company meets a subject-to-tax test;
- (ii) the vendor held a participation in the property company of at least 10% or with an acquisition value of EUR2.5 million; and
- (iii) the vendor holds the shares in full ownership for at least one year.

The non-fulfilment of either of the first two conditions would suffice to have the capital gain subject to the full corporation tax rate (i.e. 29.58% or 20.40% for small companies on a first income band of EUR100,000). If these first two conditions are met but the condition related to the minimum holding period is not fulfilled, a rate of 25.50% (or 20.40% for small companies on a first income band of EUR100,000) will apply.

Capital losses on sales of shares are not deductible, except where the company is liquidated (up to the amount of the paid-up capital of the liquidated company), or where the shares form part of the trading stock of credit institutions and investment undertakings.

Unless there has been a speculative activity, capital gains realized on the sale of shares that are not held for business purposes by Belgian or foreign individuals are tax exempt. In the event of a speculative sale of shares that are not held for business purposes, a separate tax rate of 33% will apply to be increased by additional municipal surcharges.

7.8 Real estate investment trusts

Belgian civil law does not recognize the concept of trusts as such.

7.9 Regulated real estate companies (B-REIT) and specialized real estate investment funds (B-REIF)

TAXATION OF CURRENT INCOME IN BELGIUM

Corporation tax

In principle, there is no taxation of these entities' current income. They are subject to the standard corporation tax rate of 29.58% (i.e. 29% plus 2% crisis contribution), but their taxable income only consists of specific items, such as received abnormal or gratuitous advantages and expenses that are not deductible (other than reductions in value or capital losses on shares). This usually means that their taxable base is very limited.

An exit tax will become due at a special corporation tax rate (of currently 12.75%, i.e. 12.5% plus 2% crisis contribution) on the difference between the market value and the recorded value of all transferred assets when an existing ordinary taxed company is converted into a regulated real estate investment company or a specialized real estate investment fund. The same special corporation tax rate applies to reorganizations involving a B-REIT or a B-REIF (unless only such

entities are involved), including the contribution of a real estate asset by an ordinary taxed company into the share capital of such B-REIT or B-REIF.

Immovable withholding tax

Regional tax is payable at the rate of 1.25% (in Brussels and Wallonia) or 3.97% (in Flanders) on the deemed rental income (cadastral income) of the property, plus additional local surcharges (which may increase this tax to around 30% to 50% of the deemed rental income).

TAXATION OF DISTRIBUTION OF CURRENT INCOME TO INVESTORS

Withholding tax

In principle, a 30% withholding tax will be due on a dividend distribution by a B-REIT or a B-REIF, irrespective of whether the shareholder is an individual or a corporate entity. A rate reduction may apply under a bilateral tax treaty.

Non-resident investors may in principle benefit from an exemption of Belgian withholding tax on the dividends they receive from a B-REIT or a B-REIF to the extent that those dividends do not stem from Belgian real estate and dividend income.

Qualifying non-resident pension funds may in principle benefit from a general exemption from Belgian withholding tax on dividends received from a B-REIT or a B-REIF, irrespective of the source of income – Belgian or foreign – that is distributed.

Income tax for a shareholder who is a resident for Belgian income tax purposes

An individual shareholder of a B-REIT or a B-REIF who holds his shares as a private investment, will be subject to a 30% withholding tax on the dividends that they receive on such shares. The withholding tax will be the final tax in the hands of the shareholder.

Corporate shareholders that are subject to the Belgian corporation tax will in principle be taxable on the dividends they receive from a B-REIT or a B-REIF. As a rule, such dividends are not eligible for the Belgian participation exemption regime. These will therefore be treated as ordinary income and will be included accordingly in the calculation of the corporation tax.

An exception to this rule applies for the categories of income listed below that are (re)distributed by a B-REIT or a B-REIF. To the extent and insofar dividends received from a B-REIT or a B-REIF encompass such income, these dividends benefit from the Belgian participation exemption regime and are therefore exempt from corporation tax in the hands of the shareholder:

- income stemming from real estate assets located in another EU-member state or in a treaty country (with exchange of information) and which has been subject to (a tax similar to) the Belgian corporation or non-residents tax, without benefiting from a deviating tax regime;
- subject to the B-REIT or the B-REIF complying with a 80% pay-out ratio:
 - dividends that meet the subject-to-tax requirement under the participation exemption regime; and
 - capital gains on shares that qualify for the exemption from corporate income tax.

TAXATION OF CAPITAL GAINS

Capital gains on the sale of real estate assets

There is no taxation of capital gains at the level of the B-REIT or the B-REIF, since capital gains are not part of the taxable income of such entity.

Capital gains on the sale of a participation in a B-REIT or in a B-REIF

If the shareholder is a private individual holding the shares as part of their private investment, capital gains realized on these shares will, in principle, be exempt from income tax, unless the tax authorities can demonstrate that there has been speculation or that the sale of the participation is not consistent with the normal management of the taxpayer's estate.

In the hands of a corporate shareholder, the net capital gains realized on the shares of B-REIT or a B-REIF will be exempt from corporation tax to the same extent as that the dividends received from those shares would have been eligible for the participation exemption regime.



8. Real estate finance

8.1 Interest rate risks

Commercial property can be financed with long-term and short-term loans. In both cases there is a risk of rising interest rates. Fixed interest rate periods can be chosen to protect against such risks. However, the risk of interest rate fluctuation still exists when a loan is extended or follow-up financing is secured. This can be hedged against by derivatives, particularly interest rate swaps.

8.2 Assets held as security

Real estate includes the land, buildings erected on it and fixtures which form part of those buildings.

Security can also be taken over fittings, furniture and moveable objects.

A party can only grant security over a property to the extent of the rights that they possess over that asset.

8.3 Further collateral agreements

Both private individuals and legal entities may invest in Belgian real estate, whether outright or via the means of a company. Loans can be obtained for this purpose, from both Belgian or foreign banks, without any restriction or limitation in principle.

The most common forms of security in relation to real estate finance are:

- a) a mortgage and a power to mortgage (see above);
- b) a pledge over the borrower's business and movable assets;

- c) a pledge over receivables (including rent due to the borrower);
- d) a pledge over bank accounts;
- e) a pledge over shares; and
- f) personal or corporate guarantees.

PLEDGE OVER THE BORROWER'S BUSINESS

Another form of security for a lender, is the taking of a pledge over the borrower's business as a going concern. This is a charge over the borrower business clientele, goodwill, fixtures, trademarks, leases and fixed assets, excluding any real property. A pledge over the business may also include all receivables (debts due), cash and the business own securities if the pledge agreement provides to that effect.

The pledge over the business can be granted by private deed and must be registered with the National Pledge Register. The registration is valid for ten years and is renewable.

In the event of non-payment, the creditor will, with permission of the pledgor, granted in the pledge agreement or at a later stage and subject to certain conditions, be able to appropriate the pledged assets and put those assets up for sale. If such permission has not been granted, the creditor needs to seize the assets before he can ask for the permission of the Commercial Court to sell those assets. However, a conflict can exist between the holder of the pledge over the business, and certain other creditors, such as unpaid landlords

and creditors with unpaid invoices in respect of business equipment. In certain cases these creditors must be paid in preference to the holder of the pledge over the business with the proceeds of the sale of those parts of the business that are subject to their privilege.

Under Belgian law, subsequent pledges can be taken over the business of a company. The pledge over the business which is registered and entered first will rank first.

PLEDGE OVER MOVABLE ASSETS

All movable assets, tangible and intangible, in whole or in part, can be pledged by private agreement. A pledge over movable assets is valid between the parties to it from the date it is concluded but, in order to be valid against third parties, the pledge should be registered in the National Pledge Register.

A pledge over tangible moveable assets is also valid against third parties simply by the pledgee taking possession of the relevant assets.

With the permission of the pledgor, granted in the pledge agreement or at a later stage, the pledgee can, subject to satisfying certain conditions, appropriate the pledged assets, without prior court approval, in the event of a payment default.

PLEDGE OVER RECEIVABLES

A pledge over receivables is effected by private agreement. It is valid between parties and enforceable against third parties (other than the debtor of the receivables) as from the date of its conclusion. However, the debtors of the receivables must

be notified of, or acknowledge, the pledge. If not, a payment to the pledgor is valid and the debtor cannot be held liable to make a second payment to the pledgee.

PLEDGE OVER BANK ACCOUNTS

As a pledge over a bank account is viewed as a pledge over a receivable (a claim on the bank for the funds standing to the credit of the account). The same principles as set out above apply. An acknowledgement by the bank holding the pledged accounts is required in order to protect the pledgee against risks arising out of rights afforded to the bank pursuant to its general conditions or otherwise (a bank usually benefits from a right of pledge over the accounts held by its clients, which must be waived in favor of the pledgee).

PLEDGE OVER SHARES

Where the purchaser or borrower intends to buy shares in a real estate company rather than the property directly, the lender will usually be offered a pledge over the shares to be purchased, as security.

Where the borrower is a shareholder of substance, the lender may take a pledge on the borrower's shares portfolio. This particular type of pledge may also be of interest where a holding company wishes to grant a security for a loan taken by one of its subsidiaries.

For the lender, the benefits of such a pledge rests in their effective control over the borrower's shareholding as the borrower cannot dispose of the shares without notice to and the agreement of the pledgee.

The pledge agreement will not in itself transfer title to the shares to the lender but will assign certain shareholders' interest in them on such terms that the lender (assignee) is able to dispose of them and apply the proceeds towards the debt owed.

GUARANTEES

A lender can request personal or corporate guarantees. This is often relied on by a lender as an additional top-up security and is favored by holding companies in respect of loans granted to their subsidiaries. Guarantees can be for the total amount borrowed or can be limited to interests payable or the short-fall in value (deficiency) or to any agreed amount.

The personal guarantee does not give the lender security over the borrower's assets. The only benefit of a guarantee is that the lender is able to claim against two companies instead of one and in this way may spread their risk.

8.4 Taxation on the creation of security

The following indirect taxes and fees are payable upon the obtaining of a mortgage and the registration of a pledge over movable assets or a business pledge in the National Pledge Register:

- approximately 1.3% of the amount of the guaranteed debt in connection with the registration of a mortgage and the conversion of a mortgage mandate; and
- depending on the amount of the guaranteed debt, between EUR20 and EUR500 in connection with the registration of a pledge in the National Pledge Register, EUR500 being the maximum amount payable to the extent that the maximum amount of the guaranteed debt exceeds EUR500,000.

In addition, notary fees must be paid for any notarized deed such as a mortgage deed.

For other forms of security such as a pledge over shares, a pledge over receivables and a pledge over bank accounts and guarantees, no substantial taxes or fees will be due. Only a lump sum duty of EUR0.15 on certain finance documents executed in Belgium (payable on each original finance document within the scope of the duty) and a EUR50 registration duty are due.



Glossary

FRENCH TERM	ENGLISH EQUIVALENT
Cadastre	Land Register
Compromis de vente	Private sale agreement
Précompte immobilier	Immovable withholding tax
Registre des hypothèques	Mortgage Register
Servitude	Easement
SIR	Regulated real estate company (B-REIT)

DUTCH TERM	ENGLISH EQUIVALENT
Kadaster	Land Register
Verkoopcompromis	Private sale agreement
Onroerende voorheffing	Real Estate withholding tax
Hypotheekkantoor	Mortgage Register
Erfdienstbaarheid	Easement
GVV	Regulated real estate company (B-REIT)

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This guide was written predominantly by our Real Estate practice group.

This guide was updated in February 2019. Subsequent changes in law are therefore not taken into account.

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