REAL-ESTATE NEWSLETTER

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C/M/S/ Bureau Francis Lefebvre

EDITORIAL

Having been debated by the Council of Ministers on 26 June 2013, the affordable housing and town planning bill (ALUR), also known as the "Duflot" bill, was finally adopted by the National Assembly on 19 February 2014 and the Senate on 20 February 2014, by which time 1,200 amendments had been submitted. The law was referred to the Constitutional Council which, in a ruling dated 20 March 2014, declared several articles to be contrary to the Constitution, particularly the principle of prior authorisation of co-ownership regarding any application for a change of use for short-term rentals.

The ALUR law of 24 March 2014, with no fewer than 177 articles, was finally published in the Official Journal on 26 March 2014.

This new legislation radically alters some existing laws, including in respect of co-ownership (creation of a co-ownership register, insurance obligation, etc.), the "Hoguet" law concerning real-estate professionals (application scope, entry to the profession, etc.) as well as the law relating to residential leases, particularly with the creation of a universal rent guarantee.

It also addresses regions' ecological transition by promoting the densification of residential areas and restricting urban sprawl. The main highlights are the removal of the building density coefficient and the rule regarding the minimum plot size as well as the transfer of local development plans (PLUs) to inter-communal level (EPCIs).

The ALUR law also revises the regulations governing polluted sites and land, reinforcing the duty to inform, management of depollution of sites and consideration of polluted land in redevelopment projects.

In short, the ALUR law impacts vast swathes of real-estate law which practitioners need to rapidly familiarise themselves with, since it is applicable immediately, although a number of provisions are awaiting implementation decrees.

In addition to the ALUR law, we will use this issue to provide an update on the latest news, including postponement of reform of rental values for non-industrial professional premises until 2016, changes to the SIIC regime by the amended Finance Act 2013, as well as a ruling by the Council of State against differentiated treatment of residents of non-EEA Member States and French residents concerning real-estate capital gains achieved in France. We will also touch on some of the effects of double voting rights in SIIC regimes. ■

Céline Cloché-Dubois, associate

Bare rentals: measures applicable immediately

By **Brigitte Gauclère,** associate specialised in real-estate law. She provides advisory and litigation services concerning a range of rental regimes: residential leases, professional leases and commercial leases.
brigitte.gauclere@cms-bfl.com

The application scope of the law of 1989 (art. 2) is not amended but clarified: rental of premises for residential use or mixed professional and residential use must be the lessee's main residence, i.e. the residence occupied at least eight months a year, either by the tenant or their spouse, or a dependent (children, ascendants over 65 years old on low incomes or relatives with disabilities), unless for professional obligations, health reasons or an event of force majeure.

The ALUR law is being implemented in stages. Some provisions apply immediately to existing leases. Others only apply to lease contracts signed after 27 March 2014. Others will not apply until the publication of Council of States decrees or after a certain date. This is the case for the contents of the technical survey, rules governing the allocation of estate agency cost, the content of the would-be lessor's application, the standard lease and the standard schedule of condition, rules governing rents in certain urban areas where a reference rent is defined, the electronic communication of rent receipts and the summary of charges from 1 September 2015 and the universal rent guarantee set to come into force on 1 January 2016. In addition to the provisions of the 1989 law as amended, new leases must already mention the tenant's name (!), equipment for accessing information and communication technologies, the habitable surface area of the rented premises as defined by article R. 111-2 par. 2 and 3 of the French Construction and Housing Code, with a discrepancy greater than or equal to 1/20th subject to a potential reduction in rent in proportion to the discrepancy recorded (art. 3-1). The tenant may ask the landlord or his representative to complete the schedule of condition within 10 days of it being drawn up and, in the event of refusal, the tenant may refer its case to the departmental conciliation commission (art. 3-2).

"The ALUR is being implemented in stages."

Furthermore the landlord must append meter readings for each form of energy to the entry and exit schedule of condition when there are heating facilities, an individual sanitary hot water system or a or collective system with individual meter.

Landlords may no longer oblige tenants to take out a separate contract to lease equipment in the rented premises in addition to the rent (art. 4).

The obligations binding on the tenant (art. 7) have been amended. Partial payment of the rent by the tenant, pursuant to articles L. 542-2 and L. 831-3 of the French Social Security Code (housing benefit), can no longer be considered a payment default. The terms for taking into account wear and tear on leased property, exempting the tenant from meeting its obligation in respect of upkeep and repair of the property, shall be determined by decree, with tenants of low-income housing associations being entitled to apply pre-defined rates for wear and tear agreed with tenants' representatives.

Tenants must allow access to the rented premises for certain works to be carried out, although these works may only take place once the tenant is personally delivered or sent a works notification stipulating the type of works and conditions for carrying them out, with tenants being entitled to ask for compensation after 21 days. Finally, if tenants do not take out insurance, after formal notice the landlord may take out insurance for the rental risks on the tenant's behalf and at the tenant's expense. The law now states that the obligation to provide a rental receipt now applies equally to the landlord's representative and that no cost in relation to management of the payment notice or receipt may be invoiced to the tenant (art. 21).

Revision of the rent is no longer automatic, even if the lease stipulates it. When the contract stipulates a rent revision, this only becomes applicable if the landlord declares its intention

of revising the rent, this revision only coming into effect at the landlord's request. If the landlord does not make the request within one year following its effective date, no revision may be applied.

Concerning rental charges, if these have not been calculated on an individual basis the landlord must– a month before they are due to be paid – issue an information notice on the methods used to calculate the collective heating and sanitary hot water production charges. Supporting documents must be made available to tenants "under normal conditions" for six months from the date this notice is sent. The law now stipulates that if charges have not been paid before the end of one calendar year following the year in which they become due, the tenant may ask to pay the amount due in 12 instalments.

If tenants sub-let the rented premises, they must send the sub-tenant the landlord's written authorisation and a copy of the existing lease (art. 9).

The law creates a joint rental agreement which is defined as the rental of a single housing unit by several tenants, constituting their main residence, whether a single contract has been established or several between the tenants and the landlord (article 8-1).

Finally, the mandatory period for a collective termination notice (a "block sale") now applies to all sales in lots of more than five housing units in a single building (article 11-1). Existing leases relating to a jointly owned building transferred to co-ownership located in an urbanisation zone defined by a Council of State decree and containing five or more housing units (art. 11-2) also benefit from an automatic three-year extension in addition to the previous contractual or legal term.

The procedure for serving notice has also been amended. The scenarios in which tenants can claim the right to give one month's notice have been expanded (art. 15 I-b) and the conditions to be met by tenants in order to benefit from the offer of housing meeting their needs and possibilities in the event of notice for the purposes of moving in or selling have been amended (art. 15 III). In the case of notice for the purpose of moving in, landlords must now justify the real and serious nature of their request. Any notice justified fraudulently by a decision to move in or sell shall be punishable by a criminal fine (art. 15 IV).

In the event of acquisition of an occupied property, any notice for the purpose of selling may only be given from expiry of the first renewal period of the existing lease and any notice for the purpose of moving in may only be given from expiry of the existing lease or, if expiry of the lease occurs less than two years after the acquisition, after a period of two years (art. 15 I).

Landlords' ability to give tenants notice and the term of the lease may be suspended in certain cases relating to the insalubrity or threat of collapse of the rented premises (art. 15 I). The conditions governing return of the security deposit have been revised in the interests of the tenant (art. 22).

Finally, all actions relating to a lease are time-barred at three years from the date the holder of the rights became aware or should have become aware of the facts enabling that party to exercise that right and the landlord's revision of the rent is time-barred to a one year from the rent revision date agreed by the parties in the lease (art. 7-1). ■

"Landlords' ability to give tenants notice and the term of the lease may be suspended in certain cases relating to the insalubrity or threat of collapse of the rented premises."

Management of environmental liabilities: a major challenge

By **Céline Cloché-Dubois,** associate specialised in urban planning and environmental law. She provides advisory and litigation services to companies and public bodies.
celine.cloche-dubois@cms-bfl.com

and **Solveig Le Pichon,** associate specialised in corporate-M&A. She handles all questions relating to mergers and restructuring projects.
solveig.lepichon@cms-bfl.com

In M&A transactions including the sale (or transfer) of a real-estate asset subject to ICPE[1] regulations, or sale of equity in a company which owns such a property, the drafting and negotiation of environmental guarantee clauses frequently become complex. This is a major challenge since it is a question for the seller and the buyer of dividing up the environmental liabilities.

A duty to inform

In principle, the seller's liability may be contractual or tortuous. It is often linked to a failure in the duty to inform.

In addition to general information obligations, provisions relating to hidden defects and defects in consent, article L. 514-20 of the French Environment Code makes the seller of land on which an ICPE was operated responsible for providing specific information concerning the past operation of such facilities on the site, their dangers, major disadvantages and the handling or storage of chemicals or radioactive substances. The ALUR law has amended the conditions for implementing penalties relating to failings in this duty to inform by stating that "failing that, and if pollution is discovered making the land unfit for the use stipulated in the contract, within two years from the discovery of the pollution, the buyer has the choice of asking for the cancellation of the sale or return of a portion of the price; it may also ask for the rehabilitation of the site at the seller's expense, if the cost of this rehabilitation does not appear disproportionate in relation to the sale price."

"The seller's liability may be contractual or tortuous. It is often linked to a failure in the duty to inform."

In addition to this information, the ALUR law also stipulates that the seller of land located in the "land information zone"[2], a concept introduced by this law, must now inform the buyer of this situation in writing. This duty to inform is combined with the obligation laid down by the abovementioned article L. 514-20. Non-compliance with this duty is subject to penalties. If pollution making the land unfit for the use stipulated in the contract is discovered, the buyer may request, within two years from its discovery, the cancellation of the sale, return of a portion of the price or rehabilitation of the site[3].

In general terms, it is advisable in practice for the seller to provide the buyer with as much information as possible about the environmental situation of the land, to append all studies which may have been carried out and to have an environmental audit conducted if necessary. All the information provided must be mentioned in the deed of sale.

The possibility of transferring depollution obligations to the buyer

Environmental liability guarantee clauses may legitimately transfer all or part of the environmental liabilities to the buyer – particularly the obligations to rehabilitate land on which an ICPE was operated – subject to certain conditions, relating notably to the seller's good faith and compliance with the abovementioned information obligations.

Concerning the environmental situation of the site and any pollution of the soil, subsoil or groundwater, the liability guarantee clauses may stipulate total transfer of depollution expenses in relation to the land. They may also only stipulate a partial transfer of environmental liability. The declarations and guarantees appearing in the deed of sale must be drafted and adapted to take this into account, following often long negotiations between the parties on the extent of the declarations and environmental guarantees

any specific compensation, as well as the length and maximum amount of the guarantee.
Transfer deeds may also include a clause transferring to the buyer the obligations to rehabilitate land on which an ICPE has been operated, as set out in the French Environment Code, whether or not the buyer is changing the use of the land.
We should mention that prior to the ALUR law, the obligation to rehabilitate a site on which an ICPE had been operated was the responsibility of the last operator. However case law had accepted the possibility of contractually transferring this obligation to a third party without this transfer being enforceable against the authorities. The ALUR law has introduced the possibility of "officially" transferring this rehabilitation obligation to a third party, for example the buyer of the land, subject to certain conditions and limits. To do this, the third party must submit an application to the prefecture and obtain its permission along with that of the last operator. Similarly, the approval of the last operator, the mayor, or the president of the public establishment of intercommunal cooperation (EPCI) and the owner must be obtained when the third party plans to rehabilitate the site for a use other than that stipulated in the applicable laws governing rehabilitation of an ICPE.
This third party must then send the prefecture a rehabilitation report setting out the measures required to enable compatibility between the planned future use and the condition of the soil. IN order to demonstrate its ability to carry out the necessary rehabilitation work, the third party must demonstrate sufficient technical capacities and financial guarantees covering the completion of the work – guarantees payable on first request and which may be reassessed in the event of a substantial change to the measures initially planned.
Nevertheless, it should be added that in the event of a material or financial failing by the third party in its rehabilitation commitment, the liability of the last operator may be invoked to complete the rehabilitation measures. The last operator, i.e. the seller, ultimately retains full liability for rehabilitation of the site, in the event of third-party default, in relations with the authorities. Therefore, when negotiating environmental guarantee clauses in sale contracts, the seller must verify the buyer's financial capacity and ask for sufficient guarantee to avoid its liability being invoked as a last resort. ■

"The ALUR law introduced the possibility of 'officially' transferring the rehabilitation obligation to a third party."

*1. ICPE: installations classified for environmental protection (*installations classées pour la protection de l'environnement*).*
2. These areas include land where knowledge of the soil pollution justifies the conducting of soil studies and measures to manage the pollution to preserve health and safety, public health or the environment. These areas must appear in the graphic documents appended to local development plans.
3. Article L. 125-7 of the French Environment Code.

Co-ownership: the new stipulations

By **Jean-Luc Tixier,** associate specialised in real-estate law and public law. He provides advisory and litigation services to commercial and industrial corporations, as well as property developers in matters of planning, construction, sales and rentals of buildings, long-term leaseholds and building leases. He lectures at Paris University (Paris I).
jean-luc.tixier@cms-bfl.com

The ALUR law, published in the Official Journal on 24 March 2014, devotes most of Section II to co-ownership. Many of the new co-ownership provisions, however, are not contained in the law of 10 July 1965. Several make up a new Book VII of the French Construction and Housing Code and co-ownership status is now governed by the amended law of 10 July 1965 and that Code.

The fight against the deterioration of co-owned properties is based around two chapters designed to "identify and prevent indebtedness and deterioration of co-owned properties" and to "effectively turn around deteriorated co-owned properties". The declared objective is to prevent difficulties before they occur, as well as to make better methods available for rectifying situations of deterioration.

Prevention of co-ownership difficulties

The ALUR law introduces various systems designed to prevent difficulties occurring. These include a procedure for registering co-owned properties, better information for purchasers of lots, provisions relating to governance and management of the co-owned property, as well as provisions designed to prevent deterioration and facilitate maintenance work on the building.

Registration of co-owned properties

The new articles L. 711 *et seq* of the French Construction and Housing Code concern both the registration of buildings covered by co-ownership status as well as co-ownership associations. They allow for the creation of a register for buildings totally or partially intended for residential use, kept by a public government institution. This register will contain the name, address and creation date of the co-owners' association, the number and type of lots, as well as the name of the management company, alert procedures in progress, key figures relating to the association's management and accounts for each financial year, along with information about the building will also be mentioned.

Information for purchasers of co-owned lots

For any building totally or partially for residential use, the management company must produce a co-ownership data sheet containing key technical and financial data. Its contents shall be defined by decree and it must be updated annually.

Advertisements regarding the sale of a lot or a fraction of a lot in a building subject to co-ownership status must now mention the average annual amount of the seller's share in the provisional budget for operating costs.

Any alert procedures must be mentioned.

Article L. 721-2 of the French Construction and Housing Code sets out a list of documents which must be appended to undertakings to sell or the sale of rights in rem in immovable property totally or partially for residential use, particularly including the maintenance logbook, the general technical survey and the multi-annual works plan.

The cooling-off period for non-professional buyers of residential buildings (art L. 271-1 and L. 271-2 of the French Construction and Housing Code) shall only begin on the day following communication of these documents.

Deeds recording the undertaking to sell or sale of a co-owned lot must now state the habitable surface area of the private area in addition to simply its surface area.

> ***"The declared objective is to prevent difficulties before they occur, as well as to make better methods available for rectifying situations of deterioration."***

Governance and management of the co-owned property

The new law sets out various provisions in relation to the management company, electronic notices as well as general meetings.

A separate bank account must be opened in the name of the co-ownership association, with only co-owned properties with fewer than 15 lots being exempt. The management company is prohibited from advancing costs to the co-owners association.

The management company's remuneration is determined on a fixed-rate basis, except for the possibility established by decree of allocating a specific additional remuneration for specific services.

Notifications and formal notices may now be sent electronically.

The scope of articles 24 and 25 of the law of 1965 is expanded.

Resolutions relating to maintenance work, work which is obligatory under laws and regulations, accessibility works and decisions to carry out a general performance survey must be made by the majority stipulated in article 24 (majority of votes of co-owners present or represented). Resolutions relating to transformation, addition or improvement works, as well as requests to individualise water supply contracts must now be made by the majority stipulated in article 25 (majority of votes of all co-owners).

Prevention of deterioration and carrying out maintenance work on buildings

Co-owners and the association are now bound by a civil liability insurance obligation.

A works fund must be created to cover the cost of any works prescribed by laws and regulations not included in the provisional budget, the amount of which must not be less than 5% of the provisional budget. The co-owners' association may be exempted from this obligation if the general survey does not indicate the need for works in the next 10 years.

If the building does not include any secure parking spaces for bicycles, the management company must include a resolution in their agenda to carry out work to create them. The co-owners' association may decide, by the majority stipulated in article 24, to join a free urban land association (AFUL) or participate in the creation of one. The construction of a new building or raising the height of the existing building to create new lots for private use must now be decided by the majority stipulated in article 26 (majority of members of the co-owners' association representing at least two-thirds of votes).

"Co-owners and the association are now bound by a civil liability insurance obligation."

Co-owners in difficulty

The ad-hoc representative

In relation to the ad-hoc representative, the proportion of unpaid charges triggering the procedure has been reduced to 15% for co-owners of more than 200 lots. A court ruling may now be sought by the mayor of the commune where the building is located, the president of the public establishment of intercommunal cooperation (EPCI) or the prefecture.

The management company is obliged to provide the representative with all documents required to carry out the task within 15 days of the management company being notified of the court's ruling.

The provisional administrator

Like the ad-hoc representative procedure, new parties may bring ask the court to appoint a provisional administrator: the mayor, the president of the EPCI, the prefecture, the State prosecutor or the ad-hoc representative. Like the ad-hoc representative, the provisional administrator must fulfil certain conditions of independence.

Severely deteriorated co-owned properties and proceedings for failure to act

Proceedings to repair deteriorated co-owned properties may be brought by the State, regional authorities or associated agencies to prevent buildings' neglect and deterioration. These operations shall be carried out in the context of an urban and social project for the region in question or a local housing policy. Isolated changes have also been made to proceedings for failure to act. ■

Urban planning: what the law changes

By **Céline Cloché-Dubois,** associate specialised in urban planning and environmental law. celine.cloche-dubois@cms-bfl.com

The ALUR law has made changes affecting numerous aspects of the French Urban Planning Code, particularly rules governing urban planning documents, urban planning permits, the right of urban pre-emption and urban planning disputes. The following significant innovations can be noted.

Urban planning regulations

Building density plans (POSs)

Building density plans will become obsolete after 31 December 2015 unless revision proceedings are initiated before then and subject to the proceedings being completed by 27 March 2017. Otherwise the National Urban Planning Regulations will apply.

Urban planning rules

The building density coefficient (COS) has been removed. This applies with immediate effect and will therefore apparently involve no changes to urban planning documents.

Urban planning permits

Withdrawal of prior declarations

The competent authority now has the ability to withdraw a decision not to oppose a prior declaration within three months of its issue (alignment of the declaration system with the permit system).

Public participation

Planned construction or redevelopment work subject to an urban planning permit and located in a region covered by an urban planning document may be subject to consultation pursuant to article L. 300-2 of the French Urban Planning Code.

Composition of the building permit applications

Building permit applications and prior declarations concerning construction of communal housing must now include an internal drawing of the planned development at the mayor's request.

Housing estates

Nullity of housing estate documents

Article L. 442-9 of the French Urban Planning Code has been amended to now state that urban planning rules contained in housing estate documents – particularly the regulations, the specifications if they have been approved or the regulatory clauses of the specifications if they have not been approved – are to become null and void at the end of a period of 10 years from the date the housing estate permit was granted. This provision is effective immediately if the housing estate is covered by a local development plan (PLU). Last but not least, any non-regulatory provision, i.e. purely contractual provisions in unapproved specifications, with the purpose or effect of prohibiting or restraining the right to build or stipulate the use or intended use of the building, becomes null and void five years from enactment of the ALUR if the specifications have not published at the mortgage office or in the land register.

Urban right of pre-emption

Extension of its application scope

The sale of the majority of shares in an SCI whose assets comprise a unit of land, whether built or not, is now subject to the right of pre-emption, in principle. Prior to the ALUR law, this type of sale was only subject to prior discharge of the right of pre-emption if the local authority had adopted the reinforced urban pre-emption right. Similarly buildings, or collections of corporate right allocating ownership or enjoyment of a building, are also subject to the right of pre-emption when transferred free of charge or constitute a contribution in kind within an SCI.

Urban planning disputes

The new article L. 600-9 gives the option to a judge in proceedings brought against a territorial coherence programme (SCOT), a PLU or a communal map to stay judgment until the document has been legalised. When an error other than a formal or procedural error is found, the stay of judgment is possible if the illegality can be legalised by a modification procedure. Finally, the judge may order partial cancellation of the urban planning document, limiting the scope of the cancellation to only the area plans, strategy and action programmes or provisions relating to housing or transport and travel in development and planning strategies. ■

Real-estate investments by non-residents: the end of discrimination?

We know that residents from outside the EEA (European Union, Iceland, Norway and Liechtenstein) are treated less favourably than French residents when it comes to real-estate capital gains achieved in France. Residents of France and the EEA are subject to a flat rate of 19% (excluding application of any surtaxes), while residents of a non-EEA state are generally subject to levy of a third (33.33%) on these same capital gains. In a ruling dated 26 December 2013, the Council of State ruled against this differentiated treatment on the grounds of the free movement of capital.

The question being decided by the Council of State concerned article 164 C of the French General Tax Code, which, for non-residents owning a house in France, creates taxation on a theoretical rent, but the reasoning appears relevant to the provisions of article 244.2 A of the French General Tax Code, dealing with property sales by non-residents.

Article 63 of the Treaty Founding the European Union (TFEU) lays down the principle that all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

Nevertheless, an exception is created by the "standstill clause" in article 64 of the TFEU. This clause authorises Member States to maintain a restriction on the free circulation of capital provided the restriction existed on 31 December 1993 and relates to direct investments, including real-estate investments.

The fundamental question was as follows: does a real-estate investment in private property constitute a "direct investment" pursuant to article 64 of the TFEU?

In the Yvon Welte ruling dated 17 October 2013, the Court of Justice of the European Union (CJEU) ruled that the concept of direct investment concerned investments made by natural persons or legal entities serving to create or maintain longstanding and direct relations between the investor and the undertaking receiving the funds in order to carry out an economic activity. From this, the Court deduces that the expression "direct investments – including in real estate" in article 64 of the TFEU does not cover "private property" type real-estate investments, made for private purposes without a link to the exercising of an economic activity. Since the acquisition by the applicants of a second home in France was not carried out in order to exercise an economic activity, the Council of State concluded that such an investment did not constitute a direct investment subject to discrimination permitted by the standstill clause in article 64 of the TFEU.

Since the standstill clause does not therefore protect property real-estate investments, and no overriding grounds of public interest appear to exist justifying the differentiated treatment[1], it is likely that the levy of a third can no longer apply in this case, irrespective of the state of residence of the seller.

What does this mean in practice?

In the future, real-estate investments in "private property" for private purposes not linked to an economic activity, for which discrimination appears prohibited, must therefore now be distinguished from "direct real-estate investments" made in order to exercise an economic activity.

In relation to the past, claims should be brought either on 31 December of the year following the levy, or 31 December of the second year. ■

1. Provided the residents of States have not concluded an administrative assistance agreement with France.

By **Julien Saïac**, partner, specialised in international tax matters. He specifically deals with questions relating to international restructuring and real-estate investment.
julien.saiac@cms-bfl.com

"'Private property' type real-estate investments, made for private purposes without a link to the exercising of an economic activity (...) must therefore now be distinguished from 'direct real-estate investments' made in order to exercise an economic activity"

Always in threes: the impossible reform of rental values for non-industrial professional premises

By **Laurent Chatel,** partner specialising in tax law, local tax department manager. His work includes checking the property values used to determine local taxes in real-estate transactions, auditing these values for real-estate deals and negotiating the conditions for local tax assessment in the context of major restructuring operations.
laurent.chatel@cms-bfl.com

and **Vanessa Chiffert,** associate specialised in local taxation. She provides advisory, assistance and litigation services in relation to local direct taxation, from land tax to professional tax, CFE, CVAE, housing tax and tax on business premises in the Greater Paris region.
vanessa.chiffert@cms-bfl.com

Having initially been postponed following the Presidential elections in 2012, the land values reform voted at the end of 2010 (Amended Finance Act 2010) has been delayed once again.

Initially due to be introduced with the 2014 land tax and CFE taxation with a reference date of 1 January 2012, then postponed until the 2015 taxation with a reference date of 1 January 2013, the tax authorities have recently announced in a ministerial response dated 3 April 2014 (Trillard no. 09562 Senate Official Journal, page 878) a further postponement until 2016 (with a reference date of 1 January 2013).

Since this announcement was made particularly discreetly, we would like to highlight this deferral to allow you to prepare your 2015 budgets using similar methods to those in force up until now.

Since this reform is likely to generate significant movements in the level of taxation between taxpayers (the reform being applied on a constant revenue basis for the local authority recipients), the ministry has chosen to allow departmental land value reform commissions to work without the pressure which would have applied if they had needed to incorporate the effects of the revision from 2015. Furthermore, a new obligation applicable to companies leasing non-industrial buildings, relating to the permanent updating of tariff schedules, was in principle planned with submission of the 2013 tax returns. However since no application decree has been published implementing this new declaration obligation, it is not materially possible for companies to remotely submit this new form with their tax return.

However, the ministry wants to maintain this obligation in 2014 (declaration for each leased premises of the amount of rents excluding charges as of 1 January 2013) meaning that tenants may be asked to asked to make this declaration before the end of 2014.

It is important to note that in order to do this, tenants must obtain the land register references from the tax authorities for the leased premises for which rent needs to be declared. Pending introduction of the reform, the tax authorities have not lost everything, since the ruling of 18 February 2013 and 29 January 2014 oblige owners of non-industrial professional premises to jointly submit two declarations (CBD and 6660-REV) in the event of a new construction, change of composition, allocation or use of their premises during the period prior to the revision, i.e. from 2013 to 2015.

Furthermore, these forms must also be produced, subject to a penalty of being placed on the special tax roll, at the tax authorities' request for the purpose of updating their databases.

Given the postponement of the reform, it might appear that submitting form 6660-REV – relating exclusively to application of the new tax assessment rules – will have no impact for taxpayers. However it does give the tax authorities a reliable preview of the effects of the reform.

We note that the 6660-REV declarations applicable to owners of non-industrial premises in spring 2013 gave the tax authorities a chance to identify blatant tax omissions relating to certain premises as well as under-taxation.

That is why we advise you to be particularly vigilant concerning the information to be submitted on this 6660-REV form, particularly concerning surface areas (compared with those already declared), the amount of rent and the category of the premises..

Changes to the SIIC regime

Article 33 of the amended Finance Act 2013 made certain changes to the SIIC regime.

In return for corporation tax exemption, SIICs are bound by the obligation to distribute 85% of the fiscal benefits originating from the leasing of buildings and related assets and 50% of capital gains achieved, when selling buildings, from rights relating to a property leasing contract or shareholdings in partnerships (*sociétés de personnes*) or shareholdings in subsidiaries which have opted for the SIIC regime.

It should be noted that in respect of rental and related income, the distribution must occur in the financial year following that in which the income are achieved, while for capital gains the distribution must occur within two years of their realisation.

Finally, SIICs are obliged to redistribute 100% of dividends received from a subsidiary subject to the SIIC regime, during the same year in which they are paid.

From now on – this measure applies to financial years ending from 31 December 2013 – the obligations regarding distribution of rental and related income and capital gains are increased to 95% (from 85%) and 60% (from 50%) respectively, with distribution deadlines remaining unchanged.

Article 33 of the amended Finance Act 2013 also confirms the contribution exemption of 3% on amounts distributed by SIICs in respect of their distribution obligations. This means that the exemption does not apply to the contribution of dividends from SIICs' taxable interests or dividends from their exempt interests for the fraction exceeding the distribution obligations. However, distributions carried out by SIICs to other SIICs which have opted for the same regime and hold a stake of at least 95% in them, remain totally exempt.

Finally, changes have been made to the text of article 115.5 of the French General Tax Code and, indirectly, the SIIC regime, to address the specific situation of SIICs under foreign law carrying out their SIIC activities in France via a permanent establishment, while remaining liable for corporate tax in the country where their head office is registered. According to the published grounds for the law, the changes made to article 115.5 are designed to prevent a foreign company that has opted for the SIIC regime in France being able to escape the provisions of article 115.5 of the French General Tax Code when it is not exempt from corporation tax in the country of its head office.

To understand the situation in question, it should be remembered that the purpose of article 115.5 of the French General Tax Code is to create a "level playing field" for foreign companies carrying out an activity in France via a subsidiary and those operating via a permanent establishment.

That is why the levy stipulated in article 115.5 of the French General Tax Code, i.e. 30%, is the same as that applicable in relation to withholding tax (in the absence of a convention) on dividends originating in France and paid to non-residents. This applies subject to tax conventions designed to avoid double taxation, but does not apply to companies with their head office in an EU Member State (in the European Community prior to 2013) and subject to corporation tax in the country of their head office, considering the exemption from withholding tax on intra-EU dividends.

When a foreign company that had opted for the SIIC regime in France was not exempt from corporation tax in the country of its head office, the provisions of article 115.5 did not apply. This situation has been ended and, subject to international conventions, foreign SIICs will now be subject to the levy stipulated in article 115.5 based on the distributed income of their French SIIC.

By **Richard Foissac,** partner, specialised in tax matters. He deals in particular with acquisitions and restructuring of listed and unlisted real-estate groups and provides advisory services in the context of their transactions. He lectures in tax law at the Universities of Paris I and Nice Sophia-Antipolis.
richard.foissac@cms-bfl.com

"The changes made to article 115.5 are designed to prevent a foreign company that has opted for the SIIC regime in France being able to escape the provisions of article 115.5 of the French General Tax Code when it is not exempt from corporation tax in the country of its head office."

Negative effects of double voting rights in the SIIC regime

By **Pierre Carcelero,** associate specialised in taxation. He particularly handles questions relating to acquisition and restructuring of listed and unlisted real-estate companies, and provides advisory services in the context of their transactions. He lectures in tax law at the University of Montpellier.
pierre.carcelero@cms-bfl.com

Application of the new articles L. 225-123 and L. 225- 124 of the French Commercial Code, implementing a double voting right and introduced by the "Florange" law of 29 March 2014 as an "anti-OPA" measure, could raise difficulties in relation to application of the SIIC regime pursuant to article 208 C of the French General Tax Code.
The second paragraph of section I of article 208 C stipulates that "60% or more of the capital or voting rights" in a SIIC "must not [apart from exceptions] be held directly or indirectly by one or more persons acting in collaboration."
And yet the "Florange" law has now reversed existing rules relating to double voting rights for companies listed on a regulated market. Fully paid-up shares in these companies, registered for at least two years in the name of a single shareholder, will automatically benefit from a double voting right, unless otherwise stipulated in articles of association adopted after enactment of the law (1 April 2014).
These various provisions, in principle applicable to French listed companies subject to the SIIC tax regime, may result in the lead partner(s) in some SIICs reaching or exceeding the 60% cap on voting rights fixed by article 208 C. These companies and their subsidiaries will then be deprived of the benefits of the SIIC regime, unless covered by specific exceptions contained in tax law. Since legislation states that the two-year ownership period giving entitlement to double voting rights begins on 2 April 2014, companies covered by the SIIC regime would be justified in examining the possibility of adding a clause into their articles of association, by 1 April 2016 at the latest, exempting them from this new regulation. This change will require an extraordinary general meeting to be held.

C/M/S/ Bureau Francis Lefebvre

1-3 Villa Emile-Bergerat
92522 Neuilly-sur-Seine Cedex
Tel. +33 1 47 38 55 00

You can find further information about our Real Estate activity at:

If you would like to contact the authors of this newsletter, please write to the editorial team who will pass your comments on to the persons concerned. You can also write to:

Laurent Chatel, laurent.chatel@cms-bfl.com
Richard Foissac, richard.foissac@cms-bfl.com
Jean-Luc Tixier, jean-luc.tixier@cms-bfl.com
Julien Saïac, julien.saiac@cms-bfl.com