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Our real estate insights

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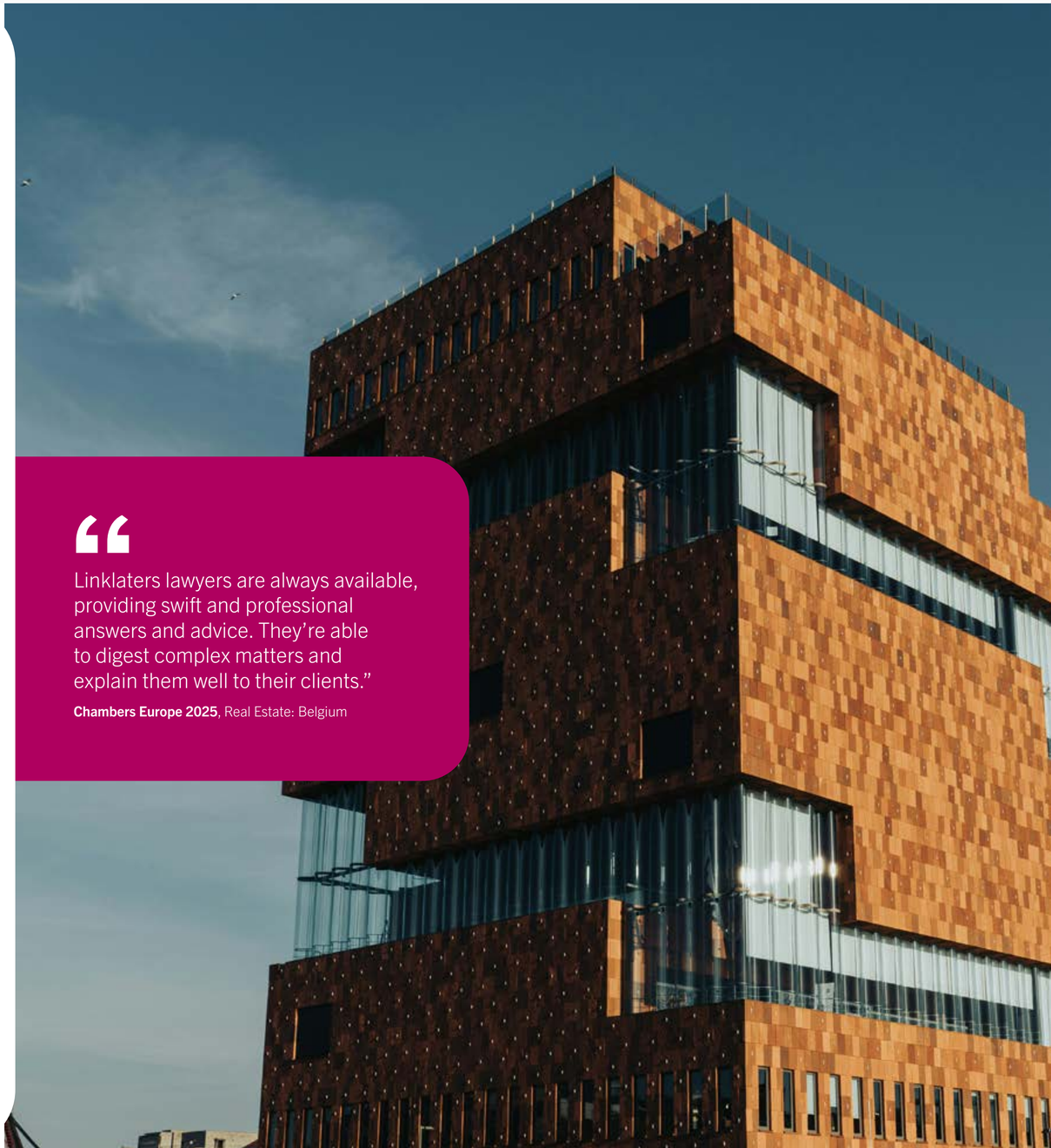
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Chambers Europe 2025, Real Estate: Belgium

Ordinance limits temporarily the indexation of rents

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The Parliament of the Brussels Capital Region adopted on 9 December 2022 an ordinance limiting the indexation of commercial leases in the Brussels Region (*Ordonnance du 15 décembre 2022, organisant la limitation de l'indexation des baux commerciaux Ordonnantie van 15 december 2022, tot regeling van de beperking van de indexering van de handelshuurprijzen*), which was published on 21 December 2022 in the Belgian State Gazette.

This ordinance introduces a mechanism of temporary limitation of the indexation of commercial leases in an attempt to curb the daunting inflation rise and to mitigate its consequences on the economic situation of businesses.

What is the applicable limitation?

The Ordinance limits temporarily, for a period of one year, the indexation of rents to a well defined level.

To which leases does this apply?

Commercial leases*, which contain an annual indexation clause and to which article 1728bis of the old Civil code are applicable.

*the Ordinance does not specify further its scope. We can therefore assume that all commercial leases in the scope of the law of 30 April 1951 as well as the so called pop up leases, regulated by the Ordinance of 25 April 2019 (*Ordonnance relative au bail commercial de courte durée/Ordonnantie betreffende de handelshuur van korte duur*).

This entails that a lease contract which does not provide for the adjustment of the rent to the cost of living or does not provide for a yearly indexation but for a three year indexation, is not impacted by the Ordinance.

As from when is this limitation applicable?

It takes effect and applies to all indexation for a duration of one year as from 22 December 2022 until 21 December 2023.

How should you calculate the indexation of your lease as from now?

The temporary indexation formula is based on a newly developed 0 energy Index, which is the consumer price index minus the energy components. It takes two forms.

$$\frac{\text{Base rent x 0,99 x New Index}}{\text{Base Index}}$$

A general form applicable to leases already in force in July 2021.

Where:

- the base rent is the rent as specified in the lease agreement,
- the New Index is the New 0 energy Index of the month preceding the anniversary date of the lease,
- the Base Index is the health index of the month preceding the conclusion of the lease.

$$\frac{\text{Base rent x New Index}}{\text{Base Index}}$$

A simplified but equivalent formula applicable to leases in force from August 2021.

Where:

- the base rent is the rent as specified in the lease agreement,
- the New Index is the New 0 energy Index of the month preceding
- the anniversary date of the lease,
- the Base Index is the New 0 energy Index of the month preceding the conclusion of the lease.

For example, if a lease came into effect on 15 June 2022, at the time of the indexation on 15 June 2023, the "new 0 energy Index" is the Consumer Price Index less the energy components for May 2023.

Here is an example…

A lease is concluded in December 2019 for a rent of EUR 1,000 with a yearly indexation. The rent was indexed in December 2020 at EUR 1,008.35. It was again indexed in December 2021 at EUR 1,056.88.

According to the indexation formula in Article 1728bis of the old Civil code, it would have been indexed in December 2022 at EUR 1,169.17.

Under the proposed formula, it is indexed in December 2022 to EUR 1,112.07.

Thus, the reduction in the adjustment there amounts in this case to EUR 57.1 per month, or EUR 685.2 per year.

Is this mandatory?

Yes. Replacing temporarily article 1728bis of the old Civil code, its application is mandatory on leases which fall in the scope of article 1728bis of the old Civil code, i.e. all commercial lease agreements which include an indexation clause.

What about other leases?

The Brussels Region has recently amended the Brussels Housing Code in order to modify the indexation of rents on the basis of the applicable EPB score of the housing Ordonnance du 13 octobre 2022 portant modification du Code bruxellois du Logement en vue de modifier l'indexation des loyers Ordonnantie houdende wijziging van de Brusselse Huisvestingscode met het oog op de wijziging van de huurprijsindexering). This amendment entered into force on 14 October We note the fact that, due to the absence of a certification method applicable to the retail sector, the measure adopted is to the detriment of the landlords who have invested in the energy efficiency of their properties as they are treated the same way as those who let their tenants bear the full impact of the energy costs increase.

Time will tell whether the measure adopted handling two different situations in the same way will pass the discrimination test.

With regard to the office sector, there is currently no sign of a legislation taking into account the energy efficiency of the building in the rent indexation clause.



The Ratios Decree in Brussels regarding charging points for electric vehicles





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As of 2030, diesel cars will be prohibited in Brussels and petrol, CNG and LPG engines will be excluded as of 2035 and most vehicles driven in Brussels will have to have zero tailpipe emissions. Therefore, the number of electric vehicles in Brussels is expected to rise in the near future.

Building on this expectation, the Brussels Capital Region enacted, on 29 September 2022, a decree determining the ratios of charging points for car parks, as well as certain additional safety conditions applicable to them ("**Ratios Decree**") (*Arrêté du Gouvernement de la Région de Bruxelles Capitale du 29 septembre 2022 déterminant les ratios de points de recharge pour les parkings, ainsi que certaines conditions de sécurité supplémentaires y applicables/Besluit van de Brusselse Hoofdstedelijke Regering van 29 september 2022 tot vaststelling van de verhouding van de oplaadpunten voor parkings evenals bepaalde bijkomende veiligheidsvoorwaarden die van toepassing zijn*). The Ratios Decree entered into force on 13 November 2022.

Does it apply to me?

Yes, if I am the holder of an environmental permit covering a car park in Brussels.

What if I plan on building a new car park?

Any new car park which is not for residential purposes shall comply with the following ratios (20% for public car park and 30% for office car park) from its construction.

According to the Ratios Decree, a new car park is defined as (i) any car park which has not yet received an environmental permit, (ii) a car park which is not covered by an environmental permit that expired less than two years before the entry into force of the Ratios Decree or (iii) a car park for which an environmental permit was requested after the entry into force of the Ratios Decree and which was not affected by any huge renovation.

This means that a new car park built in 2024 for an office building would have to directly be equipped with charging points for 30% of its parking spaces.

What about existing car parks?

Different ratios are applicable according to the type of building:

- If it is an office building, the ratio of charging point stations will have to be at least 10% of all parking spaces authorised by the environmental permit by 2025 (with a minimum of 2 charging points), 20% as of 2030, and 30% as of 2035.
- If it is a residential building, as of 1 January 2025, a charging point shall be installed upon request by a resident owning an electrical vehicle. The Ratios Decrees does not specify who will carry the burden of financing those charging points. This is therefore something to be taken into account in contractual documentation to avoid any surprises.
- IA last category of car parks concerns car parks serving shops, car parks for public use, as well as those not covered by the previous two points (hospitals, nursing homes, workshops, factories, etc.). The ratio of charging points for such car parks will have to be at least 5% of all parking spaces authorised by the environmental permit (with a minimum of 2 charging points) as of 2025, 10% as of 2030, and 20% as of 2035.

How is this ratio calculated?

For the calculation of the ratio, a charging point with power of 50 kW or more counts as 5 charging points and a charging point with power of 150 kW or more counts as 10 charging points.

My car park is used partly for offices and partly for apartments. How does that work??

Buildings protected under the heritage protection legislation will be allowed to follow a separate, more lenient regime, and thus should not need to meet the above deadlines.

In case of a mixed use car park, the applicable ratios shall apply on a pro rata basis. In the case of a shared parking place, the higher ratio applies.

For example: my building has a car park with 100 parking spaces and 60 of them are reserved for the office part of the building. Then by application of the ratios Decree, it shall have 6 charging points by 2025, 12 by 2030 and 18 by 2035. Regarding the residential parking spaces, a charging point shall be installed as soon as a resident owning an electric vehicle requests one.

Are there particular new safety rules for covered car parks?

Yes! In covered car parks:

- the use of fast charging points (i.e. any charging point with power of 50 kW or more) is prohibited, unless authorised by the fire department;
- an emergency stop button must be placed near each entrance to the car park, unless an exemption is provided for in the environmental permit, particularly in the event of technical impossibility;
- where equipped with an automatic fire detection system, the power supply to the charging points must be automatically cut off in the event of detection of a fire;
- the charging areas must be ventilated by a system allowing the air in the car park to be renewed every 3 hours;
- and a readable, visible and scaled plan indicating the locations of the charging points must be placed at the entrance and exit of the car park.

Additional rules apply for covered car parks with a surface area of more than 1,250m^2 and/or with underground levels.

Can I be prevented from installing charging points in my car park?

Yes! Article 9 of the Ratios Decree states that when a car park is equipped with a lift for vehicles, the installation of charging points is prohibited. The environmental permit may derogate from this prohibition, following the advice of the fire department.

Can I derogate from this reglementation?

Yes! There is a possibility to obtain a derogation if it can be demonstrated that there is a technical impossibility or an excessive cost attached to the implementation of charging points.



Law on improving indoor air quality in enclosed areas open to the public

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As a way of improving general wellbeing and preventing the transmission of (new) respiratory diseases, a federal law was adopted on 6 November 2022 regarding the improvement of indoor air quality in enclosed areas that are open to the public (the "Air Quality Act" NL/FR) (*Wet van 6 november 2022 betreffende de verbetering van de binnenluchtkwaliteit in gesloten plaatsen die publiek toegankelijk zijn Loi du 6 novembre 2022 relative à l'amélioration de la qualité de l'air intérieur dans les lieux fermés accessibles au public*). The Air Quality Act introduces a general legal framework that lays the foundation for future legislative developments on maintaining a healthy indoor air quality. The Air Quality Act entered into force on 11 December 2022. However, the actual obligations will only enter into force on respectively 10 December 2023 and 1 January 2025.

The obligations arising from the Air Quality Act (read in conjunction with the upcoming royal decrees) may have significant implications for the owners and operators of catering, sporting, retail or event venues.

Will the Air Quality Act apply to me or my premises?

The Air Quality Act has an impact on both the owners, as well as the operators of so called "*enclosed areas open to the public*". The term "*enclosed areas open to the public*" refers to interior spaces (i.e. spaces closed off by walls and ceilings) that are not used exclusively for residential or workplace purposes.

A future royal decree will further specify which establishments are included and/or excluded in this open definition. However, based on a logic interpretation of the above definition and the preparatory works, establishments such as:

- sport venues (including gyms);
- restaurants;
- hotels;
- cultural centres;
- movie theatres;
- retail and shopping centres;

will most likely fall within the above definition.

What air quality standards will my premises have to meet?

The Air Quality Act proposes two reference levels regarding CO^2 concentration, i.e. one below 900 ppm and one below 1200 ppm, as well as minimum standards related to ventilation and/or purification flow rates. All norms are merely indicative (i.e. non binding), but will be further elaborated in a royal decree.

The precise standard that will be applicable to you will depend on your type of business.

What obligations are in store and when will they have to be fulfilled?

The operator will be responsible for:

- installing an air quality monitor in each "enclosed place open to the public" within its premises. This may require the installation of several air quality monitors in one building in order to be compliant, depending on its size and layout;
- developing a risk analysis and an action plan if the results of the risk analysis would require this, and updating them in case of changes;
- requesting a certificate of compliance and disclosing the obtained corresponding label.

The first two obligations will have to be fulfilled as of 10 December 2023, whereas the obligation to request a certificate will only enter into force on 1 January 2025, which means that by 1 January 2025, the operators concerned must have submitted their applications for certification.

The **owner** will be obliged to:

- make available all relevant documentation on the ventilation and air purification systems;
- co-operate in the maintenance of these systems; and
- provide the certifier with access to the technical rooms to make the necessary inspections.

These obligations will be further concretised in a royal decree, which will specify, for example, the correct use of the air quality monitor, the required content of the risk analysis and any exceptions to these obligations.

What are the sanctions if I do not comply?

A criminal fine between EUR 100 and EUR 1,000 (to be multiplied by eight) may be applied in case of a violation. If the owner or operator is not cooperative or threatens the responsible authorities or refuses to present an official identity document, a prison sentence of up to six months and/or a criminal fine of up to EUR 6,000 (potentially further increased in case the operator and/or owner is a legal person and, in any case, to be multiplied by eight) could be imposed by the public prosecutor.

In case the public prosecutor decides not to initiate criminal proceedings or fails to notify its decision within 6 months after the notification by the relevant inspectors and controlling officers, an administrative fine of at least half of the minimum criminal fine and maximum half of the highest criminal fine could still be imposed.

What does the future hold?

The Air Quality Act is a first step towards an improved indoor air quality. It constitutes an integral part of a series of legislative initiatives that contribute towards so called pandemic preparedness and may be deployed as a basis to justify restrictions in times of future health crises. However, apart from any pandemic this legislation will have a very concrete impact on businesses in the coming months and years.

We will continue to track future legislation in this regard and, in particular, the upcoming royal decrees that will flesh out the general principles and obligations of the Air Quality Act.



Solar panels in a co-ownership in Belgium: some key legal issues



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The ambition to boost renewable energy sources and reduce energy costs has intensified in recent years, even more since the beginning of the current energy crisis. Although solar panels have in this context become increasingly popular in the Belgian market, certain legal issues may arise in relation to their installation in a co ownership and the sharing of the generated electricity.

In this article we will discuss the key legal issues and the most recent amendments relating to the "peer to peer" energy sharing legislative framework.

How to obtain consent to install solar panels in a co ownership?

In a co ownership structure, such as an apartment building, solar panels are typically installed in the common areas, in most cases on the roof Decisions relating to the common areas of a co ownership need to be taken collectively at the general meeting of the association of co owners in accordance with the relevant provisions of the Belgian Civil Codes.

In practice, solar panels in a co ownership are usually installed by the association of co owners The installation by the association of co owners (for its own account) of solar panels on the common areas with the purpose of generating electricity for the common areas (such as the lift or lighting in the corridors) requires a two thirds majority.

What about private consumption?

In case one or more individual co owners wish to install solar panels in order to generate electricity for their private consumption, Belgian law requires a four-fifths majority if a right in rem (*zakelijk recht/droit réel*) is granted on the common parts (such as the creation of a right to build to allow the solar panels to be owned by the individual co owner and/or the creation of easements) If, however,however,(part of) the common areas will be leased to one of the co owners for the installation of their private solar panels (i.e. without any ownership rights being granted), in principle a two-thirds majority is sufficient.

In this respect, revising the majority threshold in co ownership associations for green energy installations would likely promote the use of solar panels in co owned buildings.

How can solar generated electricity be shared between co-owners?

Until recently, the surplus of electricity generated by the solar panels in a co ownership had to be resold on the grid at a minimum price The transposition of a European directive into the Belgian regional energy decrees made it possible, when there is a surplus of electricity (in addition to the electricity needed to supply the common areas), to obtain a distribution licence to resell it to the (other) occupants of the building for their private use or to share it with them at no cost.

Flemish region

In the Flemish region, the obligation to obtain a licence for the distribution of electricity currently still applies to an association of co-owners or individual co-owners that wish to sell surplus electricity generated by solar panels to the other occupants in the building.

However, in practice, the obligation to obtain such licence, as well as other obligations related thereto, has been considered burdensome in proportion to the benefits derived therefrom (especially in smaller co ownerships).

In order to promote the use of solar produced energy within co ownerships, an amendment to the Flemish Energy Decree of 8 May 2009 was recently approved (which will enter into force on 1 April 2023 as a result of which it will become possible for the association of co owners or individual co owners to sell solar produced electricity to occupants of the same building without this being considered a licensed activity (and thus provides for a welcome exemption to the burdensome obligations associated with such distribution licence for the sale of electricity).

Walloon and Brussels regions

Similar legislative changes recently entered into force in the Walloon and Brussels regions, following amendments to the Walloon Decree of 12 April 2001 on the organisation of the regional electricity market and to the Brussels Ordinance of 19 July 2001 on the organisation of the electricity market in the Brussels Capital Region.

Together towards a climate neutral future?

These legislative changes are in line with the current trend of closely involving businesses and private individuals in solar power generation, thereby contributing to a climate neutral future Alongside this evolution of removing barriers to and incentivising private solar power generation, the regional legislators are also increasingly introducing green energy obligations One of the most notable and recently introduced obligations in this regard is the mandatory installation as of 2025 of solar panels in Flemish public and private buildings with a high energy consumption This obligation may also affect co owned properties

Upcoming reform of the environmental permit in the Walloon Region



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The Walloon Government has recently proposed a legislative reform of the environmental permit.

The proposal aims to enhance environmental protection in the region, to modernise the permit management process and to align permit issuance with the needs of local establishments. If approved, these changes could have a substantial impact on companies operating in the Walloon Region.

What does the Walloon environmental permit look like today?

The environmental permit is a means for the authorities to protect nature, people and animal welfare from potentially dangerous and adverse effects that may occur when operating an establishment, such as an industrial site, office building or shopping centre.

Operators of such establishments should apply for an environmental permit if they make use of certain hazardous installations or facilities (class 1 and 2 installations), as listed by the law. Examples of such installations or facilities include deposits of dangerous waste or flammable liquids, certain heating installations and even large car parks. For certain other installations a declaration is sufficient (class 3 installations).

The period of validity of an environmental permit in the Walloon Region is limited in time, to a maximum of 20 years. Within this period, the conditions of the permit and the installations that may be operated in principle do not change, although the permit holder can apply for a modifying environmental permit. If the business concerned wishes to continue operating its establishment after the period of validity, it has to apply for a renewal of the environmental permit.

What effects will the planned reform have on businesses?

Duration

The main change of the reform entails the duration of the permit. Whilst under the current regime the environmental permit is valid for 20 years, pursuant to the proposal this limited duration would be abolished and permits would instead be granted for the duration of the operation of the relevant establishment. This change aims at increasing legal certainty for the operation of businesses.

Continued monitoring and updates

The Walloon Government seeks to link the (in principle) unlimited duration of the environmental permit with more flexible permit conditions in order to anticipate evolutions in legislation and state of technology, combined with continued supervision of the operated establishment.

The relevant operators would periodically have to perform an environmental monitoring and communicate the results to the authorities. Simultaneously, citizens would be involved through public enquiries, which under the current regime are in principle only made during the authorisation procedure. Based on these monitoring and public enquiry procedures, the competent Walloon authorities could then amend the conditions of the environmental permit to ensure that the permit remains up-to-date. This procedure also removes the need for a new, modifying environmental permit each time a new installation or facility is added to the establishment.

Environmental offences

With this reform, the Walloon Government also aims to enhance the monitoring of environmental offences and sanction procedures. The competent authorities will, for example, be able to withdraw a permit without having to follow burdensome procedures if a permit holder does not proceed with the necessary measures following pollution.

More practical tool for businesses to use

Finally, the Walloon Government aims to make the environmental permit a more hands-on and understandable tool for businesses with more concrete guidelines and instructions. How this will be achieved in practice is yet to be seen.

When can we expect the reform?

Given that the proposed reform has yet to be reviewed by the Council of State and subsequently approved by the Walloon Parliament, it is unlikely to come into force before 2024.

Pre-emption right for residential tenants in the Brussels Region

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On 22 June 2023, the Brussels Government has adopted a **draft ordinance** amending the Brussels Housing Code (Code bruxellois du Logement/Brusselse Huisvestingscode) to introduce a pre-emption right1 for tenants whose main residence is offered for sale (the "**Draft Ordinance**"). Such right aims at ensuring a better exercise of the right to housing enshrined in article 23 of the Belgian Constitution.

If this Draft Ordinance gets approved by the Brussels Parliament, it will impose significant obligations on landlords who wish to sell their leased residential properties.

[1] Throughout the Draft Ordinance, sometimes the words "preference right" (droit de préférence/voorkeurrecht) are used, but please note that the way this right is described, it constitutes an actual pre-emption right (droit de préemption/voorkooprecht).

What is the background and ratio legis?

A preferential right for tenants in the event of a sale of the leased residence has long existed in French law. In Belgium, a pre-emption right for tenants is already known in the Act of 4 November 1969 (*loi sur le bail à ferme/landpachtwet*), inserted in the old Civil Code, which introduced a pre-emption right for the tenant of a leased rural land property (baux à ferme/pacht)[2]. More recently, the Brussels Zoning Code (*Code bruxellois de l'aménagement et du territoire/Brussels Wetboek van Ruimtelijke Ordening*) also introduced a pre-emption right for the public authorities for seven years in the event of sales of (parts of) immovable properties located within a certain perimeter determined by the Brussels Government[3].

Following the example of the above regulations, this Draft Ordinance introduces a pre-emption right for tenants to buy the residential property they occupy on a preferential basis in the event it is put up for sale. The aim is to promote ownership acquisition while increasing the stability of the occupancy, and overall, to boost the right to housing of article 23 of the Belgian Constitution.

[2] Article 48 of the Act of 4 November 1969.
[3] Articles 260 and 261 of the Code Bruxellois de l'Aménagement du Territoire (CoBAT)/Brussels Wetboek van Ruimtelijke Ordening (BWRO).

[4] One should keep in mind that those leases are the residual category. Not only does it target leases concluded for an initial duration of more than three years, but it also concerns short-term leases renewed so that the duration exceeds three years or leases deemed to be long-term duration under the Brussels Housing Code.

What are the conditions for application?

Which type of lease?
Leases with a long-term duration (i.e. more than three years) intended for main residence purposes[4].

Who benefits from the pre-emption right?
The tenant who is domiciled in the residential property to be sold, as well as its spouse or legal cohabitant, its descendants or adopted children or those of its spouse or legal cohabitant, provided that they are also domiciled in that property.

Which types of transfers?
Only in the event of sale of the leased property (in its strict sense, *i.e.* not in case of exchange, donation, division, granting of rights in rem…). The pre-emption right is not limited to private sales, but also applies to auction sales.

Are there any exceptions?

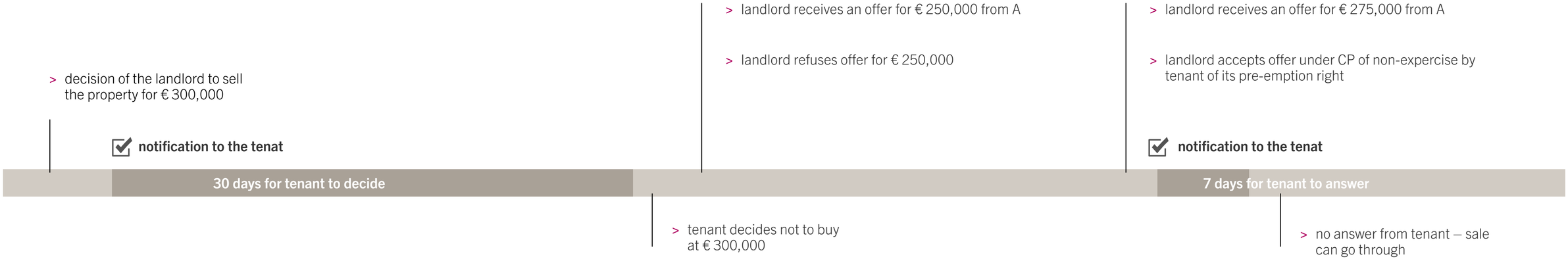
The pre-emption right will not apply, inter alia, in the event of a sale:

- to family members, i.e. (blood) relatives or cohabitants up to the third degree;
- of a building including multiple housing units which are occupied by different tenants, which would be sold as an indivisible property;
- of the bare ownership, usufruct right or any other rights in rem;
- of residential properties following mergers, demergers or liquidations of companies;
- of a building subject to an expropriation order for reasons of public utility.

For the complete list of exceptions, we refer to article 247/1 of the Draft Ordinance.

What are the obligations for the landlord-seller?

The landlord must notify the tenant of its intention to sell the residential property and of its pre-emption right.



When?

Before the conclusion of the sale. In any case, any sale concluded with regards to a property subject to this pre-emption right will be deemed to have been concluded subject to the condition precedent of the non-exercise of the pre-emption right.

Who to inform?

The tenant and its spouse or legal cohabitant each separately, but only if its spouse or legal cohabitant is mentioned in the lease agreement or if the landlord is aware of the identity of the spouse or legal cohabitant by other means.

How?

By registered letter with acknowledgement of receipt, including: (i) the identity and residence of the landlord; (ii) the address and cadastral information of the property to be sold; (iii) the price and conditions of the envisaged sale; and (iv) any rights in rem encumbering the property.

This notification constitutes an offer of sale for the benefit of the addressee (tenant).

30 days

As from receipt of the notification, the tenant will have 30 days to exercise its pre-emption right at the price and conditions included in the notification, or to waive it.The absence of any timely response from the tenant will be considered as a waiver of its pre-emption right. The acceptance by the tenant of the price and conditions mentioned in the notification will constitute a sale.

7 days

In the event the tenant does not exercise its pre-emption right and the landlord decides to sell under conditions or at a price more favourable to the purchaser, the notary should inform the tenant of those terms and the price, if the landlord has not already done so. Such notification constitutes a new sale offer valid for 7 days as from receipt of the notification.

From the current wording in the Draft Ordinance it is, however, unclear if this shorter deadline only applies if the landlord sells to the same purchaser or if it would also apply in the case of a new negotiation conducted with an alternative purchaser under conditions or at a price more favourable than the ones included in the first notification to the tenant. Neither is it clear for how long this shorter deadline should be applied.

Some uncertainties that should definitively be solved:

What if the tenant waives its pre-emption right within the 30-day period, eventually the sale does not go through with the initial purchaser, but six months later the landlord wants to sell for a better price to the same or another purchaser. Would this 7-day period apply or would the original 30-day period kick back into place?

The wording of the Draft Ordinance will hopefully be clarified before it is voted on.This notification constitutes an offer of sale for the benefit of the addressee (tenant).

Finally, the pre-emption right is of a mandatory nature, so a tenant cannot waive its right in advance5. It is however possible for the tenant to waive this right once the notification has occurred. It is therefore advisable for the landlord to include in the notification a request to waive the right and to inform the landlord about a potential waiver as soon as possible.

[5] *Article 247/4 of the Draft Ordinance.*

What are the sanctions in case of non-respect of the pre-emption right?

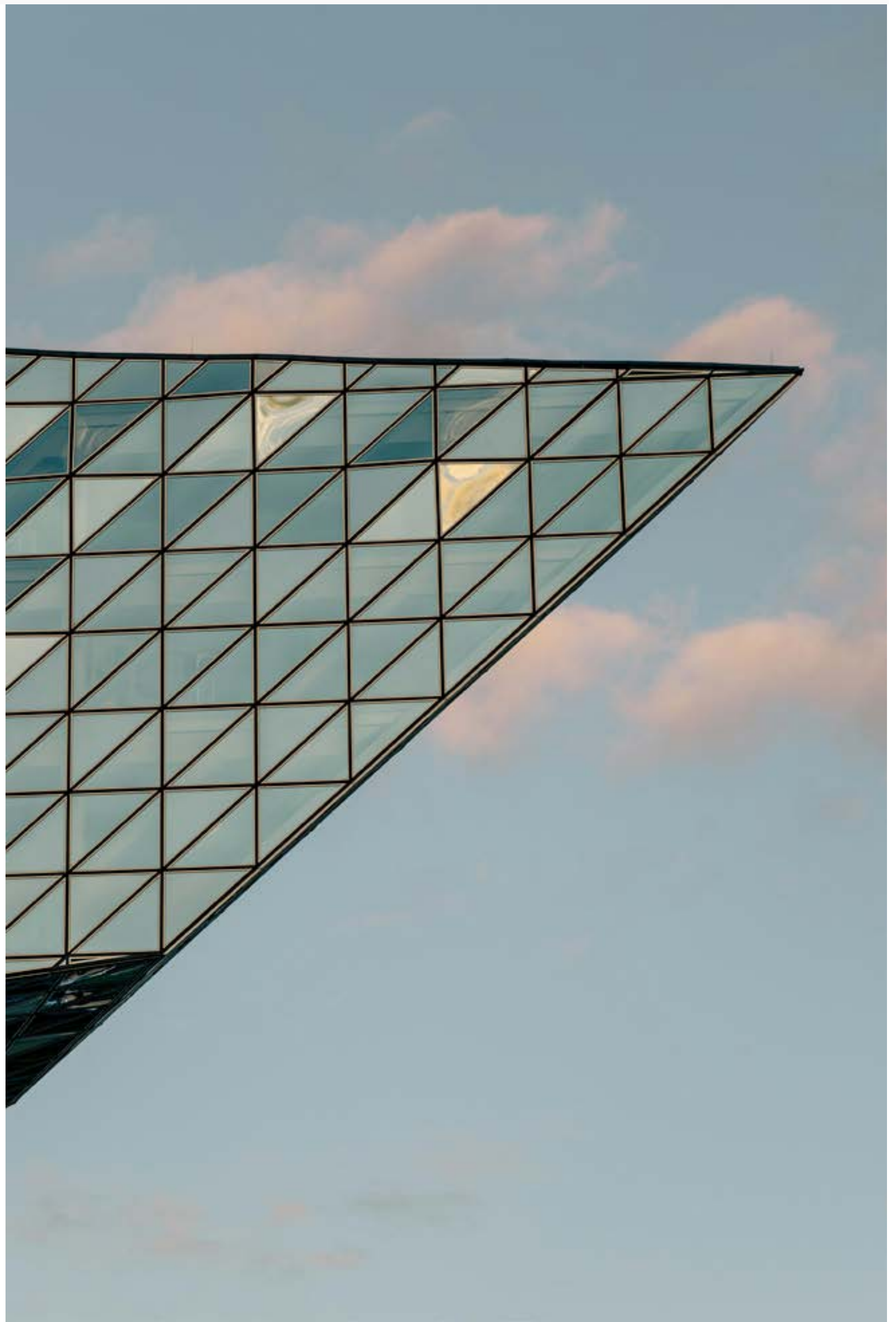
In the event a sale has taken place without the landlord having complied with its duty to inform the tenant, the latter has a claim for substitution against the purchaser of the property, whereby the tenant will be substituted into the rights and duties of the purchaser arising from the authentic sale deed, provided that the tenant pays the purchaser the sale price paid by the latter and the costs related to the authentic sale deed.

With a view to legal certainty, the Draft Ordinance provides for a shortened prescription period of one year as from the registration of the authentic sale deed in the mortgage register.envisaged sale; and (iv) any rights in rem encumbering the property.

What is the impact on the real estate practice?

Real estate actors will have to be careful that the procedure has been respected before purchasing any residential property. Attention must also be given to the form and content of the notification, since a new notification obligation occurs in case of any condition included in the sale deed that would be more favourable to the purchaser than the ones notified previously.

Note that the notary and/or real estate agent who is assigned for the sale must verify compliance with this obligation or is at risk of having its professional liability called into question.



Forced co ownership regime gets a sustainability-push



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On 25 September, Members of the Chamber of Representatives proposed a new draft law that aims at addressing the issue of sustainability in Belgium's building stock. Approximately 25% of residents in Belgium live in apartments, many of which are part of buildings built over 35 years ago. So far, only 1% of houses and 4% of apartments have been given an EPC A-label. The forced co-ownership regime is often seen as an additional obstacle to coming to agreements on what should be done, how and when and starting necessary work.

The draft law – *Proposition de loi modifiant le Code civil en ce qui concerne la copropriété forcée d'immeubles ou de groupes d'immeubles afin d'éliminer les obstacles à l'amélioration de la durabilité des appartements – Wetsvoorstel tot wijziging van het Burgerlijk Wetboek met betrekking tot de gedwongen mede-eigendom van gebouwen of groepen van gebouwen, teneinde drempels voor de verduurzaming van appartementen weg te nemen* ("**Draft Law**") – suggests several solutions to ease the complexity of the decision-making process within the general meeting of co-owners and to ensure that the co-ownership associations take steps towards improving durability.

As the Draft Law is still under discussion in the Chambers of Representatives, we provide you with an initial overview of the proposed rules.

What are main measures proposed?

The Draft Law seeks to simplify the decision-making process with the goal of improving sustainability for apartment buildings by:

> modifying rules for reserve funds;
> requiring them to establish a multi-year maintenance plan;
> granting co-ownership associations the right to enter into loans; and > updating rules on decision-making processes.

What are the new requirements for reserve funds?

Following requests from actors in co-ownership associations who complained that the reserve funds were not sufficient to cover imposed costs, these funds will now have to amount to 5% of the total estimated costs in the 10-year plan (compared to the current 5% of the charges that they each have to pay). Such reserve funds will be mandatory for co-ownership associations that are obliged to establish such multi-year maintenance plan.

Additionally, energy efficiency works will be included in the list of items that can be paid for using reserve funds as a non-periodical expense.

What is the multi-year maintenance plan and to whom does it apply?

The multi-year maintenance plan will be composed of:

> a statement of the building's energy and architectural condition;
> a description of all the maintenance work, as well as all the work required to obtain the highest-scoring EPC label;
> a 10-year plan containing all the foreseen investments presented in the form of a timetable spread over the next 10 years and accompanied by a cost estimate; and
> the financing models envisaged by the co-ownership association for certain scheduled works, whether for maintenance, energy or both.

The co-ownership manager (syndic/syndicus) will be responsible for drafting and monitoring the multi-year maintenance plan. This plan will be mandatory for every co-ownership association with more than three residential units in buildings which are 10 years old or older and will have to be updated every three years.

The multi-year maintenance plan will also have to be communicated ahead of any sale of a lot in the building.

How the right to sign loan agreements for co-ownership associations will change the current practice?

The Draft Law here recognises a common practice already accepted by the sector and will give it legal standing in legislation.

Furthermore, it is now stipulated that, in the case of a transfer of ownership over an apartment, if a loan agreement has been entered into, the seller will automatically transfer their debt related to this loan agreement and be replaced by the buyer.

What are the key takeaways from the Draft Law and what questions remain unanswered?

The multi-year maintenance plan is the most significant innovation of the Draft Law. However, it appears that the question of whether co-ownership managers have the necessary skills to draft such a plan has not been addressed. It is also worth considering what financial impact the drafting

of such a plan, and how it will be implemented, will have on co-ownership associations.

Moreover, the Draft Law does not specify what EPC the parties should be aiming for within the multi-year plan. Surely, the highest-scoring EPC label within a 10-year period will prove to be not only financially, but also technically challenging for some co-ownerships.

Additionally, raising the minimum amount for reserve funds may not be enough to address the issue of co-ownership associations not paying their debts. Banks will likely want to examine this multi-year maintenance plan as part of their assessment and may request additional securities from apartment owners subjected to a solidarity mechanism.

As it is being reviewed by the Chamber of Representatives, we are keeping a close eye on the Draft Law and its development. Therefore, we will be sure to keep you informed when it is officially published.



Brussels goes green – Overview of the new air, climate and energy policy for the upcoming decades

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The Brussels Government has adopted the Regional Air-Climate and Energy Plan, which contains concrete actions with an (indicative) timetable to reduce greenhouse gas emissions, mitigate climate change and increase renewable energy in the upcoming decades. Our real estate and environmental lawyers have summarised the most significant developments for the real estate sector.



> Ongoing	> Timeline unknown	> Timeline unknown	> 2023	> 2024
Introduction of the **TOTEM tool**, i.e. a tool to measure the impact of building materials on the environment; use of this tool to become mandatory for building projects/new buildings; will be used in a later stage to ensure the sustainability of buildings through law.	**Co-ownership** – An **EPB expert** will have to be appointed by the co-ownership association to guide each co-owner in obtaining a better EPB score and analyse what necessary renovations should be conducted to the common parts. This will help each co-owner to obtain the required EPB score for its individual part in the co-ownership.	**Limiting heating by wood**; stricter conditions in the **environmental permits** in this regard: > Upcoming prohibition of the installation and use of wood-fired primary heat generators with poor performance in terms of energy efficiency or particulate emissions. > In the case of large facilities, revise the environmental **permit requirements** where necessary (in particular the operating conditions) to require the presence of an efficient flue gas treatment system, and tighten the emission thresholds.	> **Tax relief** to support energy-efficient home renovation. > End subsidies for fossil fuels and increase support for alternatives. > Setting an **ambitious energy target** (150kWh/m^2/year) for major renovation projects.	**Stricter conditions in environmental permits** in relation to heating/cooling (such as the use of gas with lower global warming potential).

> Ongoing	> Timeline unknown	> Timeline unknown	> 2023	> 2024
> **Mandatory EPB-certificate** for non-residential buildings. rtificate > In terms of determining the energy performance of a building, a **tertiary sector certification** tool should be operational by 2025, for all uses combined, based on a calculation method established by the Regions and a study designed to determine the energy neutrality requirements for all uses in the tertiary sector. > End of fossil fuel heating for new buildings. > Ban on new oil-fired heating installations.	Any new **building** owned, occupied or intended to be occupied by a **public authority** will have to meet the “zero emission” target and will have to be equipped with a solar energy production system.	New residential building should comply with the **EPB-requirements on zero emissions.**	> End of fossil fuel heating for buildings undergoing major renovation. > As from January: public authorities will only be able to acquire or rent buildings if they are “zero energy” buildings.	**Mandatory EPB-certificate** for all buildings (including residential buildings).

> 2033	> 2035	> 2040	> 2045	> 2050
Buildings should have an **EPB score of E or lower** (F and G become prohibited).	Ban on the use of oil-fired boilers more than 15 years old.	> Complete removal of oil heating. > Public non-residential buildings should be **carbon neutral.**	Buildings should have an **EPB score of C or lower** (D and E become prohibited).	Private non-residential buildings should be **carbon neutral.** Reduction of average primary energy consumption of the entire **residential** building stock to **100 kWh/m^2/year.**



Landlord's EPB certificate obligation and nullity consequences



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On 21 October 2022, the French-speaking civil court of Brussels (the "Court") issued a decision concerning the landlord's obligation to provide their tenant with an EPB certificate prior to the conclusion of a lease.

This article will examine in more detail this obligation, explore the system of potential sanctions should the landlord fail to comply and discuss the implications of the entry into force of Book 5. Lastly, the binding nature of agreements between parties will be briefly discussed.

What are the main facts preceding the decision?

Two tenants sued their landlord, requesting the Court to grant them a rent reduction on the grounds that they suffered from enjoyment disturbances and that the rented premises did not correspond to the specifications listed in the advertisement
(and in the lease).

They further claimed that the landlord neglected to provide an EPB certificate prior to their occupation of the premises. Furthermore, the rental advertisement stated that the premises were EPB category B. However, in reality, based on an EPB certificate issued in 2012 and handed over after the conclusion of the lease, it appeared that the premises were of EPB category G (that is, the lowest energy efficiency category).

Incidentally, the tenants referred to the benchmark rent – a benchmark introduced by the Brussels Region in its ordinance of 28 October 2021 on unfair rent – to demonstrate that their rent was out of proportion.

This ordinance, which has partially entered into force, introduced the benchmark based on a rent grid established by the regional authority to assess the potential disproportionality of a rent amount. Unfortunately, this benchmark rent amount remains, so far, only indicative (Article 224/1 of the Brussels Capital Region Housing Code providing for a reduction of unfair rent has not yet entered into force).

How does the pre-contractual obligation to provide an EPB certificate work?

According to Article 217, §1, al. 1, 5° of the Brussels Capital Region Housing Code (code bruxellois du logement – Brusselse Huisvestingscode), a landlord is obliged to give to the tenant an EPB certificate of the premises as pre-contractual information necessary to the conclusion of a lease. As is stated in Article 216 of the Brussels Housing Code, this Article 217 is of a mandatory nature; it is not optional.

The tenants chose however not to invoke the mandatory nature of Article 217, which could have rendered the lease void, but instead stayed in the premises and sought a rent reduction due to the misinformation they had been given.

Decision of the Court

The judge did not hold the landlord liable for the failure to provide the certificate before the conclusion of the lease and/or for the misleading nature of the EPB category mentioned in the advertisement.

The judge considered that the tenants were not able to demonstrate they suffered damage, as an excessive energy consumption. Therefore, the liability (which requires a fault, a damage and a causal link between them) could not be established.

Potential outcomes if Book 5 had been applied

Since 1 January 2023, Book 5 of the Civil Code (applicable to agreements concluded after 1 January 2023) entered into force. While it addresses pre-contractual obligations in a general way, it proposes as well new means of action with regard to the sanction of nullity.

> Exploring the pre-contractual obligations of Book 5

Article 5.16 states that parties have to provide each other with the information required by law (as Article 217, §1, al. 1, 5° of the Brussels Capital Region Housing Code), good faith and practice, in light of the capacity of the parties, their reasonable expectations and the purpose of the contract.

In addition to pre-contractual liability, Article 5.17 provides that the breach of a duty to inform may lead to the nullity of the contract if some requirements are met.

> The novelty of nullity in Book 5

The nullity provisions in Book 5 can be found in Articles 5.57 et seq. and introduce a **new concept**. Article 5.57 states that, when the sanction is nullity, a contract may remain valid in cases provided for by law or where circumstances show that the sanction of nullity would be manifestly inappropriate, given the purpose of the rule violated.

The principle of the binding nature of agreements between parties before and in Book 5

Lastly, to support their claim for a rent reduction, the tenants also argued that the landlord failed to comply with the binding effect of any agreement (the "convention-loi" – "de overeenkomst strekt partijen tot wet" principle).

For the Court, since the tenants had visited the premises before signing the lease, they entered into it with full knowledge and could not claim the above-mentioned principle had been violated. The Court decided then the rented premises corresponded to the description given in the agreement.

Before the reform of the Civil Code, the principle that agreements between parties are binding was enshrined in Article 1134 of the old Civil Code. As the decision analysed in this article dates from October 2022, the old Civil Code was referred to by the judge.

The principle is today set out in Articles 5.69 and 5.70 of the Civil Code, and was not modified by the reform. If the decision were to be given on a lease concluded after 1 January 2023, the outcome of the case on this point would probably have been the same.

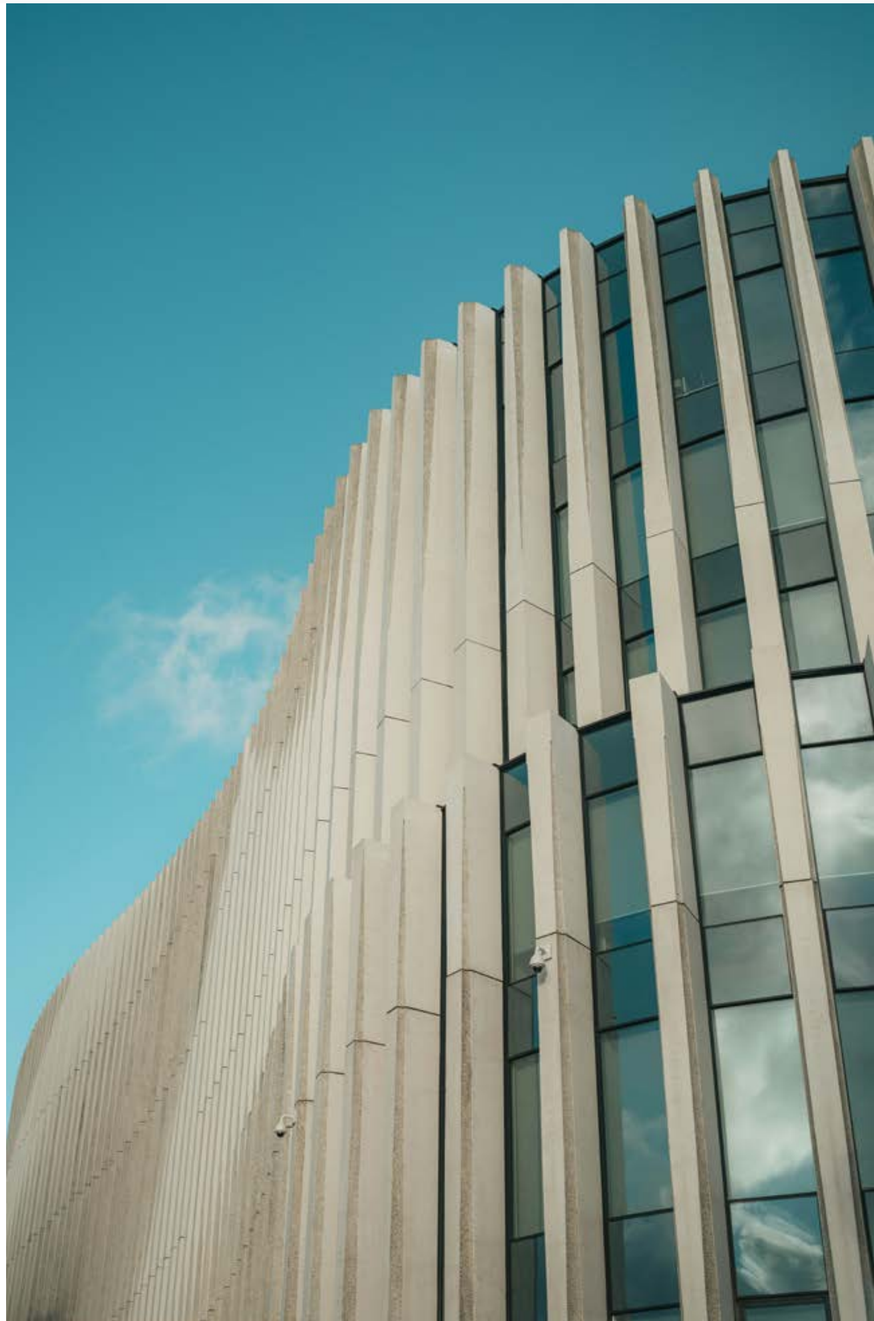
What are the key takeaways from this?

The Court's decision of 21 October 2022 could have been different if Book 5 of the Civil Code had been in force at the time. Book 5 today provides new means of action in relation to the sanction of nullity when mandatory provisions are violated.

The outcome of this case is also probably the result of the judicial principle of party disposition, where the judge is limited by what parties ask for.

Despite the need to provide an EPB certificate before entering into a lease, the tenants did not request that the lease be declared void because their landlord had failed to comply with this mandatory provision.

Claiming only a rent reduction but unable to prove the damage they suffered, the judge was unable to uphold their claim.



Green clauses in leases: What, why, how? Linklaters ESG series

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The integration of ESG concerns into real estate businesses has become increasingly important over the years. This concern was translated into legislation on various occasions:

EPC, charging stations, renovation obligations… However, unlike its neighbouring countries, as of 2023, Belgium does not have any legislation defining or imposing green clauses in leases.

The relevance of green clauses in leases can therefore only be understood, from a legal point of view, when considering the increasing obligations stemming from the EU regulations, and, particularly, the **EU Taxonomy Regulation.**

EU Taxonomy and real estate sector in a snapshot

The EU Taxonomy is a classification system that defines which **economic activities** substantially contribute to **environmental objectives**.

At this stage, compliance is largely voluntary and obligations are limited to **reporting the (non-) applicability of and compliance with the EU Taxonomy**.

Moreover, not all real estate players are currently subject to such reporting obligations.

The outcome of such reporting is however important for potential partners, clients, but also increasingly to obtain financing –be it by banks or private investors.

Which environmental objectives?

- climate change adaption;
- climate change mitigation;
- pollution prevention and control;
- transition to a circular economy;
- sustainable use and protection of water and marine resources; and
- protection and restoration of biodiversity and ecosystems.

What are the criteria for an activity to be Taxonomy-aligned?

- substantially contribute to **one** of the **environmental objectives**;
- "**do no significant harm**" on the other five environmental objectives;
- meet the so-called "**minimum safeguards**" such as the OECD guidelines for multinational enterprises and the UN Guiding Principles on Business and Human Rights to not have negative social impacts; and
- comply with the **technical screening criteria**.

What real estate activities are eligible under the Taxonomy?

- construction of new buildings;
- renovation of existing buildings;
- installation, maintenance and repair of energy efficiency equipment;
- installation, maintenance or repair of charging stations for electric vehicles;
- installation, maintenance and repair of instructions and devices for measuring, regulation and controlling energy performance of buildings;
- installation, maintenance and repair of renewable energy technologies;
- acquisition and ownership of buildings.

What is a green clause?

Although there is no universally accepted European standard or definition for “green lease agreements”, clauses promoting such agreements will be increasingly prevalent.

For example, these clauses may impose mutual obligations on landlords and tenants to manage and reduce a property’s environmental impact through improvements.

Even though green clauses can be imposed in any lease agreement, green lease agreements typically apply to non-residential properties, which can be partly explained by the fact that the requirement for an efficiently operated property, as mentioned in the technical screening criteria only relates to non-residential buildings.

Evaluating a property’s environmental impact often involves considering its energy efficiency rating as one of the most common factors.

However, a property’s environmental impact encompasses more than just its energy efficiency rating, including aspects such as:

- energy and water consumption;
- waste generation;
- certifications;
- travel to and from the building;
- materials used in the fit out;
- refurbishment and alterations of the property.

How can green clauses be relevant in the context of EU Taxonomy?

Let’s take the activity of “**acquisition and ownership of buildings**”...

To be Taxonomy aligned with the climate change mitigation objective, the activity has to comply with the conditions of alignment, as defined on the previous slide:(i) significantly contribute to this objective, (ii) do no significant harm on the five other objectives, (iii) meet the minimum safeguards and (iv) comply with the technical screening criteria.

Under the criteria applicable to the climate change mitigation objective, the owner of a large non-residential property should demonstrate that the “**building is efficiently operated through energy performance monitoring and assessment**”.

EU Taxonomy specifies that “this can be demonstrated, for example, through the presence of an Energy Performance Contract or a building automation and control system”.

This is however merely an example and other ways can be found to demonstrate the efficient operation. In this context, inserting green clauses in leases facilitates this demonstration as it ensures collaboration and data-sharing between the lessor and the lessee, joint efforts in putting in place sustainable practice and determines the allocation of costs for renovation and maintenance.



One example of soft green clause… and its potential.

The Parties agree to use and manage the Leased Property as sustainably as possible. The Tenant shall instruct its employees, agents and other users to use the Leased Property accordingly.
To maintain a comfortable indoor environment that fosters productivity and well-being for its occupants, the Parties shall work together to pursue the following objectives:

> Reducing energy use, including more efficient use of heating and lighting and minimising greenhouse gases emissions;	More stringent commitment	The Parties agree to equip the leased property with energy-efficient lightbulbs (such as compact fluorescent lamps, LEDs or other low-energy consumption alternatives as far as technically possible). They also agree to use energy-saving installations including motion detectors and daylight sensors.
> Reducing the use of drinking water and promoting the use of recycled water or rainwater;	More stringent commitment	The Parties agree to install water-efficient toilets, dual flush toilets, anti-dripping taps, sensor taps, water-efficient taps, waterless urinals, urinals with presence detectors and dishwashers with energy labels A or B equivalent.
> Minimising waste production and optimising waste processing through enhanced selective sorting and recycling practices;	More stringent form	The Parties agree that any waste materials generated from using the leased property must be sorted and disposed of according to paper, glass, batteries, energy-efficient lightbulbs, packaging materials (or other waste segregation systems that may be introduced in future), organic waste and other waste. The Parties agree to install equipment to allow for an efficient sorting of waste in the premises.
> Replacing polluting products with environmentally friendly alternatives;	More stringent commitment	The Parties agree that, to the extent possible, the Building shall be cleaned using environmentally-friendly or non-toxic cleaning products and equipment, free from natural solvents and hydrocarbons.



The EU Commission demands a reform of the Belgian Breyne Act



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On 16 November 2023, the EU Commission issued a reasoned opinion demanding the Belgian Government to amend the so-called Breyne Act, the Belgian law offering important legal safeguards for the buyer of a house or apartment to be built or under construction.

According to the EU Commission, the current guarantee to be provided under the **Breyne Act** by non-accredited sellers and contractors creates an unjustified obstacle to sellers and contractors established in other EU Member States, as the **guarantee** that Belgian accredited sellers and contractors have to provide is significantly lower, and thus violates the freedom to provide services.

Our Real Estate team analysed the issue at hand.

What is the Breyne Act?

Buying a house or apartment that is not yet (fully) constructed involves numerous risks. The Law of 9 July 1971, more commonly known as the Breyne Act, aims to protect prospective owners of residential buildings, either to be built or under construction, from the risks associated with such an endeavour. The Breyne Act imposes legal safeguards on all construction contracts, sales on plan and turnkey contracts relating to such unfinished residential properties.

One of the safeguards that the Breyne Act offers is the obligation for the seller or contractor (depending on the type of contract) to provide a financial guarantee. This financial guarantee protects the (future) owner should the seller or contractor fail to comply with its contractual obligations, for example by not delivering the agreed building. Such a scenario would have serious adverse effects for the owner as the sale would already have legally taken place and an advance payment might already have been made. It is precisely this guarantee that poses an issue for the EU Commission.

What type of guarantee is required under the Breyne Act?

Under article 12 of the Breyne Act (read in conjunction with Articles 3 and 4 of the Royal Decree of 21 October 1971), a distinction is made between two different scenarios:

> If it concerns a seller or contractor that is accredited in Belgium, the seller/contractor should deposit an amount of 5% of the price of the residential building with the Belgian Deposit and Consignment Office ("Deposito- en Consignatiekas"/"Caisse des dépôts et consignations"). This should ensure that the future owner cannot lose (part of) its advance payment, which is also limited to 5% under the Breyne Act.

> If it does not concern a seller or contractor that is accredited in Belgium, the seller/contractor should guarantee either the completion of the residential building or, in the event of dissolution of the contract before non-completion, the repayment of the amounts already paid. To do so, the seller/contractor should provide a joint and several guarantee with a credit institution or insurance company, allowing the future owner to retrieve the sums necessary for the completion of the house in case of non-compliance by the seller/contractor. This comes down to a guarantee for 100% of the contract price.

What is the issue of the EU Commission with the mandatory guarantee under the Breyne Act?

According to the EU Commission, the distinction between sellers/contractors who are accredited in Belgium and those who are not, breaches EU law, and in particular, the European Directive of 12 December 2006 on services in the internal market, also known as the Services Directive.

Pursuant to the Services Directive, service providers (such as contractors) located within the EU may not encounter any unjustified obstacles when they wish to establish themselves in an EU Member State or provide their services across borders. While in principle it is not harder for sellers/contractors from another Member State to receive an accreditation in Belgium, and no direct discrimination thus exists, the process of obtaining an accreditation is considered a bigger hurdle for non-Belgian sellers/contractors in practice.

> For example, non-Belgian contractors seeking to bid for a Belgian project could face a competitive disadvantage by having to embark on a lengthy administrative procedure to obtain accreditation, compared to Belgian contractors who in many cases already have a Belgian accreditation. However, in practice, the obligation to obtain such licence, as well as other obligations related thereto, has been considered burdensome in proportion to the benefits derived therefrom (especially in smaller co ownerships).

As a consequence, the EU Commission believes that the more stringent guarantee for non-accredited sellers/contractors provided under the Breyne Act constitutes an unjustified obstacle and should thus be removed from Belgian law

In order to enforce the freedom to provide services under the Services Directive, the EU Commission has now issued a reasoned opinion and has given the Belgian Government a deadline of two months, as of 16 November 2023, to amend the Breyne Act, after already having sent a letter of formal notice to this effect in February this year. If they refuse to do so, the EU Commission may decide to bring the case before the European Court of Justice.

What are the potential consequences of the Breyne Act?

The Belgian Government may either decide to defend its case before the European Court of Justice or immediately comply with the request of the EU Commission and thus amend the Breyne Act of its own accord.

If a proceeding were to follow before the European Court of Justice and it were to decide – in line with the EU Commission – that the provision of the Breyne Act on the mandatory guarantee indeed constitutes a breach of the Services Directive, the Belgian Government would be obliged to remove the distinction between accredited and non-accredited sellers/contractors from the Breyne Act. It is unclear at this stage what this would mean for the size of the guarantee. However, an elimination of the current distinction could result in accredited sellers/contractors having to provide higher guarantees to match the ones of their non-accredited colleagues.



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For more information do not hesitate to reach out to the Belgian Real Estate team or visit our Navigate Belgium Real Estate Sector dedicated page for more insights.



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