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Rooftop extensions

Netherlands | Germany | France

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Introduction

The Netherlands faces pressing issues such as housing shortages and a lack of space or opportunities for construction of new residential buildings. There is also a desire for sustainability, energy transition, and qualitative improvement of existing buildings.

One solution is the utilisation of unused (mostly flat) roofs by creating so-called ‘top-ups’ (rooftop extensions). This is not only a consideration in the Netherlands, but is also seen throughout the rest of Europe. How do other countries approach this issue?

This guide provides a brief comparison of the private law requirements in the Netherlands, Germany and France regarding the realisation of a top-up on a multi-unit residential building divided into condominium rights (apartment rights). This guide does not address the scenario in which the land or the apartment rights are issued in ground lease.

Rooftop extensions in the Netherlands

In the Netherlands, buildings can be divided into apartment rights through a notarial deed of division and its registration in the public registers of the Land Registry.[1] The deed of division includes at least a description of the parts of the building that are exclusively for the use of individual condominium owners and a description of the common areas within the building that are shared by all and the division regulations which regulate the rights and obligations of the condominium owners.[2] As a result, all condominium owners share ownership of the building (and therefore should make joint decisions thereabout) and each individual owner receives an exclusive right to use a specific private part of the building (unitary/ monistic system).[3] Each apartment right is a separate registered property that can be sold and transferred to a third party and can be subject to other legal actions (such as encumbrance with a right of mortgage). The community is governed by a legal entity referred to as the Association of Owners (*Vereniging van Eigenaars*).

There is no specific legislation regarding rooftop extensions in the Netherlands. Therefore, the general provisions of Title 9 of Book 5 of the Dutch Civil Code ("**DCC**") concerning apartment rights apply. Since rooftop extensions will change the contours of the building, a modification of the deed of division is required according to the DCC. There are two methods by which modification can take place under Dutch law. In the first method, all condominium owners must be parties to the deed, thus requiring unanimity.[4] In the second method, the Association of Owners is a party to the deed representing the owners of the building based on a decision with at least a four-fifths (80%) majority of the owners.[5] However, the second method cannot be followed if so-called acts of disposition (*beschikkingshandelingen*) are involved. This includes decisions about intended (major) changes to (the construction of) the building, alienation, or a complete dissolution of the division into apartment rights. In both methods, consent from mortgage holders or other limited rights holders,if any, is also required.

In view of the Dutch legislation there is uncertainty in the Netherlands whether the second method can be followed when realising a top-up. The question is whether rooftop extensions qualify as an act of disposition? On February 24, 2023, the Supreme Court (*Hoge Raad*) ruled that converting a common part of a building into a private part of a building (allocation to one of the condominium owners). is an act of disposition (and therefore is not a management act) meaning that the Association of Owners is not competent to represent the condominium owners based on a decision with at least a four-fifth (80%) majority of them, but rather the community of owners together, thus requiring unanimity.[6] Despite differing opinions in the literature[7], it appears that rooftop extensions in the Netherlands are only possible with unanimous cooperation and consent of all owners.

1. Article 5:109 DCC.
2. Article 5:111 DCC.
3. Article 5:106 (4) DCC.
4. Article 5:139 (1) DCC.
5. Article 5:139 (2) DCC introduced as of May 1, 2005 because the first method was perceived as restrictive. Cf. Kamerstukken II (MvT), 2001/02, 28614, no. 3, p. 8.
6. HR 24 februari 2023, ECLI:NL:HR:2023:286, NJB 2023/679.
7. Cf. F.J. Vonck, 'Splitsingswijzigingen na 24 februari 2023', WPNR 2023/7406.

Rooftop extensions in Germany

Condominium ownership in Germany can be created by means of a contractual grant of separate ownership (if the property is owned by multiple owners) called a division agreement (*Teilungsvertrag)*, or by division (if the property is owned by one owner) called declaration of division (*Teilungserklärung*)**.** Both the agreement and the declaration must be recorded in a notarial deed and registered in the Land Registry (*Grundbuch*). As a result, the title to the property is divided into co-ownership shares such that each share includes separate, exclusive ownership of a particular unit and/or of specified non-residential areas of the land and the rest of the building (dualistic system).[8] The division becomes effective upon the creation of separate condominium register files. A condominium owner becomes a member of the condominium owners' association (*Wohnungseigentümergemeinschaft*) by way of law.

Germany has specific laws governing condominium ownership and the operation of owners associations, primarily set out in the German Act on the Ownership of Condominiums (*Wohnungseigen-tumsgesetz*) ("**WEG**"). However, it does not specifically regulate rooftop extensions. Such measures usually affect the roof (which belongs to the commonly owned areas of the property) and involve structural alterations that go beyond the extent unavoidable in an orderly coexistence (such as normal maintenance). Therefore, rooftop extensions generally require the consent of the condominium owners via resolution passed by at least a simple majority of the owners (50% + 1, abstentions not counted) in a vote at a meeting of the condominium owners.[9] In practice, a positive resolution of the owners is often achieved by providing a compensation to the owners willing to vote against the extension, especially if they are not to benefit from the planned addition.

If the condominium owners association carries out the rooftop extension itself, it will generally also bear the associated costs. However, the minority that is unwilling to accept the addition is protected by the provisions of the WEG. According to these provisions, the condominium owners are only jointly obliged to bear the costs of structural changes to the building:

a. if the changes are decided by more than two-thirds of the votes cast, representing at least half of the shares (unless the structural change involves disproportionate costs), or

b. if the costs are amortised within a reasonable period. The costs of *other* structural changes, on the other hand, are borne exclusively by the consenting condominium owners in proportion to their shares (and only they are entitled to the benefits).[10]

If one or more condominium owners are granted permission by resolution to add a floor themselves, only they bear the costs (and only they are entitled to the benefits). A condominium owner who is not entitled to draw benefits may demand that they be permitted to do so at reasonable discretion in

8. Article 1 WEG.

9. Article 20 (1) and article 25 (1) WEG.
10. Article 21 and article 16 (1) WEG.

return for an appropriate compensation (they then share the costs and benefits with the consenting condominium owners). This distribution of costs and benefits can be deviated from by resolution, but such a resolution may not incur costs for a condominium owner who according to the WEG does not have to bear costs.[11] The aim of Article 21 WEG is to achieve an appropriate balance between the interest of the majority in wanting to improve or modify the common property and the interest of the minority in not being burdened with costs beyond what is necessary as a result of such measures.

The planned rooftop extension must not lead to a fundamental redesign of the building. The "character of the building" must be preserved, and the overall "appearance" must not be significantly altered. For example, a two-story building may not be raised to 12 stories. Finally, no condominium owner may be unfairly disadvantaged without its consent.[12]

The resolution must also specify which condominium owners will benefit from the rooftop extension. The condominium owners must register the resolution in the *Grundbuch* and amend the existing *Teilungserklärung* - otherwise, it becomes automatically common property, even if an individual condominium owner carries out the project at its own expense.[13]

11. Article 21 WEG.
12. Article 20 (4) WEG.
13. Article 3 (1) WEG, article 4 (1) WEG and article 5 (2) WEG.

Rooftop extensions in France

Under French law, the law on condominium ownership applies to any building used wholly or partly for residential purposes where the property is divided into units between several owners.[14] A division into apartment rights requires at least division regulations (*réglement de copropriété)* (which defines in particular the conditions of use of the private and common parts of the building) and a division description (*état descriptif de division*) (which identifies the various units within the building and its owners). The division description must be recorded in a notarial deed and registered in the public registers. The division regulations must also be recorded in a notarial deed and contain regulatory law. Although these documents can be included in two separate notarial deeds[15], it is common practice for both documents to be incorporated into one notarial deed. In that case, *the réglement de copropriété* has a broad meaning and includes both the deed of division and the division regulations.[16] France also has a dualistic system. The condominium owner acquires ownership of its private part, which is inseparably connected to a co-ownership right of the common parts.[17]

Unlike the Netherlands or Germany, France does have specific statutory regulations regarding rooftop extensions (*surélévation*). Before 2014, the law on condominium ownership[18] provided that, if the community of owners (*syndicat de copropriété*) itself realised the rooftop extension (and thus both the benefits and the burdens are for the community), all condominium owners had to agree (unanimity). If the rooftop extension was realised by a third party (alienation of the right to extend upwards in exchange for payment), then in principle, (only) two-thirds majority representing 50% of all owners sufficed (or a higher majority if so determined in the regulations). In that case, the revenues of the rooftop alienation accrued to the community, and the charges of the rooftop extension were borne by the third party. Owners of the top floors then had a right of veto.

Due to the desire for sustainability and the ongoing housing shortage, several legislative changes have occurred in France. The most significant change is the introduction in 2014 of the Loi ALUR[19] ("**ALUR**") for residential buildings. Currently, in France, two-thirds of the votes cast, representing half of all owners of the building, is sufficient, regardless of who will realise the rooftop extension. The right of veto has been abolished. Now, the top-floor condominium owners have a preferential right to purchase the new residential units created by the rooftop extension (for a period of two months).[20]

14. Article 1 Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis.
15. Article 8 Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis.
16. R. Timmermans, 'De hoofdlijnen van het appartementsrecht in Frankrijk, België en Nederland (II, slot)', WPNR 2003/6539 p. 525-530.
17. Articles 1I. alinéa 2 Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis.
18. Article 35 Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis.
19. Loi n° 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové (Loi Duflot II) (Loi ALUR).
20. Article 61 ALUR

Schematic overview

A schematic overview of the main topics per country as addressed in this guide:

	Netherlands	Germany	France
System	Unitary/Monistic: exclusive right of use for private parts and a share of ownership in the building	Dualistic: ownership right of private parts and a share of ownership in the common parts of the building	Dualistic: ownership right of private parts and a share of ownership in the common parts of the building
Specific legislation regarding rooftop extensions	No	No	yes
Required majority	Unanimity (100%)	Simple majority (50% + 1)	Two-thirds majority representing 50 % of all owners
Additional rights	No	Compensation of costs for dissenting voters	Pre-emptive rights for top floor apartment owners

Conclusion

Adding an extension to an existing building may be complex in view of multi-unit residential building divided into condominium rights (apartment rights). In the context of a world wide housing crisis there is an urgent need to look beyond one's own national borders to see how other countries are responding to this. It may be valuable to look not only at countries such as the Netherlands, Germany and France that have comparable systems of co-ownership of a multi-unit building, but also at countries such as England and Wales that have a 'commonhold' system (as well as a leasehold system). Not only should private law requirements be considered, but attention should also be given to the requirement of consent to the development from a planning perspective, to the possibilities of parking, to obtaining necessary permits (public law) and/or to the cause of nuisance or to a possible breach of rights of tenants who are present in the building (if any) or a breach of rights of neighbouring land owners, either during any works (for example by causing excessive noise and vibrations) or permanently (for example by overloading heating, ventilations, and utility systems, or by blocking access routes and fire escapes).

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