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France

REAL ESTATE

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This country-specific Q&A provides an overview of real estate laws and regulations applicable in France.

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FRANCE
REAL ESTATE

1. Overview

The transfers of the ownership of commercial real estate properties, the registration of securities and easements against them and their lettings are strictly regulated in France in order to ensure the security of the transactions and the protection of the business activities carried out within.

2. What is the main legislation relating to real estate ownership?

The legislation of the real estate ownership is essentially laid down in the civil code and the regulations of the land registry.

3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

The following main new laws may impact real estate investors and lenders:

The Renewable Energies law no. 2023-175 of 10 March 2023 aims to remove all obstacles to the deployment of renewable energy projects. It is the first law entirely dedicated to renewable energies in France and is structured around several key areas:

- planning with elected representatives the deployment of renewable energies in local areas,
- simplifying environmental procedures,
- mobilizing already-artificialized spaces for the development of renewable energies, and
- better sharing the value of renewable energy projects.

The Green Industry Law no. 2023-973 of 23 October 2023 aims to facilitate the development of renewable energy industries and to promote the ecological transition.

This law has three main objectives: to facilitate the establishment and development of industrial sites; to encourage virtuous companies in public procurement; and to finance green industry. It follows in the footsteps of the Renewable Energies law no. 2023-175 of 10 March 2023 and the law no. 2023-491 of 22 June 2023 on the acceleration of procedures linked to the construction of new nuclear facilities "*which enable the decarbonization of energy, an essential prerequisite for a greener industry*".

The Finance Law for 2023 no. 2022-1726 of 30 December 2022 has created an annual "tax on offices" which concerns office, commercial, storage and parking premises located in the departments of Bouche-du-Rhône, Var, Alpes-Maritimes. The main characteristics of this tax are similar to those currently in force in the Ile-de-France region. In particular, the tax is payable by owners of office, commercial, storage premises and taxable parking areas on 1st January of the concerned year (certain holders of *in rem* rights over these premises are also liable for the tax).

Cap on the variation of the Commercial Rent Index (ILC)

In order to limit the effects of inflation, the law no. 2022-1158 of 16 August 2022 has introduced a mechanism to cap to 3.5 % the variation of the Commercial Rent Index (*Indice des Loyers Commerciaux – ILC*) published quarterly by the French INSEE for the indexes of the 2nd quarter 2022, the 3rd quarter 2022, the 4th quarter 2022 and the 1st quarter 2023.

Given that inflation remains high, this measure has been maintained until the end of the 1st quarter of 2024 (Law no. 2023-568 of 7 July 2023).

This measure is applicable to commercial leases for which the rent is indexed on the basis of the variation of the ILC, and for which the tenant is a small and medium-sized company (i.e., a company employing less than 250

people and whose annual turnover does not exceed 50 million euros or whose annual balance sheet does not exceed 43 million euros).

A similar measure has also been introduced for residential rents.

Future reform of the special contracts law

Following the reform of the contract law by the ordinance no. 2016-131 of 10 February 2016, a reform of the special contracts law is underway to harmonise and modernise it with the existing laws. The scope of the preliminary draft reform includes the provisions relating to sale and exchange, lease, service contract, loan, deposit, mandate etc.

In April 2023, the preliminary draft reform of special contract law has been submitted to the Minister of Justice but this reform remains only at a preliminary stage, so it will take some time before it comes into force.

4. How is ownership of real estate proved?

Ownership is usually proved by a thirty-year uninterrupted, peaceful, unequivocal and publicly known possession of a real estate property.

All agreements relating to the transfer of the ownership of a real estate property or the registration of liens and encumbrances on a real estate property (such as, for example a mortgage or an easement) must be registered at the land registry (*service de la publicité foncière*) in order to be binding on third parties.

In order to be registered these agreements must be in a notarial form and executed before a notary.

It is usually up to the seller to appoint a notary for a sale of a real estate property. The purchaser is, however, entitled to appoint its own notary and in such a case, the statutory scale fee is shared out between the two notaries. The notary's fee for the sale of a real estate asset is *circa* 0.8% of the sale price (subject to rebates).

Each deed will set out, *inter alia*, the 'thirty-year root of title' by reference to the registered title deeds relating to the property over the past thirty years.

Obtaining from the *service de la publicité foncière* a land registry search indicating all the registered deeds relating to a real estate property takes several days. It is not possible to consult on-line the land registry file (*fichier immobilier*).

5. Are there any restrictions on who can own real estate?

There are no restrictions on who can own a real estate property *per se* except for the persons condemned for the violation of the legislation relating to housing conditions and which may be subject to a prohibition to purchase.

The sale of certain properties (especially those owned by the state or other kind of public entities) may, however, be subject to specific proceedings and controls by the French administration.

6. What types of proprietary interests in real estate can be created?

Land tenure is most frequently freehold.

Leasehold tenure in the form of a long-term ground lease with *in rem* interest and a duration ranging between 18 and 99 years does also exist and could be used in order to enable the tenant to obtain a third-party's financing of the development of the leased plot of land.

This ground lease could be either a 'emphyteusis' (*bail emphythéotique*) or a construction lease (*bail à construction*) if the tenant undertakes to erect a building which will revert to the landlord at the end of the lease.

Freeholds can be owned by one or several owners, whether in the form of a co-ownership (*copropriété*), a division into volumes (*division en volumes*) or, less frequently, a joint- ownership (*indivision*).

Buildings in co-ownerships are divided into private and common areas, the private areas being those reserved for the exclusive use of each particular co-owner whereas the common areas are those which are used by all co-owners (for example, the soil, foundations, main walls, lifts, stairways, technical plant rooms, etc.). All the co-owners belong to an association (*syndicat*). The general meeting of the co-owners appoints a manager (*syndic*) who alone has the right to represent the association *vis-à-vis* third parties. The bye-laws of the association (*réglement de copropriété*) define the various parts of the building subject to co-ownership, govern the relations between the various co-owners and set out the responsibility of each co-owner for a proportionate part of the service charges of the building.

The division into volumes is a legal technique consisting in dissociating the ownership of the various parts of a building, at different levels above and below the natural ground, horizontally and vertically, each fraction being

geometrically defined in three dimensions, by reference to plans, transversal plans and levels, without the existence of common areas between these different fractions or volumes. The volume concept enables "slicing" to be carried out so that different owners own different parts of the building. Some of volumes may be in fact without limit in height as they include the airspace.

As between the various volumes, there are usually various easements in favour of them and burdening them such as rights of support, rights for passing pipes and ducts etc.

All the owners of volumes may be members of an association which is created to be the owner of given volumes (for the example, the ones comprising the sub-soil and the technical plant room) and/or to be responsible for the management for any parts of the building and its equipment (including the volumes of which it is the owner) which benefit all the volumes.

7. Is ownership of real estate and the buildings on it separate?

The basic rule under French law is that where a person is the owner of land, it is the owner of any buildings on the land, the owner of the air space above the land "up to the sky" and the owner of the soil and subsoil "down to the centre of the earth".

Ownership of the real estate and the buildings may be separated in the context of a volume division as described above. When consisting of a mere division between the ground and the surface of the ground upon which the building are to be erected this is known as a 'surface right' (*droit de superficie*) where the ground and its surface are owned separately in freehold. Also note that under a ground lease as mentioned above, the leasehold tenure will include an *in rem* interest on the buildings to the benefit of the tenant which will temporarily divide the ownership of the land and the buildings erected on it.

8. What are common ownership structures for ownership of commercial real estate?

The choice of the type of entity to be set up for owning a commercial real estate is usually the result of a tax analysis on a case by case basis. A French company (tax transparent, subject to corporate income tax or tax exempt) is typically used.

Commercial real properties rented on an unfurnished basis are commonly held by *société civile immobilière* (*SCI*), a tax transparent entity with unlimited liability, or by a *société par actions simplifée* (*SAS*), a company with limited liability subject to corporate income tax.

Commonly used regulated vehicles include real estate collective investment vehicles *organisme de placement professionnel collectif immobilier* (*OPPCI*) and listed real estate companies *société d'investissement immobilier côtée* (*SIIC*) which can benefit from a corporate income tax exemption subject to distribution requirements.

9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

Since French notaries are liable of the efficiency of the transfer of ownership of a real estate property and the certainty of the ownership, the notary appointed by the purchaser is in charge of reviewing the previous title deeds, the easements and encumbrances registered on the property.

Notary's due diligence is usually extended to the review of the planning permissions and, when applicable construction guarantees and insurance coverage.

Most of the time, the legal advisor of the purchaser will review the lease agreements and the contracts relating to the management and maintenance of the property.

The due diligence will also include the review of all the searches and surveys that sellers are bound to provide to purchasers under French law such as asbestos search and diagnosis for any buildings erected by virtue of building permits granted before 1 July 1997, termites and other xylophage insects surveys, energy-efficiency audit (*diagnostic de performance énergétique*), the statement indicating whether the area where the property is located is known as being exposed to specific technological or natural risks or pollution, etc.

The purchaser will also appoint consultants for carrying out technical survey and, if useful, pollution search.

10. What legal issues (if any) cannot be covered by usual legal due diligence?

If the seller has set up an exhaustive, genuine and truthful data room, the legal due diligence should cover all legal risks in relation with the transaction.

11. What is the usual process for transfer of commercial real estate?

Pre-agreement and due diligence:

The initiative, pursuit and termination of pre-contractual negotiations must be carried out in good faith.

Parties often first sign an offer letter regarding the contemplated purchase of the property for seeking the grant of an exclusivity for carrying out the due diligence. Such a letter must be drafted with care since, under French law, a contract is concluded once the offer has been accepted.

The seller usually organizes an electronic data room with the assistance of its notary and legal advisors and grants an exclusivity period to the selected purchaser candidate for carrying out its due diligence, technical survey and, when applicable, environmental survey.

Signing:

Since the sale of a real estate property is often subject to a pre-emption right of the town or another administrative entity, the sale of a property is usually a two-step process.

The execution of the deed of sale is, thus, often preceded by the signature of a preliminary agreement subject to conditions precedent. The usual conditions precedent are the obtaining of the waiver of the pre-emption right which may be applicable and the obtaining of a recent land registry search showing that there is no mortgage and/or lien registered against the property for a total amount superior to the sale price or the provision by the seller of the agreement of its creditors for releasing them.

The purchaser usually pays a deposit ranging between 5 to 10% of the purchase price to a stakeholder. The stakeholder (most of the time, the notary of the seller) will pay this deposit (i) to the seller if the purchaser does not show up for executing the deed of sale whereas all the conditions precedent have been fulfilled by the agreed deadline or (ii) to the purchaser if the conditions precedent are not fulfilled by the agreed deadline.

In most cases this preliminary agreement takes the form a bilateral undertaking to sell and purchase agreement (*promesse synallagmatique de vente*) pursuant to which both parties are bound to execute the final deed of sale before the notary once the conditions precedent are fulfilled by the agreed deadline.

It may also take the form of a call option (*promesse unilatérale de vente*) which is a contract which binds the promisor but leaves the beneficiary the option to decide whether or not to purchase.

Signing to closing:

During this phase, the seller and its notary takes the necessary steps for the satisfaction of the conditions precedent by the agreed deadline and the purchaser arranges the funding of the purchase and, in particular, any third-party financing.

Closing:

Upon the execution of the deed of sale before the party, the purchaser has to arrange the payment of the sale price, notary's fees, registration duties and taxes and the seller has to arrange the repayment of any outstanding debt and the release of any mortgage and/or lien.

Post-closing:

The notary is liable to carry out the registration of the deed of sale at the land registry and to pay the registration duties and the real estate security contribution (*contribution de sécurité immobilière*) referred to below.

The notary has to keep the single original copy of the deed of sale for 75 years and to provide a certified copy of this deed with the mention of the references of its registration at the land registry to each party.

In the event of a sale of share, it is up to the purchaser's legal advisor to carry out the registration of the sale and purchase agreement and to pay the registration duties to the tax administration. The notification of the sale of the share to the company can be replaced by the signature by the company of an acknowledgement that a copy of the sell and purchase agreement has been filed at its registered offices.

12. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

The parties may prefer to transfer commercial real estate through a sale of shares rather than through an asset transfer mainly to obtain a saving on registration duties, real estate security contribution and notary fees.

The sale and purchase agreement for a share transfer does not need to be drawn up in a notarial form and registered at the land registry, and is subject to registration duties at the rate of 5% calculated based on the sale price of the shares (i.e., external debt contracted by the company the shares of which are transferred reduces the tax basis).

The taxes and duties to be paid for an asset transfer mentioned below are therefore often more important.

13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Upon acquisition of the property, all occupational leases granted on the property are, as of right, transferred to the purchaser. The purchaser will, thus, automatically become the new landlord under the leases.

14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

The real estate property may be the subject of various easements due to its situation such as:

- public utility easements (*servitudes d'utilité publique*) mentioned in local zoning plans and municipal map and imposed for the preservation of natural and cultural heritage, for the use of certain resources and equipment (such for example the easements for the installation and retain of cabling and pipes for the utilities' networks, for air traffic, etc.), for national defence and for public health and safety;
- urban planning easements which may be imposed by the existence of classified facilities, the vicinity of airports, etc.;
- easements imposed by the existence of certain risks such as bush clearing easement imposed in areas exposed to risks of fire;
- right of way for landlocked properties.

Property owners may also contractually agree to create specific easements which will burden the property of one of the parties and benefit the property of the other party (for example, a restriction on building height, in order to preserve adjacent property owners' access to sunlight and views of the surrounding area). In such a case, they must appoint a *géomètre-expert* for drawing up the plans and description of the new easements and execute a specific deed before a notary. The notary will register this deed at the land registry in order to render these easements binding on third parties.

The registration of mortgages and/or liens against real estate properties also require the execution of a specific deed by the borrower and the lender before a notary.

15. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

There exists a form of split of legal and beneficial ownership of real estate which could be compared to trust, named "*fiducie*". It consists in the owner of assets transferring the ownership of such assets to a trustee (*fiduciaire*) which shall hold them (in a specially created estate separated from his own estates) and use/operate them according to rules provided for in the trust agreement (*contrat de fiducie*) in the interest of the beneficiaries of the trust (*fiducie*). *Fiducie* shall be registered with the French tax authorities and, as applicable, at the land registry. It can be used as a management tool or as a security. *Fiducie* exists since more than 10 years now, but it is still expensive and regarded as quite complex. It is, therefore, rarely used except in specific contexts such as insolvency proceedings, successions, complex and risky developments or complex transactions.

Security agent under French law has also been entrusted by French law with fiduciary rights and obligations so that to enable it to take, hold and enforce security on behalf of secured parties. Such mechanism is nevertheless not commonly used at this stage due to few lacks consistency with, in particular, French security law and practical issues.

16. Is public disclosure of the ultimate beneficial owners of real estate required?

Corporate entities registered with the companies registry in France, other than those whose securities are traded on a regulated market, have an obligation to provide information on their beneficial ownership.

Ownership of a real estate in France does not create any legal obligation to disclose the ultimate beneficial owners.

However, public disclosure of the ultimate beneficial owners will be required if the company owner of real estate is registered in France. These companies must identify their beneficial owner(s) and file such information with the companies registry in France.

17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

Main taxes associated with ownership are:

- Real estate taxes: Owners of commercial real estate are liable for land taxes (*taxes foncières*) assessed by the local tax authorities and, in the Paris region, for tax on office and retail premises and parking areas. These taxes are, usually, re-invoiced to tenants.
- Direct taxes: Corporate income tax applies to the taxable net income derived from the real estate at a maximum effective rate of 25.83% (applicable rate as from 2022). A contribution on added value (*cotisation sur la valeur ajoutée des entreprises*, CVAE) also applies at a rate of 0.125% to 0.375% (for turnover between € 500,000 and € 50,000,000) or 0.375% (if turnover exceeds € 50,000,000) for FY2023, on a taxable basis broadly similar to the turnover basis.
- Indirect taxes: Landlords are entitled to elect for VAT on rent derived from the leasing of commercial real estate, which generally enables them to recover VAT incurred on theirs costs.
- Other taxes: an annual 3% tax on the fair market value of the real estate may apply, unless the chain of ownership of the commercial real estate is disclosed to the French tax authorities.

Main taxes on asset sales are:

- Registration duties: standard rate of circa 5.81% or 6.41% (commercial real estate in the Paris region) of the purchase price. Reduced rates apply to (i) acquisitions of building land and properties completed for less than five years, (ii) acquisitions with a commitment to resale within five years, and (iii) acquisitions with a commitment to carry our works resulting in the real estate being considered new. A real estate security contribution of 0.1% and notary's fees also apply to all transfers.
- Value added tax (VAT): at 20% on transfers of building, land and real estate assets completed for less than five years. The sale of leased commercial real estate may in certain cases be treated as a VAT-free transfer of a going concern. If this regime does not apply, the seller may elect for VAT on the transfer or re-invoice the partial refund of VAT triggered by a VAT-exempt transfer to the purchaser.
- Capital gains tax (CGT): standard rate of corporate income tax if the seller is a company, *e.* maximum effective rate of 25.83% (applicable rate as from 2022).

  Certain regulated vehicles (including the listed *société d'investissement immobilier côtée* (*SIIC*) and the real estate collective investment vehicle *organisme de placement professionnel collectif immobilier* (*OPPCI*) benefit from a corporate income tax exemption subject to distribution requirements.

18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

The French legislation for commercial leases governs the duration, the renewal and termination of commercial leases, the fixing and review of rents, the service charges and taxes that could be reinvoiced to tenants, etc. Several of its provisions are mandatory.

Duration:

The minimum term of a commercial lease is 9 years. If the term of the lease exceeds 12 years, the lease must take the form of a notarized deed and be registered at the land registry. Since the taxes for the registration of a lease with a term of more than 12 years are very important, most of commercial leases are concluded for 9 or 12 years.

If the tenant rents the premises for the first time, the parties can enter into one or several short-term leases for a total duration which cannot exceed 3 years.

Tenant's right or earlier termination:

A tenant has three yearly right to freely terminate the lease subject to a 6-month's prior notice. If the premises are let exclusively for office use or if the term of the lease is superior to 9 years, the tenant may agree to waive its break option right at the end of one or several 3-year period(s) of the lease so that the lease will have a fixed-term of 6, 9 or 12 years.

Rent indexation:

Most of commercial leases provide an annual rent indexation.

Under French law, indexation clauses and the choice of the index are strictly regulated. As a result of the provisions of the financial and monetary code on indexation clauses and their narrow interpretation by French courts, are prohibited:

- upwards only indexation clause as well as any cap or floor in the indexation of the rent, and

- indexation based on the growth of the minimum wage, on the general level of prices or salaries, or on the price of goods, products or services which is not directly related to the object of the contract or the activity of one of the parties.

The index usually chosen for office leases is the index of rents of tertiary activities (*indice des loyers des activités tertiaires* or *ILAT*) and for retail leases, the index of commercial lease index (*indice des loyers commerciaux* or *ILC*).

Rent review during the term of the lease:

Any party to a commercial can apply for a rent review:

- each time the rent has increased or decreased by more than 25% since the last fixing of the rent by the parties or by the court as a result of the indexation clause stipulated in the lease;
- every 3 years since the last fixing of the rent by the parties or by the court when evidence of a material change in the local commercial factors giving rise to a change of more than 10% of the rental value of the premises is brought.

The reviewed rent is, then, fixed in accordance with the then current rental value (*valeur locative*) of the leased premises in the same manner as for the fixing of the rent in the event of a renewal of the lease.

Renewal of the lease:

The aim of the French legislation for commercial leases is to grant to tenants security of tenure (*propriété commerciale*) so that they may ensure the continuation of their going concern and the retention of their clientele. At the end of the lease, a tenant is entitled either to renew the lease for a further nine-year term or to receive compensation if the landlord refuses to renew the lease.

In order to benefit from security of tenure, the tenant must have operated a going concern in the leased premises over the 3 years preceding the expiry date of the lease and must be registered a the commercial and companies registry for this going concern.

The lease is renewed on the same terms and conditions than the previous lease with the exception of the rent for a minimum term of 9 years.

If the landlord refuses to renew the lease, the tenant is entitled to receive compensation for eviction corresponding to the loss it suffers The amount of this compensation could be important if the non-renewal of the lease results in the loss of clientele and, thus, of the tenant's going concern.

Fixing of the rent upon the renewal of the lease:

If the parties fail to agree the new rent, the most diligent party must apply to the judge who will appoint an expert with the duty to assess the then current rental value (*valeur locative*) of the rented premises.

Rental values assessed by judicial experts do not correspond to market rents, since for assessing the rental value, they take into account:

- various references of rents of renewed leases for similar premises located in the vicinity of the leased premises whether these rents have been amicably agreed between the parties or fixed by the court and not exclusively references of market rents;
- the terms and conditions of the lease to be renewed: certain provisions are considered as marked-up factors whereas other are discount factors depending on whether they are favourable or not to the tenant; for example, a stipulation of an authorization for the tenant to sublet is considered as a marked-up factor increasing the rental value of the leased premises since this provision is favourable to the tenant.

Taking into account all the aforementioned criteria results "mechanically" in the assessment by the experts appointed by the courts of rental values inferior to the market rental value.

Furthermore, there are cases where the increase of the rent upon the renewal of the lease is either capped (*i.e.* the difference between the initial rent under the original lease and the rent at the date of renewal cannot exceed the variation of the *ILC* or *ILAT* over the duration of the lease) or spread so that the tenant does not have to bear an increase in the rent of more than 10% per year.

For these reasons, it has become usual to stipulate in commercial leases that in the event of the renewal of the lease, (i) the application of the provisions of the legislation relating to rent capping are excluded and (ii) the new rent will be fixed exclusively in accordance with market rents by departure from the legislation on commercial leases.

Subletting:

Sub-letting is prohibited unless the parties have agreed

otherwise.

Assignment:

Exclusion of the right to assign a lease is null and void to the extent that it prevents the tenant from assigning the lease to a purchaser or future owner of its going concern or business undertaking. Accordingly, a clause excluding the right to assign the lease is only valid in the case of an assignment of the lease exclusively, apart from the going concern operated by the assignor in the leased premises.

The lease may, nevertheless, provide that the right of the tenant to assign the lease, even together with its going concern, is subject to prior approval of the landlord.

Costs, repairs and services charges:

Landlords can no longer recover from tenants:

- the expenses relating to major repairs mentioned in article 606 of the civil code (i.e. mainly those affecting the main walls and the ceiling vaults, the restoration of beams and the entire replacement of the roof) and fees relating to the performance of these repairs;
- the expenses relating to works performed for remedying wear and tear or for putting the leased premises in compliance with applicable regulations if they correspond to the aforementioned major repairs;
- the taxes, in particular the *contribution économique territoriale*, taxes and levies for which the legal debtor is the landlord or the owner of the leased premises or of the building in which these premises are located; it is, however, possible to provide that by departure from this provision, the tenant shall reimburse the landlord for the land tax (*taxe foncière*) and the additional taxes to the land tax (such as the tax on waste collection), as well as, all taxes and levies relating to the use of the premises or of the building or to a service of which the tenant benefits directly or indirectly;
- the fees of the landlord in relation with the management of the rents of the premises or of the building subject of the lease agreement.

The landlord must, furthermore, provide to the tenant the following information and documents:

- upon the signature of the lease agreement:
- a precise and limitative inventory of the categories of service charges and taxes;
- a forecast of the works that the landlord contemplates to perform on the property in the next 3 years together with a budget forecast;
- a summary statement of the works that the landlord has performed on the property in the last 3 years;
- every year and within the course of the lease, the landlord will have to inform the tenant of any new service charges and taxes;
- every 3 years, the landlord will have to provide the tenant with a forecast of the works that it contemplates to perform within the next 3 coming years, together with a budget forecast and a recapitulative statement of the works performed in the past 3 years.

Tenant's right of preference:

The single tenant of premises for retail or craft workshop use benefits from a right of preference if the lessor contemplates to sell the leased premises. The tenant's right of preference is, however, not applicable in the event of:

- a sale of the leased premises by the landlord to someone of its family or to a co-owner of a property complex,
- a sale of the leased premises together with other commercial premises,
- a sale of the totality of the building including the leased premises and other premises, and
- a sale of various premises forming a commercial property complex including different retails and/or craft workshops.

The provisions of the commercial code relating to this right of preference are mandatory.

The tenant cannot, therefore, waive its right of preference beforehand upon the signature of the lease.

19. How are use, planning and zoning restrictions on real estate regulated?

The planning and zoning restrictions on a real estate property are usually set out in the local planning documents named *plan locaux d'urbanisme* applicable to the town and area where it is located and, as the case may be, in the local regulations and plans for the prevention of foreseeable risks and hazards, for the environment protection, preservation of heritage sites, etc.

Demolition, building, extension and renovation works and the division of a property into several plots of land with the view of erecting new buildings on these plots require the prior grant of specific permits and administrative consents. The town and other administrative authorities will review the applications for these permits and administrative consents for checking, in particular, whether they comply with the planning and zoning restrictions application to the property.

20. Who can be liable for environmental contamination on real estate?

French law has adopted the “polluter pays” principle.

Facilities that are likely to present a risk to human health and safety, protection of the natural environment, or other legally protected interests fall within the scope of the classified facility regime and are either subject to a declaration, registration or authorization.

The obligation to clean up a site where a classified facility was operated is binding upon the last operator if the site has been definitely closed. The last operator can, however, officially transfer its obligation to clean-up the land to a third party with the prior consent of the *préfet* (who is the local representative of the state). For obtaining this consent, the third party must provide a memorandum describing the rehabilitation to be carried out in order to render the land fit for its future use, show that it has sufficient technical capacity and provide financial guarantees for the performance of the works.

The owner of the land should not, therefore, be required by public authorities to carry out clean-up measures if it has not been involved in the operation of the site.

If the operator of a classified facility no longer legally exists or has become insolvent, the owner of the land is liable for cleaning-up the land or for removing the waste but only if it is proved that it acted negligently or played a part in causing the pollution.

Should the pollution arise from waste, the former operator of the registered facility could be held liable if the waste was produced from operating the facility. If the producer of the waste no longer exists or cannot be identified, the owner of the land on which it was discarded may be held liable as being “holder” of the said waste but only if proved negligent or has committed a specific fault.

If, as a result of the operators’ insolvency or disappearance, the rehabilitation of the land cannot be carried out, the state may entrust such rehabilitation to a specific agency named *Agence de l’environnement et de la maîtrise de l’énergie* (*ADEME*).

If a land is located in an area registered as being concerned by risk of soil pollution, the seller or landlord must inform the purchaser or tenant of such a situation. If it fails to do it and if a pollution is found that renders the land unfit for the use indicated in the deed of sale or in the lease, the purchaser or tenant has the right to asks either the reimbursement of a part of the price or a reduction in the rent within 2 years as from the discovery of the pollution.

The purchaser can also require the rehabilitation of the land at the expense of the seller if the cost of this rehabilitation is not disproportionate by comparison with the sale price.

21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

The laws n°2009-967 of 3 August 2009 and n°2010-788 of 12 July 2010 laid down the objective to improve the energy performance of buildings in the tertiary sector and premises in which public service activities are carried out.

The law n°2018-1021 of 23 November 2018 has, later on, amended the article L. 111-10-3 of the French construction and housing code (now article L. 174-1 of the same code) in order to provide, in particular, a first deadline at 2030 while maintaining the overall ambition of reducing energy expenditure by 40% (50% in 2040 and 60% in 2050) compared to 2010, and a modulation of the performance objective according to the size of the building, or even to exempt certain buildings from any obligation in order not to impose on owners work that would be disproportionate in view of their economic situation (for example, a small business).

The *décret* n° 2019-771 of 23 July 2019 on obligations to reduce final energy consumption in buildings for commercial and non-commercial activities in the tertiary sector known as the “Tertiary” décret:

- determines the existing buildings subject to the energy reduction targets,
- defined the conditions for modulating these targets and
- set up the platform responsible for verifying compliance with the obligations.

In order to specify the terms of application of the “Tertiary” décret, the *arrêté* of 10 April 2020:

- set out the methods for calculating the final energy consumption targets to be achieved for each category of commercial or non-commercial activity,
- defined the methods for adjusting these data according to climatic variations, and for modulating them according to particular circumstances (volume of activity, technical, architectural and heritage reasons, manifestly disproportionate cost of actions), and
- designated ADEME (Agence de l'Environnement et de la Maîtrise de l'Energie) as the operator in charge of setting up the digital platform for collecting and monitoring energy consumption (OPERAT platform).

An amending *arrêté* dated 24 November 2020 set the absolute values of the energy consumption requirement levels, by 2030, for offices and public services, education and logistics activities only.

A second amending *arrêté* dated 13 April 2022 completed the measures by setting the values to be used for the other categories of activities.

Activities and buildings subject to the "Tertiary" décret

The new regulations target:

- the existing buildings exclusively used for tertiary activities with a floor area greater than or equal to 1,000 sqm;
- any part of a mixed-use building that houses tertiary activities with a total floor area of 1,000 sqm or more;
- any group of buildings located on the same plot of land or on the same site where these buildings house tertiary activities with a total floor area equal to or greater than 1,000 sqm.

Energy consumption targets to be met by decade

For each of the years 2030, 2040 and 2050, the targets for reducing energy expenditure will be met:

- either by reducing final energy consumption in each decade by 40%, 50% and 60% respectively, compared to a reference energy consumption that cannot be prior to 2010 (being specified that the years 2020 and 2021 cannot be taken into account in view of, in particular, the closing down of premises imposed by the various containment due to the pandemic),
- or by achieving a final energy consumption fixed in absolute value, according to the energy consumption of new buildings in their category.

In order to achieve these objectives, owners (and lessees) can, in particular, intervene on:

- the energy performance of buildings;
- the installation of efficient equipment and devices for the control and active management of this equipment;
- the way in which the equipment is operated;
- adapting the premises for energy-efficient use and the behaviour of the occupants.

Whatever the means implemented, the change in the type of energy used must not lead to any deterioration in the level of greenhouse gas emissions.

Modulation of energy saving targets

In order to avoid undertaking actions that could prove ineffective or too costly for an economic activity, the legislator has provided for the possibility of modulating the energy saving objectives according to:

- technical, architectural or heritage constraints;
- a change in the activity carried out in the building or in the volume of this activity
- costs that are clearly disproportionate to the expected benefits in terms of energy consumption.

Unless it only concerns the volume of the activity carried out, the modulation of the final energy consumption reduction targets must be justified in a technical file. This document, whose content and preparation procedures have been specified by the above-mentioned *arrêté* of 10 April 2020, is prepared under the responsibility of the owner and, where applicable, the lessee.

Establishment of an IT platform for collecting and monitoring targets

In order to collect consumption data in an anonymised manner to monitor the obligation to reduce energy expenditure, a digital platform has been set up by ADEME under the supervision of the French state. This platform is called "Observatoire de la Performance énergétique, de la rénovation et des actions du tertiaire" (OPERAT).

Every year from 2022, by 30 September at the latest, the owner and, where applicable, the lessee must declare the data for the previous year to this platform, subject to penalties.

However, given that 2022 is a transitional year for entities required to file declarations, the French Ministry of Ecological Transition has decided to grant a tolerance, until 31 December 2022, for the filing of declarations. According to the French Ministry, new declarations may be filed and declarations already filed may be amended as many times as necessary until the end of 2022.

Assessment and verification of compliance with the obligation at each of the deadlines

No later than 31 December 2031, 2041 and 2051, the platform manager must verify whether the objectives set have been achieved by each of the owners (and lessees), taking into account climatic variations.

The assessment of compliance with the obligation to reduce energy consumption must be appended to any preliminary contract for the sale of a building for information purposes and, failing that, to the deed of sale. This assessment will be carried out on the basis of the latest annual digital certificate generated by the platform. The same information will be brought to the attention of the tenant by attaching the document to the lease contract.

Article L. 174-1 of the French construction and housing code requires the publication, in each building, of its final energy consumption over the past three years, its past targets and the next target to be reached.

Control and administrative sanctions incurred

In the unjustified absence of data transmission on the digital platform, the préfet competent for the location of the building may give formal notice to the owner (and, where applicable, the lessee) to comply with its obligations within a period of 3 months. The préfet will then notify the taxpayer, in the context of this formal notice, that in the absence of transmission of this information within the time limit, a document tracing the formal notices that have remained without effect will be published on a website of the State services, according to a “name and shame” approach.

Finally, if one of the final energy consumption reduction targets is not met, without justification, the préfet may give formal notice to the parties subject to the law to draw up an action plan to meet their obligations and to undertake to follow it. This action plan, drawn up jointly by the owner and, where applicable, the lessee, and submitted to the préfet for approval, must mention the actions for which each party is responsible. It will include a provisional timetable for completion and a financing plan.

If this action plan is not provided within 6 months after the first formal notice, the préfet may give individual notice to the owner and the lessee to draw up their own action plan, in accordance with their respective obligations, within 3 months.

If the action plan is not provided within the time limit, the document outlining the unsuccessful formal notices is published on a State services website. The préfet may also impose an administrative fine of up to EUR 1,500 for individual persons and EUR 7,500 for corporate entities.

22. Is expropriation of real estate possible?

Expropriation of real estate is possible but only for the development of projects declared to be in the public interest (for example, the improvement of the roads’ network or the construction of an educational institution or hospital)

Once the project is declared as being of public interest after a preliminary public enquiry, the court can determine the expropriation compensation if the public entity and the expropriated owner fail to agree its amount on an amicable basis.

The compensation should correspond to the value of the expropriated real estate property.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

Mortgages can be granted over French real estate assets by means of notarial deeds.

They can be granted to secure amounts due under agreements drafted in French or any other language and submitted to French law or any other law.

They shall be published at the land registry (*service de la publicité foncière*) so that to be enforceable against third parties. There is no time limit to register a mortgage, but it will take rank according to its date of registration.

Mortgages are registered for a period corresponding to one year after the secured debt final repayment date (but no more than fifty years).

In the absence of insolvency proceedings of the French mortgagor, the secured creditors benefiting from a duly registered mortgage will effectively have priority over the real estate asset (subject, as applicable, to the rights under certain super-ranking legal liens such as those securing the payment of judicial costs or employees and,

as applicable, co-ownership rights, and subject obviously to any prior ranking registered creditor). Secured creditors can enforce mortgages in the following ways if the secured debts are due and unpaid (subject to insolvency proceedings specific rules):

- by way of a public auction;
- by way of application to the court for the attribution by court order of the property to the secured creditors, in accordance with the judicial attribution procedure; or
- if so provided in the security deed, by way of appropriation (*pacte commissoire*), in which case the secured creditors become the owners of the real estate asset. The value of the real estate asset shall be determined on the transfer day by an expert designated by the parties, or judicially if no agreement can be reached. Such enforcement process should in theory be straightforward, but due to lack of consistency with certain French law rules and necessary compliance with others (such as preemption right), it remains little used.

Enforcement of French mortgage is in any case complex and long.

Certain real estate liens, such as legal mortgages securing lenders, trigger similar protection as mortgages, but are less expensive than mortgages (please refer to our answer to question 24 below). The scope of the related secured obligations are nevertheless more restrictive. For example, the legal mortgage (which has replaced the lender's lien) can only secure the loan receivable used to pay the acquisition price of the real estate asset.

24. Are there material registration costs associated with the creation of mortgages over real estate?

Creation and registration of a mortgage (when granted by the borrower in the loan agreement) trigger:

- notarial fees – a legally defined percentage of the secured receivable determined by tranche (e.g. for securing a loan financing a professional activity, the following percentage (VAT excluded) of the principal secured amount should apply, as from 1st January 2021 according to last applicable regulation, to the following tranches of such principal secured amount: between EUR 0 and EUR 6,500: 2.128%; between EUR 6,500 and EUR 17,000, 0.878%; between EUR 17,000 and EUR 60,000, 0.585%; above EUR 60,000, 0.439%), subject to possible legally limited discount depending upon the amount of the secured receivable;
- land registry tax (TPF) – which corresponds to 0.715% of the principal secured amount and of the ancillary secured amount (ancillary secured amount being usually between 5 and 15% of the principal secured amount and being contemplated to secure, among others, enforcement costs of the mortgage); and
- other tax (CSI) – which corresponds (subject such percentage not being changed by the 2023 finance law to be voted soon) to 0.05% of the principal secured amount and of the ancillary secured amount.

Legal mortgages securing lenders are less expensive than mortgages (i.e. same costs, except for the 0.715% land registry tax (TPF)) but can only be granted when the relevant conditions are met (as explained above in our answer to question 23).

25. Is it possible to create a trust structure for mortgage security over real estate?

In theory, security agent under the new French regime should be able to be granted mortgages. Many French notaries are nevertheless still reluctant to have mortgage granted to the security agent and registered to its benefit on behalf of the relevant secured parties.

On the other hand, foreign trust duly created under applicable law and benefiting from a parallel debt can benefit from French mortgage (but not lender's lien) securing the parallel debt.

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