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Operating permits for shopping centres and retail stores: status in the 3 Regions

By Ariane Brohez, Martin Manzanera and Sophie Van Berkel

Background

Shopping centres and (large) retail stores underwent rapid growth at the end of 1920, forcing the Belgian legislator to intervene in 1937 through the so-called “Padlock Law” that provided basically for a ban on opening new store surfaces or enlarging existing store surfaces except in exceptional circumstances.The abrogation of the Padlock Law in 1961 led to a (new) spectacular development of superstores on out-of-town sites, calling for a new legislative measure, namely the law of 29 June 1975. The **socio-economic permit**, seen as a compulsory complement to the building permit, was born. In 2004, the system was simplified by what was called the “Ikea Law”, which, among other things, did away with the reference to the gross built surface and the link with the building permit (which has since come under the authority of the regions).

In 2009, further to the implementation of the Bolkestein Directive into Belgian law, socio-economic criteria included in the Ikea Law, considered as contrary to European law, were modified: the new language refers to (i) consumer protection (instead of consumer interests), (ii) compliance with social and labour legislation (instead of the project’s influence on employment) and (iii) protection of urban environment (instead of the impact of the project on existing trade).

With the 6th State Reform, authority to grant/refuse socio-economic permits was transferred to the Regions, with effect as from 1 July 2014. The Brussels Region immediately adopted a new Ordinance, abrogating the Ikea Law with effect as from 1 July 2014 – and promptly announced a review of the current legislation. The Walloon Region followed suit early this year, with effect as from 1 June 2015. The Flemish Region has a draft Decree ready but has not adopted it yet, and so still applies the Ikea Law. Moreover a specific regime is provided for large projects adjacent to the other regions: a consultation process must take place between the authorities concerned, where the project exceeds 20,000 m² net retail surface located at less than 20km from the boundaries of the other Region(s).

In this short note, we highlight the main modifications and differences compared to the Ikea law and between these new legislative regimes.

Ikea Law

The Ikea Law was built around two main concepts and four criteria:

- the **retail trade establishment** whose activity is to resell merchandise to consumers;
- the **net retail surface**, which is the surface designated for sales and is accessible to the public, which comprises cash register zones and entrances used to display or sell merchandise;
- the **four assessment criteria** being the location of the retail store, the protection of the urban environment, the protection of the consumer and compliance with the social and labour legislation.

Situations where an operator will need a socio-economic permit, are as follows:

	Net retail surface	Socio-economic permit	Other authorisations
New construction of a retail store	< 400 m^2 > 400 m^2	No Yes	Not on the basis of Ikea Law – but possibly under other legislation (e.g. building permit and/or environmental permit)
New retail centre /shopping centre (i.e. several stores on the same site, having a commercial or legal connection)	< 400 m^2 > 400 m^2	No Yes	
Extension of an existing retail store or retail centre / shopping centre	If < 400 m^2 even after extension	No	
	If already > 400 m^2 or if total surface after extension > 400 m^2	Yes (subject to simplified procedure)	
Operation of a retail store in a building previously not used for retail	< 400 m^2	No	
	> 400 m^2	Yes	
Substantial change in the nature of the commercial activity	< 400 m^2	No	
	> 400 m^2	Yes	

The Ikea Law also provides for a simplified procedure (limited to a declaration) if (i) the extension is to an existing retail store or retail centre that already has a socio-economic permit, provided the extension does not exceed 20% of the existing net retail surface (with a cap of 300 m^2) or (ii) the relocation within a distance of 1,000 m within the same municipality (as the case may be with the extension mentioned before).

In our view, the three major problems of the Ikea Law and its application, are:

- the notion of "net retail surface", which is a variable statistic, particularly in the context of a shopping centre, where it will also depend on the location of shops, their own fit-out and the use made of the total space available;
- the notion of "substantial change in the nature of the commercial activity", which is not defined. It should be noted that the scarce case-law on this has generally been favourable to the operator, concluding that, in most cases, there has not been a "substantial" change and hence, no need for a new socio-economic permit; and
- the "retail mix", which is tied in with both these issues: the net retail surface dedicated to a type of shop or merchandise is a variable statistic and the question as to whether a change of retail activity should (always) be

considered as a substantial change in the nature of the commercial activity. Furthermore, one could take issue with the need to comply with this request for a retail mix, or even with the sated reasons for imposing such a requirement for a retail mix, with the Bolkestein Directive.

Brussels Region

Since the Ordinance of 8 May 2014 that enters in force on 1 July 2014, the regulation of shopping centres and retail stores is now fully integrated into the **town-planning legislation**. The socio-economic permit in Brussels is, therefore, a redundant issue, and we refer exclusively now to a building permit in Brussels.

The Brussels reform is based on four principles:

- through the definition of net retail surface, the legislation is extended to **services** (e.g. horeca, fitness, banks);
- the "**substantial change** in commercial activity" (instead of the "nature" of the commercial activity) under the Ikea Law, now requires a building permit;
- an **environmental impact report** (rapport d'incidences / effectenrapport) is required for projects of 1,000 m² or more, and an **environmental impact study** (étude d'incidence / effectenstudie) is required for projects of 4,000 m² or above;
- a **town-planning declaration** is required for each and every retail project, including changes that are not substantial.

The assessment **criteria** cover mobility, accessibility and parking, the integration of the project in its urban environment, consumer protection and health and safety issues related to the site and its surroundings.

Compared to the Ikea Law, the situation in Brussels is now as follows:

	Net retail surface	Building permit	Building permit assessed on the basis of aforementioned criteria	Environmental impact
New construction of a retail store, which now also includes services	< 400 m²	Yes	No	No
	400 – 1,000 m²	Yes	Yes	No
	1,000 – 4,000 m²	Yes	Yes	Report
	> 4,000 m²	Yes	Yes	Study

New retail centre / shopping centre (i.e. retail stores on the same site, having a commercial or legal connection) , which now also includes services	< 400 m²	Yes	No	No
	400 – 1,000 m²	Yes	Yes	No
	1,000 – 4,000 m²	Yes	Yes	Report
	> 4,000 m²	Yes	Yes	Study
Extension of an existing retail store or retail centre / shopping centre, services included, but without increase of the gross surface	If 400 m² not reached after extension	No	No	No
	400 – 1,000 m²	Yes (except if application of art. 98, 13° §4 COBAT)	Yes (except if application of art. 98, 13° §4 COBAT)	No
	1,000 – 4,000 m²	Yes (except if application of art. 98, 13° §4 COBAT)	Yes (except if application of art. 98, 13° §4 COBAT)	Report
	> 4,000 m²	Yes (except if application of art. 98, 13° §4 COBAT)	Yes (except if application of art. 98, 13° §4 COBAT)	Study (or Report if exception > 300m² & 20%)
Extension of an existing retail store or retail centre / shopping centre, services included, and with increase of the gross surface	If 400 m² not reached after extension	Yes	No	No
	400 – 1,000 m²	Yes	Yes (except if application of art. 98, 13° §4 COBAT)	No
	1,000 – 4,000 m²	Yes	Yes (except if application of art. 98, 13° §4 COBAT)	Report
	> 4,000 m²	Yes	Yes (except if application of art. 98, 13° §4 COBAT)	Study (or Report if exception > 300m² & 20%)
Operation of a retail store, services included, in a building previously not used for retail	< 400 m²	Yes	No	No
	400 – 1,000 m²	Yes	Yes	No
	1,000 – 4,000 m²	Yes	Yes	Report
	> 4,000 m²	Yes	Yes	Study

Substantial change in the commercial activity (instead of "the nature of the commercial activity"), including services	< 400 m²	No	No	No
	400 – 1,000 m²	Yes	Yes	No
	1,000 – 4,000 m²	Yes	Yes	Report
	> 4,000 m²	Yes	Yes	Report

The Brussels Ordinance also specifies that an extension of the net retail surface of less than 20%, subject to a cap of 300 m², when the store already benefits from a socio-economic permit (before 1 July 2014) or a building permit (after 1 July 2014) is not an "substantial change" (COBAT, Article 98, 13°, §4).

As with the Ikea Law, we believe that the terms, "net retail surface", "substantial change" and "retail mix" may cause problems under this new legislation, particularly the term "net retail surface" where the town-planning regulations refer to gross surface areas. The Brussels Government envisages modifying this legislation in order to specify when an extension requires an environmental impact study and to define the concept of "substantial change".

Walloon Region

The Walloon Decree of 5 February 2015 entered into force on 1 June 2015. Compared to the Ikea Law, and contrary to the Brussels Ordinance, this Decree does not modify the definitions of "retail trade establishment" and "net retail surface", and still refers to the "substantial change in the nature of the commercial activity".

The main novelty of this Decree is that it provides for two types of permits: the **retail permit** (permis d'implantation commerciale) and the **integrated permit** (permis intégré). Public enquiry and evaluation of environmental impact are also required, subject to exemptions decided by the Government and in accordance with the Environmental Code. The Municipality must also be informed of all opening, extension or modification of the nature of the commercial activity of a retail trade establishment of a net surface of 400 m² or less.

The assessment **criteria** for a permit request are: consumer protection, protection of the urban environment, the social policy objective and the contribution to sustainable mobility.

Where the Ikea Law provided for a simplified procedure, the Walloon Decree provides for an exemption from permit for (i) an extension of an existing retail store or retail centre that already has a socio-economic permit, provided the extension does not exceed 20% of the existing net retail surface, subject to a cap of 300 m², or (ii) the relocation within a distance of 1,000 m within the same municipality (as the case may be with the extension mentioned before) provided that the net retail surface does not exceed 400 m². This second exemption is of no practical interest as, in such cases, a town-planning declaration is required.

It should also be noted that exempted extensions and modifications, not considered by the operator to be substantial, are to be mentioned in a dedicated register. This register is accessible upon request by the civil servant responsible for retail trade establishments, and must be periodically produced to him (periodicity to be determined by the Government). Within

15 days from receipt of this register, the civil servant may decide to requalify the change as being substantial and invite the operator to fill in a retail permit request for regularisation.

Compared to the Ikea Law, the situation in Wallonia is now as follows:

	Net retail surface	Application of the Decree ?	Type of permit ?
New construction of a retail store	< 400 m²	No	Prior information to be given to the municipality Building permit or sole permit (permis unique) depending on the actual situation
	> 400 m²	Yes	Integrated permit
New retail centre / shopping centre (i.e. retail stores on the same site having a commercial or legal connection)	< 400 m²	No	Prior information to be given to the municipality Building permit or sole permit (*permis unique*) depending on the actual situation
	> 400 m²	Yes	Integrated permit
Extension of an existing retail store or retail centre / shopping centre	If 400 m² not reached after extension	No	Prior information to be given to the municipality Building permit or sole permit *(permis unique)* depending on the actual situation
	If 400 m² already reached or total surface after extension > 400 m²	Yes (subject to exemption)	Without construction: retail permit With construction: Integrated permit
Operation of a retail store in a building previously not used for retail	< 400 m²	No	Prior information to be given to the municipality Building permit or sole permit (*permis unique*) depending on the actual situation
	> 400 m²	Yes	Integrated permit

Substantial change in the nature of the commercial activity	< 400 m²	No	Prior information to be given to the municipality
	> 400 m²	Yes	Retail permit

The legislation also introduces new tools:

- the regional and local retail development schemes (*schémas régional et communaux de développement commercial*) help operators to complete their application forms and guide the authority in the assessment of a project;

- the software "LOGIC", which is a geographic data base reflecting the "current" state of the commercial sector in Wallonia, with a classification based on net retail surface, products, brands… The operator can check his project against these criteria to see if it is appropriate to apply and the authorities can use the results to assess the project; and

- the software "MOVE", which targets underlying commercial and geographic behavioural patterns.

As with the Ikea Law and the Brussels Ordinance, we believe that the terms, "net retail surface", "substantial change" and "retail mix" may cause problems under this new legislation, particularly the term, "net retail surface," where the town-planning regulations refer to gross surface areas.

Flemish Region

The Ikea Law is still in force in Flanders, where only a draft decree is currently available.

The main aspects of the draft legislation can be summarised as follows.

- If both a building permit and a retail permit are required, the procedure will be integrated into the building permit procedure.

- The construction and extension of retail stores or retail centres for a new retail surface of more than 400 m² will require a permit. The change of use of a building, in order to operate a retail store or retail centre, exceeding 400 m², will require a permit. The merger or split of retail stores or retail centres, when at least one of the retail trade establishments has a net retail surface of more than 400 m², will require a permit. A substantial change in the nature of the commercial activity in a building with a net retail surface of more than 400 m² will require a permit.

- The assessment criteria are:
  (1) the project must ensure sustainability,
  (2) guarantee that consumers can access what is on offer,
  (3) improve the quality of urban life by complementing core commercial spaces, avoiding pockets of retail outlets, and

(4) contributing to sustainable mobility.

The draft Decree defines what is to be understood by a “substantial change in the nature of the commercial activity” by classifying the activities in three categories: the sale of food, the sale of personal/household goods and the sale of other products and services. The closure or start-up of one of these activities is a “substantial change” as is the changeover from one activity to the other. The reference to “services” in this definition is of questionable relevance since the rendering of services is excluded from the scope of the definition of “retail trade establishment”.

Preliminary conclusion

Having survived the transfer of responsibility for town-planning and environmental matters to the Regions, the Belgian market and investors in it should be able to survive this reform as well (with a certain amount of instruction, maybe). But the real challenge is not confined to modest dimensions of Belgium and its three Regions, but is to be found at European level. Despite the (lengthy) explanation, in all parliamentary preparatory works, it is not yet demonstrated that these legislative changes comply with the Bolkestein Directive and this could well give rise to differences of interpretation in the (near) future.

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Joint liability for tax and social debts: extension to the principal

By Justine Thiry and Antoine Béchaimont

The campaign against tax and social security fraud has always been on the agenda of the Belgian government – whatever its political persuasion. The construction industry, particularly sensitive to this issue, did not escape the regulatory determination of our politicians. The main aim of current regulations, is to establish **joint liability** between the contractor and his sub-contractors, in cases of non-payment of tax and social charges. If one sub-contractor, therefore, does not pay his fiscal and/or social dues, the contractor must withhold 15% (tax debt) and/or 35% (social debt) from amounts owing to the subcontractor, and transfer the amounts withheld to the tax and/or social authorities.

The principle was established in the **Articles 402 and 403** of the Income Tax Code (tax debt) and **Article 30bis** of the Act of 27 June 1969 (social debt).

Background

Originally, the **withholding principle** was only applicable to the **direct** relationship between (i) the principal and his contractor, and between (ii) the contractor and its sub-contractors. The two providers were jointly liable for the tax or social debt of one of them, with a threshold equal to the price of the works.

In 2012, the government concluded that the system was too inefficient to effectively combat on-site fraud. The withholding principle was therefore enlarged to a “**waterfall principle**”. Should one sub-contractor fail to pay his tax and/or social debt, the tax and/or social authorities would be able to claim the unpaid amount from its direct contractor. Should the latter fail to pay, then the tax/social security authorities should be allowed to follow the contractual chain until full payment of the outstanding debt. Until now, however, the original principal has not been replaced by the joint liability or the waterfall principle.

New regulation

By a **10 August 2015** Program Law, published on 18 August 2015, **the waterfall principle has been extended to the principal**. Under this Program Law, a principal in the contractual chain can be jointly liable for the tax and/or social debts of one of his (sub-)contractors. The principal must now, therefore, verify whether its contractor (and sub-contractor) is liable for any tax or social security debt before signing the construction contract and during the time of the construction.

Scope

This new rule puts a heavy burden of liability on principals, who must check that the other contracting party, as well as all other sub-contractors working on the site[1], do not owe money to the tax or social security authorities. When receiving an invoice for works performed by the contractor[2] , the principal must request him to provide an attestation from social and tax authorities. The attestation (valid for 20 days) confirms the amount of the contractor's debt (if any).

If the (sub-)contractor owes money to the tax and/or social security authority, the principal must withhold 15% (tax debt) or 35% (social debt) from its direct contractor's invoice (VAT excluded), up to the amount owed by the subcontractor, and transfer it to the relevant authority. Failure to do so will render the principal jointly liable towards the authorities for the subcontractor's or other contractor's tax and/or social debt. The penalty incurred will be equal to the amount the principle should have withheld. If the contractor owes money to both the social security and tax authorities, the principal's joint liability for the social security debt will be capped at 65% of the total invoice, whilst the cap for the joint liability for tax debt will be of 35% of the invoice.

Please note that withholding avoids the principal's joint liability with his **direct contractor(s) only**, and, therefore, not the joint liability with its sub-contractor(s). The amount that the principal has withheld on his direct contractor's invoice, will, however be credited against the amount owing under the joint liability with its sub-contractor(s) (and is always capped at the abovementioned amounts). In practice, this scenario should be infrequent considering (i) the direct contractor will first be jointly liable, according to the waterfall principle, and (ii) the direct contractor will flagged as indebted as well in the official database after 30 days of joint liability with its sub-contractor[3] .

The joint liability is applicable to:

- All construction works;

- Any works, even if they are not construction works, related to :
  - supply and installation into a building of :
    - heating or HVAC ;
    - sanitary equipment ;

1 Such verification can be made on-line

2 In case of an invoice amounting or exceeding 7,143.00 euros

3 In case of joint liability, the authority send a request of payment to the contractor. The contractor has 30 days to pay before being reported as indebted in the database of the authority.

- electrical equipment;
- alarm systems;
- storage equipment, sinks, ventilators (kitchen/bathroom), extractor fans/hoods, etc. ;
- shutters, blinds, awnings.

o supply and installation into a building of wall or floor coverings, even if the installation just requires simple cutting to shape;

- Any fixing, installation, repair, maintenance or cleaning of the goods described above.

Conclusion

The principal can now be jointly liable for nearly all works executed in his building, and his obligation of verification is considerably extended since it now includes the sub-contractors (sometimes unknown to the principal on major construction works). As before, the joint liability for social debt does not apply to individual principals.

In order to mitigate this legal obligation, the drafting of contractor's agreements should be upgraded and further negotiated in order to strengthen the (main) contractor's obligation to verify the absence of tax and social security debts in respect of its own contractors.

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VAT taxable leases of warehouses: new Ruling

By Hélène Bourleau

As opposed to a standard lease of immovable property, which is, in principle, exempt from VAT, the lease of storage space / warehouses can, under certain conditions, be subject to VAT. This, consequently, gives rise to a right to deduct input VAT in the hands of the lessor. The Ruling Commission has rendered an interesting Ruling regarding the conditions under which leases of warehouses qualify as VAT taxable.

Administrative tolerance in the case of office space in warehouses: 10% rule based on the surface areas.

According to administrative guidelines, VAT only applies to leases of separate premises specifically equipped and exclusively used for the storage of goods. If the building is used not only for storage, but also as office space, or for the sale of the stored goods, the Belgian VAT authorities consider that the lease, as a whole, qualifies as a VAT exempt lease of immovable property.

However, in accordance with guidance on what the authority will tolerate, the lease is still subject to VAT if (i) the office space is used by the persons responsible for the management of the stored goods and (ii) the surface of the office space does not exceed 10% of the total surface of the building (10% rule).

Note that if the registered office is located in the leased premises, the Belgian VAT authorities tend to consider that the office space is also used for other purposes (e.g. the meetings of the shareholders and the board of directors) so that the lease should be VAT exempt.

New Ruling extends the tolerance: 10% rule based on volume

Despite the office space exceeding the 10% threshold, the Ruling Commission has accepted, in a recently published Ruling nr. 2015.035, that the lease in question should be subject to VAT since the volume of the office space did not exceed 10% of the total **volume** of the building.

This decision shows that the Authorities can adopt a more flexible interpretation of the criteria to assess whether a warehouse/office lease qualifies as a VAT taxable lease. Furthermore, since storage space commonly has a higher ceiling than office space, it should be easier to avoid exceeding a 10% volume threshold rather than a 10% surface threshold.

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Self-supply of a new building: should the interim interest be included in the VAT taxable amount?

By Hélène Bourleau

The European Court of Justice (ECJ) has recently rendered a decision regarding the VAT taxable amount of the deemed "self-supply" which occurs when a building is used for a VAT exempt activity despite the previous deduction of the input VAT on the construction costs of that building (*Case C-16/14 Property Development Company NV)*.

This decision concerns the situation where a professional builder has put up a new building with the intention of selling it or of granting a right in rem on it, and has consequently deducted the input VAT on the construction costs of the building, whereas the building is ultimately leased without VAT. The question is: what should be done with respect to the previously deducted input VAT.

Deemed self-supply of a building – Determination of the taxable amount

The European VAT directive and the Belgian VAT code provide that, when a building is used as an investment property although it was first built for another purpose (e.g. because it was destined to be sold) so that the input VAT on the building was deductible, a professional constructor is deemed to perform a taxable self-supply and has to pay the VAT on this self-supply.

The European VAT directive and the Belgian VAT code further provide that the taxable amount of this self-supply should be "the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of that supply". According to the Belgian administrative guidelines, for the self-supply of a new building, the taxable amount should be the cost price of the construction, valued at the time of the self-supply.

It has long been debated whether this taxable amount of the self-supply should also include the interim interest, i.e. interest paid by the constructor on a loan to finance the construction of the building, and progressively drawn down during construction. The Belgian courts are divided on this issue.

Belgian Supreme Court: Taxable amount based on the cost price of the building, including the interim interest

In a case that came before the Supreme Court, the new building first appeared as stock in the accounts of the professional constructor, as it was destined to be sold. In valuing that stock, the constructor capitalised the interim interest as part of the value of the building. However, in anticipation of the sale of the building, the constructor had leased out parts of the building.

According to the Supreme Court, the professional constructor removed the building from the stock account to use it as an investment property, and, therefore, carried out a VAT taxable self-supply based on the cost price of the building, including the interim interest (*Supreme Court, 19 January 2012*). The Supreme Court thus set aside the judgment of the Court of Appeal of Antwerp regarding the question of interim interest, and referred the case to the Court of Appeal of Ghent.

Such interim interest was not subject to VAT and thus did not give rise to any VAT deduction. The fact that VAT would become due on the interim interest at the time of the deemed self-supply took place, raised questions regarding compatibility with the principle of neutrality of VAT. The Court of Appeal of Ghent thus decided to suspend the proceedings and to refer the question regarding the interim interest to the ECJ.

ECJ-Case Property Development Company – Taxable amount based on the purchase price of similar buildings, irrespective of whether this price includes interim interest

According to the ECJ, when a building is not purchased but is built, and when there are similar buildings on the market (i.e. buildings whose location, size and essential characteristics are similar), the taxable amount for the self-supply is, in principle, the purchase price of similar buildings at the time the self-supply occurred. Only in the absence of a purchase price for the property or for similar properties, is the taxable amount determined on the basis of ‘cost price’.

If the taxable amount is determined on the basis of the purchase price of similar buildings, the ECJ considered that it is irrelevant to know whether the purchase price of similar buildings includes interim interest which may have been paid during their construction.

Consequences for the real estate sector

The Belgian VAT Authorities have not yet commented on this ECJ decision, but it might have a negative impact for professional constructors who have to perform such a deemed self-supply. The value of a similar building at the time of the self-supply, might be higher than the actual construction costs (whether increased or not with the interim interest), so that the VAT to be paid on the self-supply will exceed the previously deducted VAT on the construction costs.

It is regrettable that full focus has been placed on the taxable amount of the self-supply, while the key question has not been addressed: whether such self-supply should be performed at the time when the building is leased -in anticipation of the sale of the building- but is still destined to be sold with application of VAT.

An analysis of each case will be required in order to avoid a situation where a self-supply might have to be made when there is a risk that the building may cease to be used for a VAT taxable activity or sold with application of VAT.

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Existing split deals: Vlabel vs. Ruling Commission

By Ariane Brohez

Since 14 August 2015, it is possible to ask for a ruling to Vlabel (Flemish tax administration) or ask for an interpretation based on a hypothetical or theoretical case. What should have been good news for taxpayers seeking an advance guarantee regarding the tax treatment of a transaction, turned into a nightmare after a few weeks.

Requested to rule on an existing "split deal" structure, the Vlabel effectively came to a decision totally opposed to the position adopted by the Ruling Commission:

- Existing split deals: Rulings issued at the time of structuring a split deal required the parties concerned to commit to not reuniting the full ownership over the real estate asset until expiry of the long-term lease, save in cases of reunification in the hands of a third party with payment of the transfer tax applicable to sale (10% or 12.50%) on the entire value.
- Ruling Commission: The Ruling Commission is now reconsidering its standpoint, on a case-by-case basis, confirming that (i) the commitment not to reunite, can be waived, (ii) the transfer of the long-term lease to a third party is subject to 2% registration duties and (iii) the sale of the residual property rights to the same third party is subject to a 10% or 12.50% transfer tax.
- Vlabel: The situation is totally different in Flanders where Vlabel decided, basically, that the commitment not to reunite, cannot be waived. Should such a reunification occur, then the Flemish tax administration is allow to (i) assess 10% transfer tax on the initial transaction (split deal) **and** (ii) assess 10% transfer tax upon reunification of the full ownership over the real estate asset in the hands of a third party. In addition to Flemish taxation, the Federal tax administration may still assess 2% registration duties on the transfer of the long-term lease to the third party.

The Vlabel decision is open to criticism: the initial ruling on the split deal does not create, as such, a legal basis, for the assessment of transfer tax and the application of the general anti-abuse rule to an existing split deal. Taxing an existing situation in which the candidate purchaser was not involved, seems fraught with difficulties. Moreover the very authority of Vlabel to render such a decision is in question: while Vlabel is undoubtedly responsible for transfer tax in cases of sale (or usufruct), the Federal tax administration is only authority with responsibility for registration duties on long-term leases. Deciding that the transfer of a long-term lease right, subject to registration duties, leads to the assessment of Flemish transfer tax, purports to unconstitutionally restrict the competence of the Federal tax administration.

Both services still have to agree on a new protocol and way of working when the transaction or question concerns both Federal legislation and Flemish legislation. Let us hope that this type of transaction, frequent in the market, will be at the top of their agenda.

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Flanders: (double) taxation of security interest (avoided) clarified

By *Ariane Brohez*

The Regions have authority to determine the base, rate and exemption for e.g. registration duties on mortgages; the Flemish Region is, since 1 January 2015, competent for the collection of these registration duties as well. Taxation (if any) on other security interests, like floating charges, remains within the remit of the Federal State.

Mortgages (*hypothèque / hypotheek*) are subject to 1% registration duties in the three Regions, in accordance with regional legislation, and floating charges (*gage sur fonds de commerce / pand op handelszaak*) are subject to 0.5% registration duties, in accordance with federal legislation. The Federal legislation provides, however, that:

- These duties cover all mortgages or floating charges granted as security interest for the same receivable and the same guaranteed amount. In other words, if asset A has been mortgaged as security for a receivable and the amount of that receivable, (X) has been subject to 1% registration duties, then a mortgage on asset B, granted as security for the same receivable (X), will be exempt from these 1% registration duties.

- A mortgage on real estate to secure a debt which is already secured by a floating charge is subject to 1% registration duties subject to deduction of the 0.50% registration duties already assessed on the floating charge.

This avoidance of double taxation, or increased taxation, on security interests, under Federal legislation, was, however, no longer guaranteed in Flanders once responsibility for collection of taxes was transferred to the Flemish Region. Vlabel has recently clarified the position, under Flemish law, concerning the assessment of the registration duties in this situation.

	First deed	Second deed	Taxation
Hypothesis 1	Mortgage on real estate located in Flanders and subject to 1% registration duties	Mortgage on real estate located in Flanders	Second deed exempt. NB: if the first deed was prior to 1 January 2015, duty paid on the first deed must be mentioned in the second deed because Vlabel does not have that information
Hypothesis 2	Mortgage on real estate located outside Flanders and subject to 1% registration duties	Mortgage on real estate located in Flanders	Second deed subject to 1% registration duties

Hypothesis 3	Mortgage on real estate located in Flanders and subject to 1% registration duties	Mortgage on real estate located in Flanders	Exemption from registration duties on the second deed will depend on (interpretation / application) of Federal legislation
Hypothesis 4	In the same deed, mortgage on real estate located in Flanders and floating charge		The deed is first presented to Federal registration office, which applies either 0.5% registration duties or an exemption In case of application of 0.5% registration duties, Vlabel will levy 0.5% registration duties on the mortgage If an exemption applies, Vlabel will levy 1% registration duties on the mortgage
Hypothesis 5	Mortgage on real estate located in Flanders and subject to 1% registration duties	Floating charge	Exemption from registration duties on the second deed will depend on (interpretation / application) of Federal legislation
Hypothesis 6	Floating charge subject to 0.5% registration duties	Mortgage on real estate located in Flanders	Vlabel will levy registration duties at 0.5% on the mortgage provided that the Federal duty paid is mentioned in the second deed because Vlabel does not have that information

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Wallonia: increase of transfer tax to 15% as from the 3rd asset

By *Ariane Brohez*

Walloon Region: the Walloon Government has announced an increase of the transfer tax on acquisition of real estate, as from the **third asset**, to **15%**. The third (and any subsequent) real estate asset must be located in the Walloon Region to be subject to this increased taxation, but the first and second assets may be located in any of the Belgian Regions. Further details are not yet available.

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Brussels tax reform partially anticipated

By *Ariane Brohez*

As part of an agreement for forming a government, the Brussels Government had announced a tax reform, to include measures regarding real estate income. Although it has been announced that it will start to apply in 2017, this tax reform will be partially anticipated in 2016. The major highlights for real estate are as follows:

- The annual real estate tax (*précompte immobilier / onroerende voorheffing*) will, as from 2016, be increased by 10 to 12%, depending on the municipality where the real estate is located. Individual-owners will however benefit from a lump-sum reduction of 120 EUR for the house they actually live in. This reduction will be applied as from 2016, as will measures to alleviate the most fragile taxpayers. The other reforms will apply as from 2017.
- As from 2017, the housing bonus (*bonus logement / woonbonus*) will be abolished.
- As from 2017, the first tranche for the exemption from transfer tax in case of housing purchase, will be increased to 175,000 EUR.

Further details are not known yet.

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Federal tax shift: new REIT status and extension of REIT's benefits

By *Ariane Brohez*

In the framework of what is called the "tax shift", the Belgian Government plans:

- to introduce a new real estate investment vehicle dedicated to institutional and professional investors; to this end, the status of *sicafi / vastgoedbevak* will be extended to "private REITs" for which stock quotation would not be required;

- to open the beneficial regime of institutional REITs (*sicafi institutionnelle / institutionele vastgoedbevak*) and institutional B-REITs (*société immobilière réglementée institutionnelle / institutionele gereglementeerde vastgoedvennootschap*) to Belgian real estate companies owned by non-resident REITs, for the purpose of compliance with EU legislation.

According to available budget forecast, these new measures should enter into force in 2016. No other information is available at this time. We will be following this matter closely and will keep you promptly updated.

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