



Real Estate Newsletter



Looking ahead towards 2021 and the potential changes that it could bring to the real estate landscape, this newsletter first addresses some insights on the new property law that will enter into force and some tax reflections in relation thereto.

In addition, we have performed an analysis of the Law of 4 April 2019 specifically dedicated to the real estate sector and the potential impact thereof.

Finally, the logistics property sector is booming more than ever since the COVID19 crisis resulting in an increasing focus on investment in this segment of the real estate market that we share with you.

Happy reading.



Reform of property law (“goederenrecht”): modernization and flexibilization of ancient concepts and some tax reflections in relation thereto



By means of the Law of 4 February 2020 (“Law”) the Belgian legislator has adopted the new Book 3 on “Goods” of the Belgian Civil Code (hereafter “Book 3”). As property law is currently split between the Belgian Civil Code (dating back to the ‘Code Napoléon’ of 1804) and the old laws of 1824 on the right to build (“*opstal*”/“*superficie*”) and the long lease right (“*erfpacht*”/“*emphythéose*”), this modernization is and will be very welcome. According to the parliamentary documents the aim is to codify all regulations into one Book, modernize Belgian property law and make it more functional and flexible by enhancing parties’ contractual autonomy without disregarding legal certainty. Although the introduction of Book 3 is not a revolution (this was not the intention of the legislator either), there are some remarkable changes compared to current legislation.

In this contribution, we will focus on the modernization of the following **rights in rem**, i.e. the right of **usufruct** (Title 6), the **long lease right** (Title 7) and the **right to build** (Title 8) and not on the entire Book 3.

Given the relevance of these rights in rem for the real estate tax practice during the past few decades, the changes to these rights in rem will inevitably also have some tax impacts or give rise to some fundamental questions as regards their tax treatment. We will address some of these questions / observations in this contribution.

<div style="background-color: #008000; color: white; border-radius: 15px; padding: 5px; display: flex; align-items: center; justify-content: space-between;"> Entry into force </div> <div style="background-color: #f0f0f0; padding: 10px; border: 1px solid #ccc; margin-top: 5px;"> <p>Book 3 will enter into force on 1 September 2021. To ensure legal certainty it is foreseen that Book 3 will not apply to:</p> <ul style="list-style-type: none"> • future consequences of legal acts and legal facts that have taken place before 1 September 2021; or • legal acts and legal facts that occur after 1 September 2021 when they originate from rights in rem constituted before this date. <p>The parties can however always decide otherwise. This allows for example to constitute a right to build today that will be governed by the new regulations as soon as they have entered into force. A specific entry into force has been foreseen also for the creation of volumes (cf. <i>infra</i>).</p> </div>	<div style="background-color: #008000; color: white; border-radius: 15px; padding: 5px; display: flex; align-items: center; justify-content: space-between;"> Supplementary law </div> <div style="background-color: #f0f0f0; padding: 10px; border: 1px solid #ccc; margin-top: 5px;"> <p>The provisions of Book 3 are generally of a supplementary nature (“<i>van aanvullend recht</i>”). Parties can thus deviate from Book 3 and as such have the contractual freedom to tailor their agreement to their specific needs and the agreed terms. Some provisions are mandatory (where explicitly stipulated), e.g., the definitions and the provisions with regards to the duration of the rights in rem.</p> <p>Moreover, parties cannot create any rights in rem themselves (only the legislator may do so). Book 3 now explicitly confirms this so-called <i>numerus clausus</i> principle.</p> </div>	<div style="background-color: #008000; color: white; border-radius: 15px; padding: 5px; display: flex; align-items: center; justify-content: space-between;"> Modernisation of rights in rem </div> <div style="background-color: #f0f0f0; padding: 10px; border: 1px solid #ccc; margin-top: 5px;"> <p>Certain differences between the rights in rem (a.o. right of usufruct, right to build, long lease right) have been levelled out, in particular, the maximum duration. For all rights in rem the maximum duration will be 99 years under the new property law. The legislator wanted to put focus on the definitions and the core characteristics/purpose of the rights in rem (from which parties cannot deviate). The aim is to avoid situations whereby parties choose for a certain right in rem only because of its maximum duration (e.g., in the past often a long lease right was chosen above a right to build only because of the maximum duration of 99 years instead of 50 years).</p> </div>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Some key changes to the rights in rem are further outlined below.



1. Usufruct

Duration: When an individual holds the usufruct, the usufruct generally expires upon the death of this person. Maximum duration for companies has now been extended to 99 years (previously this was 30 years). Bankruptcy or dissolution of the company will henceforth automatically terminate the usufruct. A merger, demerger or other similar operation should not, however, impact the usufruct.

Prolongation: The new provisions explicitly stipulate that the right of usufruct can be prolonged. As the prolongation of a usufruct is not foreseen by the current property law, the tax authorities took the position that a prolongation should be considered as the establishment of a new usufruct for registration duties purposes (subject to 10% for property located in the Flemish region and 12,5% for property located in the Brussels and Walloon regions). Now that the new property law explicitly foresees the prolongation of a usufruct, the question arises whether such an administrative position can be maintained or whether a change of the registration duties code/Flemish Tax Code (that currently only refers to the establishment or the transfer of usufruct) will be required in order to submit a prolongation of a usufruct to 10%/12,5%.

In case the usufruct was/is subject to VAT, the prolongation also triggers the question whether the VAT due needs to be adapted especially when the prolongation has an impact on the total usufruct remuneration. A change in the duration and the remuneration, might also impact the VAT deductibility (cf. so-called reconstitution of the invested capital and the application of the 97,5% threshold).

Structural repairs: Today, structural repairs (e.g., a new roof) are to be borne solely by the bare owner. Under the new regime, the bare owner can request that the holder of the usufruct contribute to the structural repair works, taking into account the (residual) value of the usufruct compared to the value of the full ownership based on Article 745sexies, §3 of the old Civil Code. This is to be seen in the overall context of the reform of the usufruct which provides for a certain cooperation between the bare owner and the usufructuary. The timing of the repair works will determine the amount of the contribution by the usufructuary: the earlier the works are carried out, the higher the contribution of the usufructuary will be. Under the current property law, the tax authorities are of the opinion that a contribution by the usufructuary in important improvement works qualifies as a contribution to structural repairs and thus gives rise to a taxable benefit for the bare owner (and certainly in the context of usufruct constructions between a company and its director). As the new property law explicitly provides for contributions by the usufructuary, in principle the compensation cannot be considered as a benefit in kind.

This adjustment in the new property law will probably not end the discussions with the tax authorities and will open new ones regarding the deductibility of such costs, as well as the moment when an advantage or benefit resulting from a contribution of the usufructuary will become taxable (where under current property law the tax authorities generally verify whether a compensation is foreseen at the end of the usufruct, such discussion might now already occur during the usufruct right).





2. Right to build

Duration: the maximum duration has been extended from 50 to 99 years. The right to build can be extended as long as it does not exceed the term of 99 years.

The right to build can even be perpetual if it is constituted by the owner of the land (i) for purposes of the public domain or (ii) to create volumes in case of a complex and heterogeneous immovable property. In the latter case, the property should consist of different volumes which can be managed separately, whereby each volume has its own destination and there are no common shares. In practice the creation of volumes will be possible in case of e.g., a residential or commercial building with an underground parking.

Creation of volumes: The creation of volumes is indeed a new feature and is warmly welcomed by real estate practitioners, as then the (often complex and burdensome) rules of co-ownership no longer apply. Book 3 also provides for a transitional provision allowing the constitution of a right to build in order to create volumes even before the entry into force of Book 3 (so before 1 September 2021). In those cases, the duration of the right to build can exceed 50 years or

even be perpetual if no end term has been determined or the right to build has been constituted for an indefinite period of time.

Existing buildings: the new property law explicitly stipulates the scope of the right the holder of the building right has in relation to existing buildings in case the building right is established on an existing building. If parties do not stipulate otherwise, the holder of the building right will be deemed to have obtained the full ownership of the building(s) in question for the duration of the building right. From a registration duties perspective, it will be key to carefully draft the building right agreement in order to avoid that – given the aforementioned Article in the new property law – 10% (Flemish region) /12,5% (Brussels/Walloon Region) becomes due on the market value of the building next to 2% (in relation to the building right) by stipulating e.g. that the building right owner will not become the owner of the building and does not have any disposal right ("beschikkingsrecht") in relation to the existing building(s).





3. Long lease right

Duration: The maximum duration remains 99 years (same as the usufruct for companies and the right to build). It can be extended as long as it does not exceed the term of 99 years, except for purposes of the public domain, when it can be perpetual. The minimum duration is reduced from 27 years to 15 years since it was found to be too long for certain real estate structures, such as immovable leases. Please note, however, that in order to qualify as an immovable lease for VAT purposes (in the meaning of the Royal Decree n° 30), the duration of the right in rem (granted by the landowner to the financial institution) and the VAT lease may not coincide. In order to qualify as a VAT lease, the lease contract should provide for a purchase option at the end of the term that gives the lessee the reasonable possibility to acquire the rights of the lessor (financial institution). If the term of the VAT lease (e.g., 15 years) were to be equal to the term of the long lease right (e.g., 15 years) it could be questioned whether there is indeed an actual purchase option as the landowner then automatically becomes owner of the building by accession ("natrekking").

As mentioned above, changing the duration of the right in rem needs to be monitored from a VAT point of view especially when the remuneration is also changed. VAT is calculated on the cumulative amount of the periodic payments and thus changing the remuneration/ payments can lead to questions. Next to this aspect, the VAT deduction in the hands of the 'bare owner' is only guaranteed when the cumulated payments are (almost) equal to the value of the building. In case the duration and the payments change, the VAT deduction of the bare owner may be impacted.

Remuneration: The annual payment ("canon") that used to be an essential criterium for the constitution of a long lease right is no longer obligatory. In practice, a symbolic payment of 1 EUR per year was often stipulated in the contract in order to meet the condition. This is no longer necessary under the new property law.

Buildings constructed by the long lease holder during the long lease right: Such constructions should be compensated at the end by the owner of the land ("natrekkingsvergoeding"). Compensation is explicitly determined on the basis of the rules of unjustified enrichment ("ongerechtvaardigde verrijking" / "enrichissement injustifié"), i.e., the lowest amount of either the 'impoverishment' for the holder of the right in rem or the 'enrichment' for the bare owner. The same rules apply to the right to build (and usufruct in the situation where the usufructuary has carried out construction works on the basis of an accessory building right). With respect to the rules of unjustified enrichment, the explanatory memorandum to the Law of 4 February 2020 stipulates that the bare owner should compensate the lowest of either the increase in value of the land resulting from the building (in favor of the bare owner) or the cost of the building (incurred by the holder of the long lease right, usufruct or building right). From a tax perspective, a compensation at the end of a long lease right is not new. The tax authorities already stipulated that any building, constructions, etc. erected by the long lease holder during the long lease right should be compensated at the end of the long lease right ("natrekking"). Otherwise, this would give rise to taxable income under the form of an abnormal or benevolent advantage received or a benefit in kind (in the context of a right in rem between a management company and its director) at the level of the bare owner. However, the new property law now provides how the compensation should be determined in case parties have not stipulated otherwise. The question arises whether the tax authorities will (be able) to continue to apply their current viewpoint, i.e., that the building should be compensated at its market value at the end of the right in rem (as they based such viewpoint on (old) Article 6 of the Building Right Law that refers to the actual value of the building at the end of the right in rem) under the new Property Law.



4. Other observations from a tax perspective:

Where one of the determining differences between the rights in rem was initially related to the duration of the rights, this is clearly no longer the case under the new property law.

Together with the supplementary nature of the provisions of the new property law, the differences between the rights in rem can be further eliminated between parties. Therefore, discussions may arise with the tax authorities in the future with respect to the correct qualification of the right in rem as this would lead to a different taxation, e.g., the establishment of a long lease right does not have the same tax treatment as the establishment of a usufruct (not only the treatment for registration duties purposes but also the income tax treatment might be different).

The Law of 4 April 2019 and its impact on the real estate sector

The Law of 4 April 2019 introduced several new provisions in the Belgian Code of Economic Law in 3 different areas: the abuse of economic dependence, unfair market practices and unfair clauses. The Law only concerns B2B relations. Regarding real estate contracts, our focus will be on the provisions of unfair clauses in business contracts which will enter into force for contracts concluded, renewed or amended after 1 December 2020.



Scope



General

Real estate contracts do not escape the scope of the Law of 4 April 2019. As soon as there is a contract between businesses (ondernemingen/entreprises), the law applies. Nor does it make any distinction between large or small businesses. As a consequence: (share) purchase agreements, occupation agreements (long term leases, office or retail leases, etc.) and construction agreements entered into between businesses do fall within the scope of the Law.

The Law only excludes (1) agreements related to financial services and (2) public procurement agreements and agreements deriving from public procurement (for example: agreements with subcontractors).

The unfair clauses are elaborated on the basis of a general imbalance test and a "black" and a "grey" list.



Core terms

Clauses which determine the subject matter of the contract (the so-called "core terms") are excluded from the scope of application of the B2B protection regime, provided they are clearly and comprehensibly worded. The principle of freedom of contract is not affected in this way, only its abuse. The so called "core terms" include the price, the nature of the good, etc.

The ancillary terms contain the modalities of the goods or services object of the contract (e.g. delivery, damages, liability, exoneration clauses,..). In practice, it will not always be easy to distinguish "core terms" from other ancillary terms. What about clauses dealing with price adjustments and/or the extension of delays in forward purchase of forward letting transactions, for example?

This distinction between core and ancillary terms will undoubtedly give rise to discussions.

The parliamentary works determine that to the extent it can be evidenced that the other party agreed to a particular element of the agreement, or a particular risk, to be excluded in exchange for a certain advantage, the underlying clauses will be deemed to be part of the core terms which fall within the scope of freedom of contract.

It remains to be seen, however, how both practice and case law will apply this in practice.





Unfair clauses

Imbalance test

With the Law of 4 April 2019, the legislator wanted to tackle the imbalance in contract terms and provide legal protection. As a result, the legislator introduced a general imbalance test. Each clause which (taken individually or in conjunction with one or more other terms) creates a significant imbalance between the rights and obligations of the parties is prohibited.

Black list

The legislator provided a "black" list of 4 provisions. Contractual terms falling within this list will be deemed unfair.

One clause in particular is more likely than the others to have an impact on the real estate industry. According to this provision, clauses that aim to establish irrefutably the knowledge or acceptance of terms which a party was unable to gain actual knowledge of prior to the conclusion of the contract are unlawful.

This may apply to some clauses in (share) sale or lease agreements to the extent the purchaser/tenant did not get access to sufficient underlying documents (e.g., a data room). A clause specifying that the purchaser/tenant "has a perfect knowledge of the condition of the property" is likely to be regarded as unlawful in case the tenant was unable to gain actual knowledge of the state of the property. These clauses should therefore be avoided from now on.

Grey list

The provisions listed in the "grey" list contain a rebuttable

presumption of illegality. Evidence to the contrary can be provided by showing that there is no significant imbalance in the relationship or that the term is not unlawful according to its effects, specific nature, use, etc. The grey list unfortunately contains many grey areas, a couple of which are listed below, and therefore creates some legal uncertainty.

Unilateral amendment clauses

Clauses granting the company the right to unilaterally modify the price, characteristics or conditions of the contract without valid reason are presumed to be unlawful. In the real estate sector, agreements providing for unilateral price changes and/or modifications to the pre-agreed description of property under construction are not inconceivable (e.g., in contractor agreements and/or as part of fit-out works required by a purchaser or a tenant). Parliamentary works stipulate that unilateral adjustments are possible if they can be objectively justified. It is therefore important to list/document the "valid reasons" in the agreement.

Duration clauses

Contractual terms are presumed to be unlawful when they are binding upon the parties without providing for a reasonable period of notice (without prejudice to article 1184 of the Civil Code). A reasonable notice period depends on the sector. As an example, a lease agreement often provides for the tacit extension or renewal of the agreement. It is therefore appropriate to provide a timely notice period before (or in order for) these clauses (to) enter into force. In this way, the other party can oppose the tacit extension or renewal.

Restriction or exclusion of rights in the event of breach of contract

Terms which improperly restrict or limit the legal rights of a party in case of non-performance or inadequate performance of the counterparty (often as part of so-called "catch-all" clauses) should be avoided. The impact of this provision e.g., on force majeure clauses - which are currently playing an important role in the corona crisis – remains to be determined by case law. Is there still a possibility to draft them broadly? Jurisprudence will play a key role in the interpretation of these clauses.

Sanction

Unfair contractual terms listed in the black or grey list (or based on the general imbalance test) are prohibited and the nullity sanction shall apply to the term in question. The contract will continue to exist where possible. In other words, the nullity sanction is only partial and hence only applies to the specific clause(s) which are unfair. A court will nevertheless be entitled to restore the balance of the agreement if a party so requests. It may therefore be useful for the parties, when drawing up their agreement, to provide for another clause that preserves the economic balance of the agreement in case one of the clauses would be deemed unfair. Severability clauses will gain in importance.

Escape?

If the contracting parties expressly agree to an arrangement which would normally be covered by one of the provisions listed in the grey list and yet deliberately opt for such an arrangement, this arrangement will remain valid based on the principle of freedom of contract. It may therefore be important to clarify in the contract why such unfair clauses are included and to accurately clarify which clauses are "covered" by such an escape arrangement.

If the "escape" mechanism is too largely used by a number of businesses, case law will soon teach us to what extent this mechanism can be considered an abuse of law.

Mandatory provisions

The provisions of the Law of 4 April 2019 are of a mandatory nature. Nevertheless, the principle of the "lex specialis" to assess the existence of unfair terms still applies. This concerns legislation that explicitly regulates certain situations and takes precedence over general legislation.

In the real estate sector, one can think of the commercial lease Law of 1951. Some of these provisions can be considered as mandatory law, others as non-mandatory law so that a cumulative application with the Law of 4 April 2019 can take place.

Conclusion

The law repeatedly states that the autonomy of the will is not affected. Is such a reading possible or will the new B2B protection regime threaten to replace the fundamental principles of the Civil Code? The potential impact of the new B2B law should not be underestimated. The law of 4 April 2019 contains many grey areas as to what clauses are permitted/forbidden and creates legal uncertainty. It remains to be seen what the impact will be and how the case law will interpret the various terms of the new law.



Reallocation of financial means into logistics asset class



While most asset classes are enduring negative trends or uncertainty due to the outbreak of the Covid-19 pandemic, the prime yields of logistics property in Europe have declined to their lowest level ever. Despite the crisis, prime yields in Belgium fell to 4,5% in the second quarter of 2020, narrowing the gap with the office market currently at 4,0%.

Some structural changes lying under this exceptional performance have been anticipated by investors who keep entering into partnerships with specialized logistic developers.

Over the past 5 years, e-commerce has grown by an average 9% annually in Belgium. Covid-19 has increased consumer dependence on e-commerce and efficient supply chains, resulting in a total revenue increase of 17% expected in 2020 in Belgium.

As a consequence, customers are becoming further accustomed to online shopping and home delivery. It is estimated that e-commerce will represent over a third of all retail sales by 2040. We know that the need for logistic spaces for e-commerce is projected to be three times higher than for traditional retail, and this will inevitably result in an increasing level of necessary stock.

In addition, the global supply chain shock suggests that one consequence of this pandemic could be an acceleration in reshoring or near-shoring (when a business moves its operations to a nearby country in preference to a more distant location) of some industries, particularly those where supply chains have been highly disrupted.

Given these positive trends, the sector resilience and the low interest rates, logistic real estate is becoming increasingly

attractive to investors. Rental values remain at a good level and are even slightly rising, partly due to the vacancy in Flanders being close to zero. Those high occupancy rates are ensuring stable cash incomes, attracting the attention of pension funds and other institutions that seek decent risk adjusted returns.

The interest is confirmed by the increasing setup of logistic funds. Even before the pandemic, developers and institutional investors were shifting their strategic focus and financial means gradually towards the logistics markets. The core+ pan-European EUR 2BN fund ("GRELF") launched by Generali in 2019 and the joint venture of EUR 1,7BN between Allianz and developer VGP in 2019 are just some examples of this type.

Looking within Belgium, developer Heylen Group and AG Real Estate have set up a (50/50) joint venture aiming at logistic assets in Belgium and the Netherlands. The logistics portfolio of Heylen Group formed the basis of the new fund with the ambition to grow the fund to a portfolio of at least EUR 500 M.

More recently on 12 November, Ethias and the Belgian family business Weerts Group entered into a 50/50 joint venture aiming at the joint development of a pan-European portfolio of logistics real estate. Ethias has reserved an investment envelope of EUR 160 M.

From our perspective, we are convinced that these new partnerships will provide the right foundation for further growth, properly mitigating the risk along the whole life cycle of the asset while benefiting from the very positive logistic prospects.



Get in touch

Danny Stas

Managing Partner, Deloitte Legal-Lawyers
Real Estate Industry Leader
dstas@deloitte.com
+32 2 800 70 11

Michael Van Gils

Partner, Business Tax
Deloitte Belgium
mivangils@deloitte.com
+ 32 2 600 65 79

Joaquim Heirman

Director, Indirect Tax
Deloitte Legal – Lawyers
jheirman@deloitte.com
+32 2 800 71 27

Alexandre Terlinden

Strategic Adviser, Financial Advisory
Deloitte Belgium
aterlinden@deloitte.com
+ 32 2 639 49 42

Bernd Tiebout

Manager, Business Tax
Deloitte Belgium

Frédéric Sohet

Managing Partner, Financial Advisory
Deloitte Belgium
fsohet@deloitte.com
+32 2 639 49 51

Maximilien van de Werve

Partner, Real Estate
Deloitte Legal – Lawyers
mvandewerve@deloitte.com
+ 32 2 800 71 73

Astrid Peeters

Director, Indirect Tax
Deloitte Legal – Lawyers
astrpeeters@deloitte.com
+ 32 3 242 42 28

Laura Carmans

Lawyer, Real Estate
Deloitte Legal – Lawyers
lcarmans@deloitte.com
+ 32 2 800 71 33



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

Deloitte provides audit, tax and legal, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte has in the region of 312,000 professionals, all committed to becoming the standard of excellence.

This publication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this publication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this publication.

