1. Tax-friendly dissolution of purchase agreement now also possible in the Brussels Region

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The technique of the tax-friendly dissolution of purchase agreements has existed in the Flemish and Walloon Regions for some time. Since the beginning of this year, this is now also possible in the Brussels-Capital Region.

Context

In Belgian real estate practice, two purchase contracts are usually drawn up to settle the purchase of real estate:

- In an initial phase, a private purchase agreement (the so-called ‘compromis’) is signed between the parties, with or without the assistance of a notary or a broker.
- In a second phase, the notarial deed of purchase is signed.

Sometimes, something goes wrong between the two. It is relatively common - especially in these less favourable economic times - for the buyer finally to have to back out because he is unable to obtain a loan from the bank to pay the purchase price. Other circumstances relating to the buyer may also mean that after signing the ‘compromis’, he is no longer interested in the purchase (e.g.
the breakdown of a relationship or his employer suddenly sends him to a foreign branch for a few years, etc.).

**Dissolution of the purchase agreement**

People have the idea that the 'compromis' is merely a 'provisional' purchase agreement. A 'scrap of paper' as it were, that can easily be torn up through consultation between the parties and thrown in the bin. However, nothing could be further from the truth. *There is nothing as definitive as a provisional purchase agreement!*, the saying goes. Not least in terms of taxation. As soon as a 'compromis' is signed, the sales duties (registration duties) on this are due and the receiver of registration duties can claim them (from both the seller and the buyer). In principle, the amicable severance of the private purchase agreement does not change this.

The sales duty remains, as it were, like a tax sword of Damocles hanging over the dissolved purchase agreement. The only way to avoid having to pay the sales duty is to establish a legal claim with the court for the dissolution of the purchase agreement. If this is done within one year as of the signing of the 'compromis', then it is possible to benefit from a refund of the registration duties (application of Article 209, 3° Br.W.Reg. - Brussels Registration Code).

**Tax-friendly alternative to dissolve the purchase agreement**

A far more attractive alternative has existed in the Flemish and Walloon Regions for a number of years. In these regions, the parties have the possibility, after two payments of EUR 10 (specific fixed rate), of dissolving the private purchase agreement in a tax-transparent manner and thereby being released from payment of the sales duty (cf. for the Flemish Region Articles 2.9.4.2.9 and 3.6.0.0.6, §1, 2° VCF - Flemish Tax Code; for the Walloon Region, Article 159bis Wal.W.Reg. - Walloon Registration Code). In the Brussels-Capital Region, until recently this possibility did not yet exist. Since 1 January 2017, it has applied in this region, as well. Through Articles 18 and 19 of the Brussels Order of 12 December 2016, a new Article 159bis Br.W.Reg. was introduced, along with a point 3°/2 and 3°/3 in Article 209, paragraph 1 Br.W.Reg.

Various scenarios are possible, but the ‘preferred’ scenario is that where the ‘compromis’ (private purchase agreement) is tendered for registration together with the private dissolution agreement. In that case, just EUR 10 is levied on both agreements and that is it. The condition, however, is that the dissolved (purchase) agreement has not yet been established by means of an authentic deed and furthermore that this was not drawn up more than one year before the conclusion of the dissolution agreement.

It should be noted that the application of this technique of tax-friendly dissolution of the purchase agreement requires the cooperation and consent of both parties (buyer and seller). Further to the signing of the amicable dissolution agreement, the seller can, if need be, insist on compensation from the defaulting buyer (who turns out not to be able to pay the purchase price or withdraws from the purchase for some other reason.)
2. Brussels allowance rises steeply

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The Brussels Order of 12 December 2016 'containing the second part of the tax reform' was published in the Belgian official journal of 29 December 2016 (ed. 3). This indicates that the Brussels-Capital Region has sharply increased the allowance for the purchase of a first home. As a result, buyers can make substantial savings.

Context

Pursuant to the so-called 'localisation' criterion, the Brussels sales duties apply when the real estate purchased lies in one of the 19 communes of Brussels. Unlike in the Flemish Region, in the Brussels-Capital Region a basic rate of 12.5% still applies for the sales duty (Article 44 Br.W.Reg. - Brussels Registration Code). This duty is levied on the price (plus the tax charges; Article 45 Br.W.Reg.), but the taxable base may not be lower than the sales value of the property purchased (Article 46 Br.W.Reg.). This relatively high rate has been 'mitigated' in the Brussels-Capital Region for some years now by means of a so-called 'allowance' (Article 46bis Br.W.Reg.).

This is an amount laid down by law which may be fictitiously deducted from the tax base. The rate of 12.5% is then applied to this lower tax base. Prior to 1 January 2017, in principle the allowance amounted to EUR 60,000. However, it was increased to EUR 75,000 if the property purchased was in an ‘area for stronger development of housing and urban regeneration’.

Increase of the allowance when buying a home in Brussels

Since 1 January 2017 (that is for all purchases given the so-called ‘fixed date’ after 31 December 2016, either by registration of the private purchase agreement, or by the signing of a notarial deed of purchase), the rules on the allowance have changed slightly.

The amount of the allowance has basically been increased to EUR 175,000. The tax saving for the buyer now therefore amounts to EUR 21,875. From now on, this one amount only applies. No further
distinction is therefore made, depending on whether or not the property is in an ‘area for stronger development of housing and urban regeneration’.

Limitation relating to taxable base

One new feature is that the **taxable base** for the purchase may **not be higher than EUR 500,000**. In other words: if the price (+ tax charges) exceeds this limit, then the buyer cannot benefit from the allowance. In practice, caution is advisable. After all, the price is not the only decisive factor. In addition to the **price**, a minimum, subsidiary tax base also applies, i.e., the **sales value of the real estate**. So the sales price may be lower than EUR 500,000, but the receiver of registration may believe that the buyer has made a ‘bargain’ and assess the sales value of the purchased real estate himself at a higher level (for example, EUR 600,000) on the basis of the so-called ‘points of comparison’ available to the receivers of registration. Does the receiver assess the sales value at a higher level? In that case, he sends the buyer a so-called notice of 'underestimation'. Then the buyer not only has to **pay extra sales duties of 12.5% on the difference** between his purchase price and the sales value established by the receiver, but if this difference exceeds certain limits, the buyer also risks a **tax fine**. At present, in the Brussels-Capital Region, if the sales value is above the EUR 500,000 limit as a result of a notice of underestimation, then the buyer loses any allowance granted post factum and **lower purchasing duties paid as a result of the wrongfully granted allowance** have to be paid to the Brussels treasury!

New additional conditions: absence of right to tax reduction

One important new feature regarding the Brussels allowance lies hidden among the provisions on the entry into force of the Order, more specifically in Article 40, §1, paragraph 3 of the Order of 12 December 2016. This is a higher class of grammatical freak. These almost indecipherable (and therefore unclear) legal provisions conceal the following principles:

- During the tax assessment year that corresponds to the year of registration of the purchase giving the right to the allowance, none of the buyers may fulfil the conditions to benefit from a regional tax reduction for the purchase of their own home.
- If one of the buyers does benefit from this, then the allowance can still be granted provided that for the tax assessment year in question this buyer waives his right to this tax reduction.
- The exclusion of the allowance applies for the tax reductions as referred to in Articles 145/37 to 145/46 inclusive of the Income Tax Code 92. However, the exclusion only applies if the tax reduction is linked to the ‘purchase’ of a right in rem on real estate that is wholly or partially used or intended for habitation. Consequently, the exclusion does not apply if the buyers of the home in Brussels for which they are requesting the allowance benefit from a tax reduction that relates to the ‘establishment’ or ‘renovation’ of their own home. In practice, the reductions referred to in the aforementioned articles of the Income Tax Code 92 concern:
  a) regional home bonus
  b) regional additional interest deduction
  c) regional reduction to offset the withholding tax on real estate
  d) regional reduction for ‘other interests’
  e) regional reduction for construction savings
  f) regional reduction for long-term savings.

The new condition explained above is entirely to do with the fact that in the Brussels-Capital Region, the **home bonus and similar favourable measures for home owners have been abolished** and replaced by a **sharp increase in the allowance in the registration duties**. Article 24 of the Brussels Order of 12 December 2016 introduces a new Article 145/36bis of the Income Tax Code 92 in the subsection ‘Tax reductions for own home’. On the basis of this new provision, the tax
reductions for home owners are only granted for loans and contracts concluded before 1 January 2017 and if the taxpayer has not benefited from the allowance provided for in Article 46bis Br.W.Reg, as amended by the aforementioned Order for his purchase. The tax reduction referred to here concerns not only the so-called ‘home bonus’ (Article 145/37 of the Income Tax Code 92), but also the tax reduction for long-term savings (Article 145/39 of the Income Tax Code 92) and a number of old systems that still exist for loan contracts concluded in the past (Article 145/43, 145/44 and 145/45 of the Income Tax Code 92).

**Other conditions unchanged**

The other conditions that apply to benefit from the Brussels allowance remain unchanged. We list them briefly below:

- Only buyers who are natural persons are eligible for the allowance.
- They must buy the entirety in full ownership of a real property used or intended (in whole or in part) for habitation which is located in the Brussels-Capital Region and in addition, they must establish their main residence there.
- In more concrete terms, they will have to be registered in the population or foreigners register at the address of the property purchased within two years of the purchase (or three years if the purchase concerns an apartment under construction or on the drawing board.
- On the date of the purchase for which they are applying for the allowance, none of the buyers may already be the owner in its entirety in full ownership of another real property that is intended in whole or in part for habitation; and if there is more than one buyer, they may not together already be the owners in its entirety in full ownership of another real property that is intended in whole or in part for habitation.
- Finally, the buyers must maintain their main residence in the real property purchased with the allowance for an uninterrupted period of at least five years as of the time when they establish their main residence there.
It seems almost too good to be true. You go to Paris for a weekend and stay in a lovely apartment that is someone's home. Better still: you pay for it simply with the proceeds from letting your own apartment via AirBnB during the same weekend. It's possible, but Belgium wouldn't be Belgium if things weren't a little more complicated than that.

Offering a room or an entire house on the market, and therefore not just for family and friends, comes down to offering tourist accommodation. And that falls under a relatively complicated tangle of regulations. In this newsletter, we aim to set out the most important points to be noted for Flanders and Brussels, although we cannot go into all the details. For more information, we provide a few useful sources below.

Situation in Flanders

A phasing-out system currently applies in Flanders. The Flemish decree on tourist accommodation of 10 July 2008 still applies at the moment. This will shortly be replaced by the decree of 5 February 2016 on tourist accommodation. This can only come into force once the necessary implementing decisions are ready. The Flemish legislator has clearly opted here for the simplification approach.

In the old decree, which is currently still in force, there are five categories of tourist accommodation. Of these, 'guest room' and 'holiday home' are the most relevant for small, private letters:

- A guest room is, to put it briefly, a room in the family home of the operator, who also has his main residence there.
- A holiday home is an equipped house, apartment or studio, where tourists can prepare their own meals.

In the new decree, this division into categories will be abolished and the only reference is to ‘tourist accommodation’.

In the old decree, an obligation to give notification or hold a permit applies. So you always have to notify the Tourist Permits Service of the International Flanders Department if you run guest rooms and holiday homes. However, if you let out three or more guest rooms, or provide accommodation for nine or more tourists, then more stringent rules applies and you need a permit. Fairly detailed rules also apply in the areas of fire safety, hygiene and maintenance, and the premises must fulfil all relevant urban planning rules.

Under the new decree, on the other hand, much of this hassle has been substantially reduced:

- You will also be able to let rooms in premises that are not your main residence, and the obligation to hold a permit no longer exists.
- The rules on content that accommodation has to fulfil have been greatly harmonised by the abolition of the four categories. These rules concern, among other things, mandatory insurance for civil liability, fire safety, hygiene, etc.
- What will actually be left over in terms of the obligation to give notification still has to be clarified.
- Prior checks and formal hassle are being dropped in favour of private initiatives that are checked afterwards for compliance with rules on content and enforced by sanctions.

**Situation in Brussels**

In Brussels, the opposite path has been taken. The order of 8 May 2014 concerning tourist accommodation and the corresponding implementing decision of 24 March 2016 define the mandatory division of accommodation into six categories. Of these ‘aparthotels’, ‘tourist residences’ en ‘accommodation with the occupant’ are the most relevant in this context.

All tourist accommodation businesses - which also presumes a public offer on the market - are subject to a duty of notification. In practical terms, this means that every letter has to notify the director-head of service for the Economy of his accommodation, by recorded delivery or by e-mail, using a specific form. This notification must be accompanied by a detailed dossier, containing the following elements among others:

- transcript of the insurance policy with proof of payment of the premium
- copy of the tax assessment for the withholding tax on real estate
- written agreement from the joint owners association of the building
- clean extract from the criminal record of the operator that may be a maximum of three months old
- fire safety certificate
- urban planning certificate
- plan of the building, indicating the rooms to let (depending on the type of accommodation, this has to be a professional plan drawn to scale)
- photos.

The director-head of service for the Economy will assess the conformity of the dossier on the basis of these elements. If the assessment is positive, a registration number and an identification logo will be allocated. After this, the premises can be let. In principle, an inspection visit will be carried out within the following 12 months. The competent officials will have the capacity of officers in the judicial police and if necessary will be able to obtain a warrant to search the inhabited premises.
As regards the rules on content that have to be fulfilled, the landscape in Brussels is also far more fragmented. Detailed terms and conditions of operation apply for each of the categories, which we are unable to look at in more depth here.

**Conclusion**

The conclusion is obvious. What began as a carefree, budget-friendly city trip to Paris quickly becomes an administrative ordeal. In Flanders, fortunately, improvement is on the way, but in Brussels things only seem to be getting more difficult. Gather all the relevant information, because the fines in both regions can vary from **EUR 2,000 to EUR 200,000**.

**A few useful sources**

4. The updated audit committee

Yorik Desmyttere
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On 31 December 2016, a new law came into force that is part of the European audit reform. Among other things, the law lays down new rules on supervision. In this article, we look at the background to the law and consider what impact the modifications may have for your company.

A. Background

1. Further to the law of 7 December 2016 on the organisation of the profession and public supervision of company auditors (the “Law”), since 31 December 2016 additional obligations have applied as regards audit committees. In addition to far-reaching changes in the organisation of the profession and public supervision of company auditors, annual financial statements and consolidated annual financial statements and the auditing of these statements, the Law also changes the provisions on audit committees:

   - They are given an enhanced role as regards the appointment and remuneration of the supervisory director.
   - They monitor the independence of the supervisory director or company auditor (Article 526bis, §7, 5) of the Companies Code).

The Audit Directive establishes the obligation to set up an audit committee for all public interest entities. For listed companies within the meaning of Article 4 of the Companies Code, this rule is to

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1 Law of 7 December 2016 on the organisation of the profession and public supervision of company auditors, Belgian official journal 13 December 2016.
2 Article 156; §1 of the Law.
3 For instance, the proposal for appointment to the position of supervisory director, which has to be put to the general meeting by the management body, is formulated at the recommendation of the audit committee on penalty of invalidity (Article 130, §4 and §5 of the Companies Code) and certain auditing services may only be provided after approval of the audit committee (Article 133/1, §5, Article 133/2, §4 of the Companies Code).
4 Classified as "public interest entities": (i) entities that fall under the law of a member state whose securities are traded in a member state on a regulated market, (ii) credit institutions and (iii) insurance companies. The member states can
be found in Article 526bis, §1 of the Companies Code, and for the remaining categories of public interest entities, in the specific regulations.

8. What has changed?

2. The composition of the audit committee remains unchanged as regards listed companies. It must comprise non-executive members of the Board of Directors and at least one member of the audit committee must be an independent director. The Audit Directive stipulates that the audit committee must consist largely of independent directors, but the Belgian legislator has not adopted this provision.

Account does, however, have to be taken here of the Belgian Corporate Governance Code 2009 which, in line with the Audit Directive, stipulates that at least the majority of the members of the audit committee must be independent. So the rule that at least the majority of the members of the audit committee must be independent will take effect on the basis of the comply or explain principle and the corporate governance declaration provided for in Article 96, §2 of the Companies Code and therefore not on the basis of the Audit Directive.

3. Two additional requirements regarding the composition of the committee are also being included in the updated Article 526bis of the Companies Code:

(i) The chairman is appointed by the members of the audit committee.

(ii) The members of the audit committee must have collective expertise in the field of the activities of the company audited (Article 526bis, §2 of the Companies Code).

4. In addition, the audit committee is given two additional assignments, namely:

(iii) informing the Board of Directors of the result of a statutory audit of the annual financial statements and, if appropriate, of the consolidated annual financial statements and clarifying the way in which the statutory audit of the annual financial statements and, if appropriate, the consolidated annual financial statements, has contributed to the integrity of the financial reporting and what role the audit committee played in that process; and

(iv) making recommendations to the Board of Directors of the company for the appointment of the supervisory director and, if appropriate, the company auditor who is responsible for the statutory audit of the consolidated annual financial statements.

C. What is the impact on your company?

5. As was said earlier, these obligations came into force on 31 December 2016. Does this mean that the chairman and the members of the audit committee who do not fulfil the above conditions also designate other entities as public interest organisations, such as entities which are of great general interest owing to the nature of their business activities, their scope or their workforce (Article 2, 13 Audit Directive).

It should be noted that the Belgian legislator has made use of the possibility of extension and has also designated reinsurance companies and clearing houses as public interest entities (Article 4/1 of the Companies Code).

Whereby in Article 526bis, §3 of the Companies Code, the exemption is applied for "small and medium-sized enterprises" within the meaning of the Prospectus Directive as provided for in Article 41, paragraph 1 of the Regulation.

The law of 13 March 2016 on the status and supervision of insurance or reinsurance companies, Belgian official journal 23 March 2016, the law of 25 April 2014 on the status and supervision of credit institutions and listed companies, Belgian official journal 7 May 2014, and the Royal Decree of 26 September 2005 on the status of clearing agencies and bodies related to clearing agencies, Belgian official journal 11 October 2005.

See Article 526ter of the Companies Code for a description of an “independent director”.

This is on the basis of the derogation provided for in Article 39, §5 of the Audit Directive.

Belgian Corporate Governance Code 2009 (Appendix C – 5.2./).  

Explanatory Memorandum to the draft law on the organisation of the profession and public supervision of company auditors, Parl.St. Chamber 2016-17, No 54 2083/001, 12-13.

This principle was already to be found in the Belgian Corporate Governance Code 2009 (Appendix C – 5.2./).
have held their positions invalidly since 1 January 2017 or even that their mandates have been terminated ipso jure? No, because the **transitional provisions** of the Law \(^{12}\) state that the legal provisions do not put an end to current mandates on the date on which the Law takes effect\(^{13}\). They remain in force until the expiry of the period of the mandates. However, if the competent body in the company terminates the mandate in question prematurely, the tolerance provided for in the transitional provisions also lapses.

6. If your company is classified as a public interest entity, you need to check whether the articles of association of the company are contrary to the new legal provisions. This will not pose a problem if your articles of association contain only a limited description of the working, composition and tasks of the audit committee, whether or not simply by referring to the applicable legal provisions. However, if these matters are laid down *in extenso* in the articles of association, for example by literally repeating the legal provisions, then it would be advisable to **update the articles of association**.

**Note:** would you like more concrete information after reading this text? Unfortunately Berquin Notarissen cvba is unable to advise you by email. If you wish, you can phone to make an appointment with one of our lawyers or notaries.

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\(^{12}\) Article 152-154 of the Law.

\(^{13}\) It should be noted that the transitional provisions for listed companies refer to "the current mandates of chairman" and as regards the other categories of public interest entities, "the current mandates of member or of chairman".