Real Estate Investment in Belgium

THE LEGAL PERSPECTIVE

DLA PIPER

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.

Contents

1. Ownership of real estate

1.1 Law reform on the provisions relating to ownership of real estate and property law in general

On 17 March 2020, the bill of 4 February 2020 containing the new Book 3 on "Property Law" of the Civil Code was published in the Belgian Official Gazette (Bill).

The larger reform of the Belgian Civil Code indeed includes a fairly comprehensive revision of property law. The goal of the new legislation is to adopt a functional approach to property law and to modernize antiquated legal concepts for use in a contemporary context.

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 is 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 is no longer be written that the owner has absolute powers over the property (see *supra*).

1.3 Co-Ownership

The Bill introduces several important changes to the rules on 'forced co-ownership', including:

- The possibility to vote by a 4/5 majority on the demolition and reconstruction of the building, if the safety or hygiene of the building is compromised or if the renovation would be disproportionately costly. Accompanying measures are provided for with a view to protecting the co-owners who did not consent to this. They may give up their private property in exchange for compensation if the cost of the works exceeds the value of their private property.
- The implementation of the "the one who pays decides" principle: only those who contribute to the charges in the common parts may vote in connection with the common parts. This offers additional possibilities for compartmentalisation of real estate co-ownership projects without having to establish partial co-ownership associations.
- Downsizing of the bylaws, so that only the division of the building and the obligation to contribute must be included in the bylaws. The other provisions can be inserted in the house rules, which have to be updated by the co-ownership manager ("syndicus"/"syndic").
- Various measures facilitating the recovery of contributions, such as (1) an automatic power for the co-ownership manager to claim the contributions in court, (2) the granting of a privilege to the association of co-owners, and (3) legal joint liability of the bare owner and the usufructuary of an apartment.
- Reduction of the 3/4 majority to a 2/3 majority.
- A statutory public easement to lay cables and pipelines across the common parts of the building.

1.4 Volumes

The Bill introduces the concept of volumes in the very definition of the right to build ("opstalrecht"/"droit de superficie"). The right to build has now been defined in terms of volumes. It is now foreseen that the right to build can be "perpetual" in a number of cases. This is the case, and this is the most far-reaching innovation, for a complex and heterogeneous property comprising different volumes that are eligible for independent use and have no common parts between them. One thus creates a kind of equivalent for volume ownership, via the detour of the right to build. These are the conditions for such perpetual building right to apply:

- it must be a complex and heterogeneous whole;
- volumes must be formed;
- there must be no common parts, otherwise you end up in the scope of application of the mandatory apartment co-ownership law (instead of common parts there will be easements);
- there must be a landowner (one does not speak of a right in rem, but effectively of ownership).

1.5 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 is 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 is integrated in the Civil Code. This creates a general legal framework for exercise of the right and leaves significant room for contractual freedom, save for a maximum duration of 50 years under the old law and 99 years under the new law.

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.

1.6 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/kadaster)*. 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 Office of Legal Certainty (previously Mortgage Register) (bureau de sécurité juridique/kantoor rechtszekerheid). The information contained in both the Land Register and the Mortgage Register is available to the public.

The Mortgage Law governs registration with the Office of Legal Certainty (previously 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 Office of Legal Certainty (previously 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 Law, 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. An alternative of protecting the buyer's interests is the indemnity clause, which will generally be included in the agreement if the due diligence review reveals any irregularities or beaches regarding the company's activities and/or operations.

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. If the agreement contains an indemnity clause, the occurrence of a specified event resulting in the seller's liability will be a sufficient basis for the buyer's claim

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 mortgage mandates

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 Office of Legal Certainty (previously registration office) and entered on the Office of Legal Certainty (previously Mortgage Register) in order to be valid against third parties. Depending on the location of the property, different regional registration fees may apply.

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 and will be the basis for the calculation of the applicable taxes and fees. The granting of a mortgage entails a significant cost (taxes, registration fees, notary fees, etc) of approximately 1.6% of the secured amount, with the biggest cost relating to the registration of the mortgage in the Office of Legal Certainty (previously Mortgage Register).

Mortgage mandate

In order to reduce the registration duties and fees related to granting in a mortgage, it is a common practice in Belgium to split the mortgage into (i) an effective mortgage and (ii) a mortgage mandate. With this technique, the chargor only grants effective security for a fraction of the agreed secured amount, and a mandate for the balance.

The mortgage mandate is an agreement between a the chargor and representatives of the lender pursuant to which those representatives (acting in their own name and not that of the lender) are granted the power to establish a mortgage.

Note, however, that the mandate itself does not create an actual security interest in the asset, but only a mandate to grant such security interest at a later point in time. Only at that point, namely upon the conversion of the mandate and the registration of the mortgage in the Office of Legal Certainty (previously Mortgage Register), the security interest will obtain its ranking and the registration fees will be due. As a result, any mortgage established before the conversion of the mandate, will be prior in ranking. Furthermore, 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.

Despite this mortgage mandate technique, it remains customary in Belgium for lenders to take an effective mortgage for at least a portion of the secured obligations, in order to secure ranking for a portion of the secured amount and to raise awareness towards potential other creditors as to the existence of outstanding secured financing.

3.2 Easements

The right of easement (*servitudelerfdienstbaarheid*) 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.

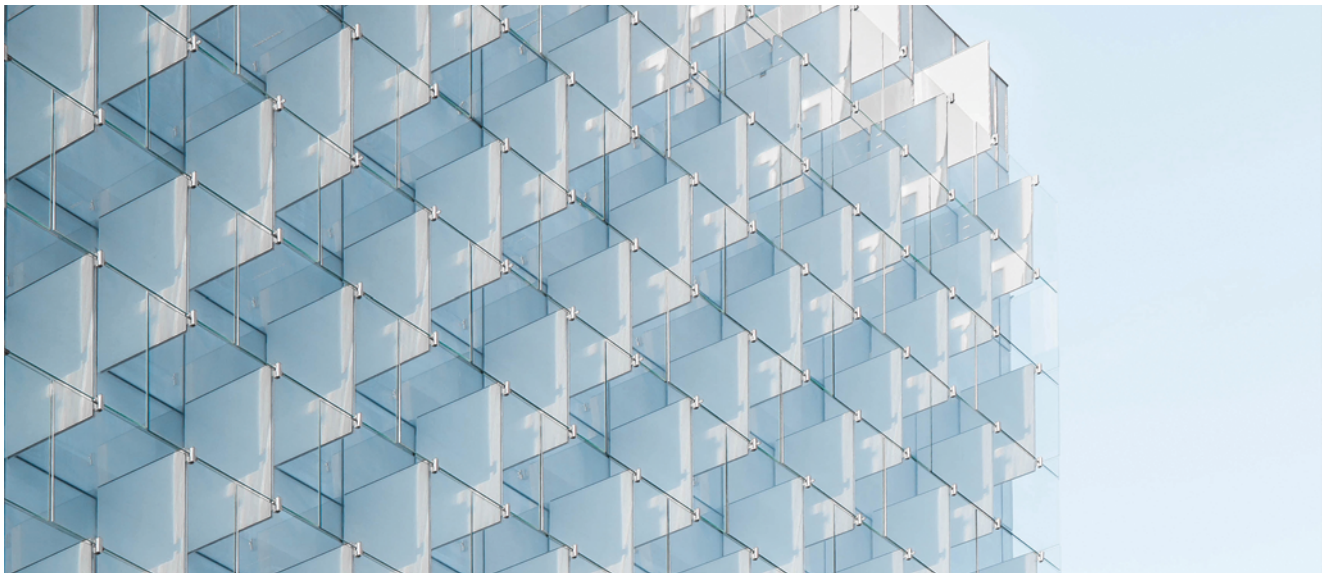
Local authorities e.g. provinces in the Flemish Region and municipalities) apply the regional legislation, and can set their own local zoning and planning policies taking into account the regional policies.

The main current zoning and planning legislation is:

- the Flemish Urban Planning Code of May 15, 2009 (VCRO Flemish Region).
- the Flemish Decree on the integrated environmental permit (omgevingsvergunning) of April 25, 2014 (Omgevingsvergunningsdecreet, Flemish Region), which (entirely) came into effect on January 1, 2018.
- the Decision of the Flemish Government implementing the Decree of 25 April 2014 on the integrated environmental permit of November 27, 2015 (Omgevingsvergunningsbesluit, Flemish Region) which came into effect on February 23, 2017.
- the Flemish Decree relating to complex project of April 25, 2014 (Decreet complexe projecten, Flemish Region) which entered into force on March 1, 2015.
- 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 entered into force on September 1, 2019.

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, level, and local level and provincial level in the Flemish Region. 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.

In addition, we note that other rules apply for earth moving (grondverzet/travaux de terrassement).

Flemish region

According to the Flemish decree on soil remediation and soil protection of October 27, 2006, 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 integrated environmental permit or a 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 Walloon soil management and soil remediation of March 1, 2018 provides that the following persons are responsible for remediation:

a) the causer or the alleged causer of the soil pollution; or

b) the exploitant.

If neither of these people can be identified, or it is difficult to attribute responsibility, or if they are insolvent, then the responsibility rests with the holder of a right in rem or the owner.

Brussels Capital region

In the Brussels Capital region, the Ordinance on the management and remediation of contaminated soils 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 that remediation shall be carried out at the expense of:

a) the current operator who has caused this pollution;

b) the holder of rights in rem causing the pollution;

or

c) the identified person who caused that pollution.

Again, the person who has caused the soil contamination is liable for the costs incurred for the treatment of the contamination.

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 Brussels Capital Housing Lease ordinance and the Walloon Housing Lease decree have also introduced specific provisions with respect to the student lease *(bail étudiant/ studentenhuurovereenkomst) and the shared lease (bail de colocation/ medehuurovereenkomst)*.

The Flemish Housing Lease Decree has also introduced specific provisions with respect to the student lease. Student leases in Flanders, concluded as of January 1, 2019 must comply with the provisions of the Flemish Housing Lease Decree.

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 Office of Legal Certainty (previously 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 Office of Legal Certainty (previously 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)*, income tax *(inkomstenbelasting/impôt sur les revenus)* and/or VAT *(Belasting over de Toegevoegde Waarde (BTW)/Taxe sur la Valeur Ajoutée (TVA))* come into play in the framework of real estate transactions.

7.1 Registration duties

The transfer of full ownership of real property and the constitution or transfer of an usufruct right (i.e. the temporary right to use and enjoy the property belonging to the bare owner) on real property located in Belgium are subject to a 12.5% (Walloon and Brussels Region) or a 10% registration duty (Flemish Region), calculated on the stipulated price or the market value of the property, whichever is higher. Under certain conditions, a reduced registration duty of:

a) 4% in the Flemish Region;

b) 5% in the Walloon Region; and

c) 8% in the Brussels Region,

can apply to purchases by so-called "professional sellers", i.e. companies or individuals whose business activity primarily consists of buying and selling real property.

The constitution or the transfer of a long lease right or building right on real property is an alternative to the purchase of the real property itself. Aforementioned rights can be granted for a long period (up to 99 years for both rights as from 1 September 2021). The constitution or transfer of these rights in rem is generally subject to a registration duty of 2%, calculated on the total amount of remuneration and charges (if any) to be paid by the beneficiary of the right in rem, unless VAT applies (see below).

A contribution (in kind) of real property, other than property entirely or partially destined for private use and contributed by an individual, into a Belgian company, or the transfer of all assets and liabilities, including such real property, to a company in the framework of a merger or demerger, is generally exempt from l registration duties or VAT (provided that certain conditions are met). In this case, only a fixed duty of EUR 50 is payable upon registration of the notarized deed. The exemption also applies to the absorption by a company of a wholly owned subsidiary (the "simplified merger")..

7.2 Value added tax

The supply of or grant of rights in rem on "new" buildings is in principle subject to VAT (at 6%, 12% or 21%). A building is considered to be new for VAT purposes until December 31 of the second year following the year during which the building was first used or occupied. Renovated old buildings can be considered as new buildings for VAT purposes under well-defined conditions. The purchase of a new building together with the land on which it stands are subject to the same VAT treatment. If the building is not "new" for VAT purposes of if the land is not sold simultaneously with the (new) building by the same party, no VAT will be due and registration duties will apply (at a rate of 12.5% or 10%).

Subject to specific conditions, no VAT will be due if the transfer of real property is part of a "transfer of going concern".

7.3 Other real estate taxes

IMMOVABLE WITHHOLDING TAX *(PRÉCOMPTE IMMOBILIER/ ONROERENDE VOORHEFFING)*

The immovable withholding tax is an annual tax on real property located in Belgium. The immovable withholding tax is levied by the Region (Flanders, Wallonia or Brussels) in which the real property is located and is due by the owner of the real property or the beneficiary of a right in *rem*. This withholding tax is levied at a rate of 1.25% or 3.97% (depending on the Region) on the annual deemed rental income *(revenu cadastral/ Ikadastraal inkomen)* that has been attributed to the real property as indexed on January 1 of the relevant tax assessment year.

Additionally, provincial and municipal surcharges are levied on top of the regional 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 in which the real property is located.

The immovable withholding tax is not refundable and cannot be credited against corporate income tax. However, it can be fully deducted from a company's taxable profit.

LOCAL TAXES

There are a number of local taxes imposed by the regions, provinces and municipalities that are linked to the real property itself or the operation of the real property.

7.4 Taxation of real estate income

Resident companies (and non-resident companies with a permanent establishment in Belgium) are subject to a standard corporate income tax rate of 25%. Small companies may benefit from a reduced rate of 20% on their first income band of EUR100,000, provided that certain conditions are fulfilled.

The taxable base for companies using or operating real property is determined on the basis of the accounting profit or loss, with tax corrections, realized from such use.

The taxable profit can be reduced by deducting the expenses related to the real property, such as the depreciation of the property (depreciation of land is not allowed), repair, maintenance, renovation and similar costs, and interest on loans contracted to finance the acquisition of the real property (the deduction of net interest charges is limited to the higher of (i) EUR3.000.000 or (ii) 30% of the taxable EBITDA.).

Corporate income tax, advance tax payments and withholding taxes, as well as late payment interests and (criminal) fines are not tax deductible. On the other hand, the immovable withholding tax, registration duties and mortgage duties are generally tax deductible.

7.5 Taxation of dividends distributed by a real estate company

Dividends paid by Belgian companies are in principle subject to a 30% withholding tax. An exemption from or reduction of withholding tax may be claimed on the basis of Belgian domestic tax law or of the applicable double tax treaty concluded between Belgium and the state of residence of the shareholder(s). Pursuant to the EU Parent Subsidiary Directive, implemented in Belgian domestic tax law, an exemption from withholding tax on dividends paid by a Belgian company to a company established in another EU company or in a country with which Belgium has concluded double tax treaty which provides for an exchange of information clause can be claimed under the following conditions:

- the beneficiary holds a participation in the Belgian company that represents at least 10% of the share capital (shares which are subject to a pledge or other security rights at the moment of the dividend distribution are not taken into account for the determination of the 10% minimum participation);
- the beneficiary holds or has held this participation uninterruptedly for a period of at least one year;
- the beneficiary is a tax resident in its country of residence and is subject to corporate income tax without benefiting from a tax regime deviating from the common tax regime; and
- the beneficiary has a legal form that is mentioned in the Annex to the EU Parent-Subsidiary Directive (for EU companies) or a similar legal form (for non-EU companies).

If the minimum detention period of at least one year is not yet complied with at the time of the dividend distribution the Belgian company must provisionally retain the withholding tax theoretically due on the dividends and the beneficiary must provide the Belgian company with a duly signed certificate in which it declares that the participation will be held for at least one year. If the beneficiary does not comply with this requirement, the withholding tax must be paid by the Belgian company to the Belgian Treasury.

7.6 Taxation of capital gains realized upon the sale of real property

Capital gains realized by companies upon the sale of real property located in Belgium are in principle subject to corporate income tax. However, a system of deferred and spread taxation applies if the sale proceeds are entirely reinvested in depreciable intangible or tangible fixed assets that are used for business purposes in Belgium or in any other member state of the European Economic Area (EEA) within three years as from the start of the taxable period in which the capital gain is realized. This period is extended to five years for reinvestments in buildings.

Capital gains realized by non resident companies or individuals upon the sale of real property located in Belgium are subject to a (professional) withholding tax (to be) retained at source by the notary public. The retained withholding tax will subsequently be offset against the actual non-resident income tax due. Capital gains realized by individuals upon the sale of real property located in Belgium held for business purposes are in principle subject to personal income tax

at the progressive income tax rates (plus municipal surcharges). Individuals can also benefit from the system of deferred and spread taxation (see above). A distinct tax rate of 16.5% (plus municipal charges) will apply if the real property has been held for business purposes for more than five years, and no use is made of the system of deferred and spread taxation.

Capital gains realized by (Belgian and non-resident) individuals upon the sale of real property not held for business purposes are subject to personal income tax at the distinct rate of 16.5% (plus municipal charges), if the real property is sold within a period of five years (for buildings) or eight years (for land) as from the acquisition date.

7.7 Taxation of capital gains realized upon the sale of shares in a real estate company

Capital gains realized by a Belgian company (shareholder) on shares held in a real estate company are exempt from Belgian corporate income tax provided that:

(i) the real estate company meets the subject to tax condition (this condition is met if the real estate company is subject to corporate income tax);

(ii) the shareholder holds a participation in the capital of the real estate company of at least 10% or with an acquisition value of at least EUR2.5 million; and

(iii) the shareholder has held the shares in full ownership for an uninterrupted period of at least one year.

If one of the aforementioned conditions is not met, the Belgian company will be taxed on the realized capital gains at the ordinary corporate income tax rate of 25%.

Capital losses suffered upon the sale of shares and reductions in value of the shares are not tax deductible, except for capital losses realized upon liquidation of the real estate company(for the part that corresponds to the paid up capital represented by those shares).

Capital gains realized by a Belgian individual (shareholder), outside the exercise of a professional activity, on shares held in a real estate company are in principle exempt from personal income tax provided that the sale of the shares falls within the scope of a normal management of private assets. Should this not be the case, the capital gains will be taxed at the distinct rate of 33% (to be increased with municipal surcharges).

7.8 Trusts

The Bill has introduced the new concept of the "*fiducie*", akin to a "trust". Within strict boundaries once can set up this *fiducie* concept in which the trustee receives property in trust for a beneficiary and can even dispose of such property.

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

TAXATION OF INCOME IN BELGIUM

Corporate income tax

B-REITs and B-REIFs are subject to corporate income tax at the rate of 25%, but their taxable base only consists of received abnormal or gratuitous benefits and disallowed expenses other than write-offs and capital losses on shares and excess borrowing costs which are not considered as professional expenses). Their taxable base is therefore limited, since it does not include investment income (rental income, capital gains, ...).

A so-called "exit tax" of 15% (*i.e.* special corporate income tax rate) will be due upon conversion of a regular company into a B-REIT or B-REIF on the unrealized gains and tax-exempt reserves of that company. The exit tax also applies to reorganizations (e.g. mergers, demergers) in which a B-REIT or B-REIF is involved, including, the contribution of real property by a regular company into the share capital of such B REIT or B REIF.

TAXATION OF DISTRIBUTIONS OF INCOME TO INVESTORS

Withholding tax

A 30% withholding tax is in principle due on a dividend distribution by a B REIT or B REIF to its shareholder(s), irrespective of whether the shareholder is an individual or a company. An exemption from or reduction of withholding tax may be claimed on the basis of Belgian domestic tax law or the applicable double tax treaty concluded between Belgium and the country of the shareholder(s). Dividends distributed by a B-REIT or B-REIF can benefit from a reduced withholding tax rate of 15% (instead of 30%), provided that at least 60% of the company's real estate portfolio is (directly or indirectly) invested in real estate properties that are located in a member state of the European Economic Area and are exclusively or primarily destined for care and housing units suited for healthcare.

Non resident investors (who did not affect their investment to the exercise of a business activity in Belgium) can in principle benefit

from an exemption from Belgian withholding tax on dividends received from a B REIT or a B REIF. Such exemption does not apply to the part of the dividend that stems from Belgian real estate income and dividend income which the B-REIT or B-REIF has itself received from a resident company.

Qualifying non resident pension funds may benefit from a an exemption from Belgian withholding tax on dividends received from a B REIT or a B REIF, under certain conditions.

Taxation of distributions at the level of the Belgian shareholders

A dividend distribution by a B-REIT or B-REIF to a shareholder-individual who holds the shares as a private investment will be subject to a 30% withholding tax. This withholding tax will be withheld from the gross dividend amount and be paid to the Belgian Treasury by the B-REIT or B-REIF. The withholding tax will constitute the final tax in the hands of the shareholder-individual.

A dividend distribution by a B-REIT or B-REIF to a shareholder-company will in principle be subject to withholding tax (unless an exemption applies) and the dividend amount received will be treated as income and included in the taxable base of the shareholder-company and, therefore, be subject to corporate income tax. Such dividends are in principle not eligible for the Belgian "participation exemption regime" (pursuant to which dividends received are exempt from corporate income tax at the level of the shareholder-company).

However, 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 can benefit from the Belgian participation exemption regime:

- (the part of the) dividends derived from income from real property located in another EU Member State or in a country with witch Belgium has concluded a double tax treaty and which provides for an exchange of information clause and which has been subject to (non-resident) corporate income tax (or a similar tax), without benefiting from a tax regime deviating from the common tax regime;
- provided that the articles of association of the B REIT or B REIF provide for a yearly distribution of at least 80% of the income earned, less remunerations, commissions and charges ("80% pay out ratio"), insofar and to the extent that this income arises from:
  - dividends that meet the subject to tax condition under the participation exemption regime; or
  - 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 by a B-REIT or B-REIF

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 reduced taxable base of such entity.

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

Capital gains on shares realized by a (Belgian) shareholder-individual are in principle exempt from personal income tax, provided that the sale of the shares falls within the scope of a normal management of private assets.

Capital gains on shares realized by a (Belgian) shareholder-company are exempt from corporate income tax insofar and to the extent that the dividends derived from those shares are (also) eligible for the participation exemption regime (see above).

8. Real estate finance

8.1 Real estate assets as security

A security right over the real estate is established by means of a right of mortgage*, which requires:

- the execution of a notarial deed of mortgage in front of a Belgian civil law notary (or by way of granting a notarial power of attorney to the notary); and
- a registration thereof in the appropriate Office of Legal Certainty (previously Mortgage Register), in order to be enforceable towards third parties. This registration will be valid for 30 years.

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

It is also possible to take security over fittings, furniture and moveable objects but in this case, this will be done by way of a pledge over the movable assets (see below 8.3) and a registration in the National Pledge Register will be required in order to ensure validity and enforceability.

Security can only be granted over real estate to the extent of the rights a party has over the real estate. For example, in the case of a long lease, a party can only mortgage the real estate in question within the limits of the long lease.

A party can only grant security over a property to the extent of the rights that party has over that asset For example, in the case of a long lease, a party can only mortgage the real estate in question within the limits of the long lease.

8.2 Common forms of security

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

a) a mortgage and a mortgage mandate with respect to the real estate asset (see above paragraph 3.1 and 8.2);

b) a pledge over the borrower's 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 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. As long as the debtor is not notified, any payment the debtor makes to the pledgor in fulfilment of its payment obligation towards the pledgor will be valid and the debtor cannot be required 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. The bank holding the pledged accounts should be notified of this pledge in order for the pledge to be enforceable against it.

PLEDGE OVER SHARES

A pledge over shares is also effected by private agreement. The pledge should be registered in the share register of the company in order to be effective against third parties.

In case of enforcement of the share pledge the lenders may either choose to sell the shares to a third party or, if that right was included in the share pledge agreement, can choose to appropriate the shares. In case of appropriation the value of the shares will then be determined by an independent expert, in the way further specified in the share pledge agreement.

*Please also refer to 3.1

GUARANTEES

A lender may also request personal or corporate guarantees. In real estate finance, these may be relied on by a lender as an additional top up security and is often provided by holding companies in respect of loans granted to their subsidiaries.

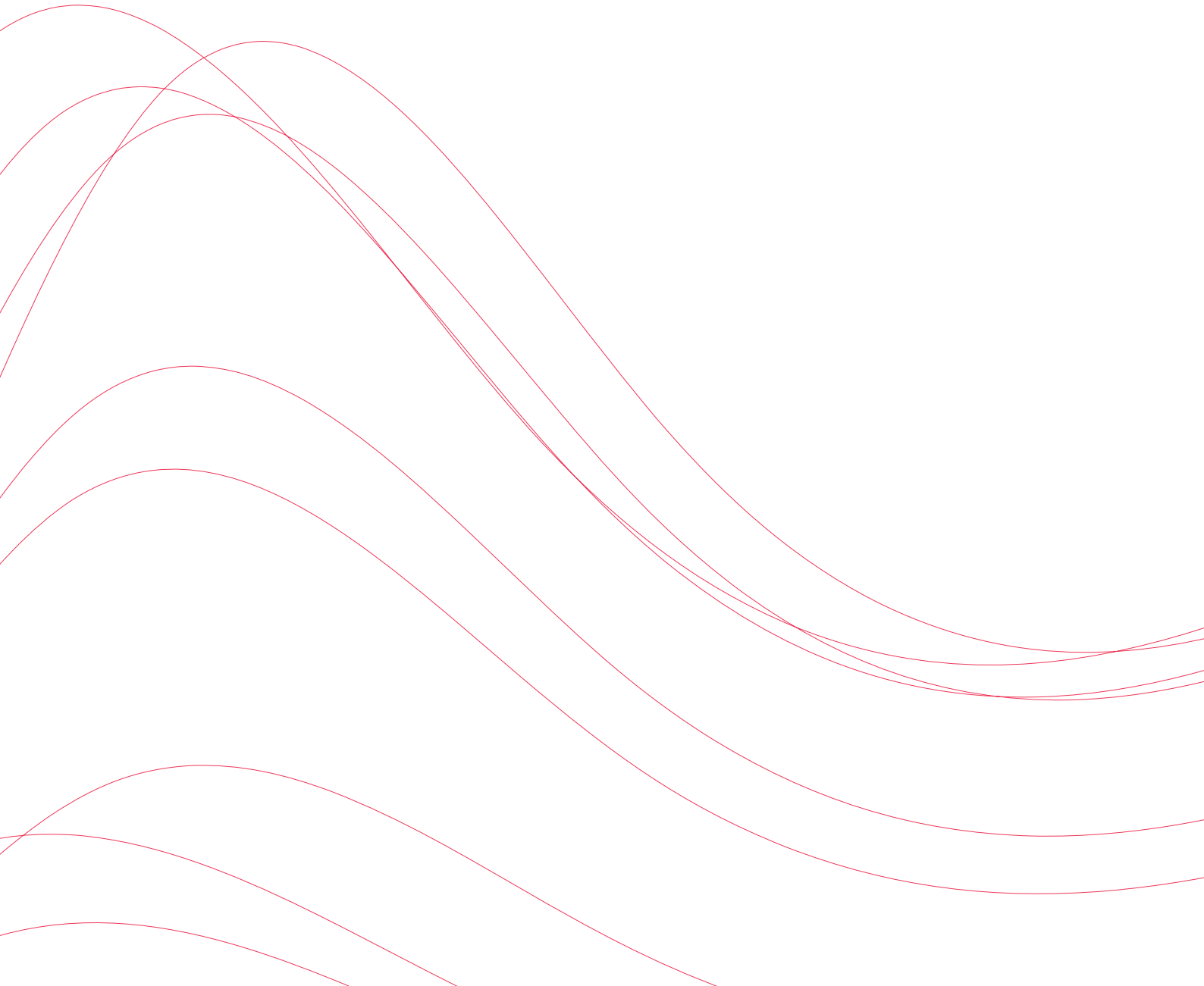
Corporate guarantees should be within the limits of the guarantor's corporate interest, and as such, particular attention must be given to this when structuring and documenting such arrangements. Therefore, for companies, guarantees are usually made subject to certain guarantee limitations.

8.4 Taxation on the creation of security

In relation to the establishment of a mortgage, indirect taxes and fees will be payable for amount equal to approximately 1.3% of the secured amount mentioned in the mortgage deed, with the biggest cost relating to the registration of the mortgage in the Office of Legal Certainty (see above paragraph 3.1). In addition, notary fees must be paid for any notarized deed such as a mortgage deed or mortgage mandate deed. The amounts of these fees are determined on a case by case basis.

In relation to a pledge over movable assets, a fee will be due between EUR20 and EUR518 in connection with the registration of the pledge in the National Pledge Register. This fee will be determined on the basis of the secured amount and will be maximum EUR518 when the secured amount exceeds EUR500,000.

A lump sum duty of EUR0.15 will be due on all finance documents executed in Belgium (payable on each original finance document within the scope of the duty).

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Glossary

FRENCH TERM	ENGLISH EQUIVALENT
Bureau de Sécurité Juridique	Office of Legal Certainty
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
Kantoor Rechtszekerheid	Office of Legal Certainty
Verkoopcompromis	Private sale agreement
Onroerende voorheffing	Real Estate withholding tax
Hypotheekkantoor	Mortgage Register
Erfdienstbaarheid	Easement
GVV	Regulated real estate company (B-REIT)

Contacts

ANTWERP
DLA Piper UK LLP
Brusselstraat 59
B-2018, Antwerp
Belgium
T +32 (0) 3 287 2828
F +32 (0) 3 230 4221

BRUSSELS
DLA Piper UK LLP
70 Rue aux Laines
Brussels, B-1000
Belgium
T +32 (0) 2 500 1500
F +32 (0) 2 500 1600

Joseph Spinks
Partner
T +32 (0) 2 500 15 56
joseph.spinks@dlapiper.com

Antoine Mercier
Partner
Global Co-Chair, Real Estate
T +33 1 40 15 24 09
F +33 1 40 15 24 01
antoine.mercier@dlapiper.com

About DLA Piper

DLA Piper in Belgium offers you an integrated approach to real estate. Our goal is to provide commercial and innovative advice that adds value at all stages of the investment and development cycles: from due diligence to contract negotiations, planning to construction, structuring to litigation and leasing. Therefore, our clients benefit from our multidisciplinary approach that offers advice across all aspects of real estate law, encompassing investment and investment funds; real estate finance; asset management, leasing and franchising; environmental, planning and zoning law; public procurement and PPP; real estate tax; infrastructure; and litigation.

We are part of one of the largest real estate teams in the world: a single unit, cutting across borders and simplifying your projects. Working from offices in Brussels and Antwerp, we provide legal services to foreign and national investors and developers (institutional and private), retailers, authorities, end users and hotel chains.

Because we work across a diverse range of sectors, we have a holistic view of the market that adds more insight to the advice we give you. Each of our lawyers is committed to the DLA Piper philosophy of everything matters, so that you receive a consistently high standard of personal service and quality advice. In short, we are one team with no borders, providing a real advantage to you in Belgium and beyond.

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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