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A Comparative Analysis of Recent Modifications to Several Legal Regimes for Apartment Co-ownership

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Abstract: On 5 February 2018, the Belgian government submitted a draft bill to the Chamber of Representatives for a Law containing various provisions on civil law and amending the Judicial Code in view of promoting alternative forms of dispute resolution. This bill, referred to hereafter as the 'Law of 18 June 2018' was approved by the Belgian Parliament on 7 June 2018 and published in the Belgian Official Gazette on 2 July 2018 (Law containing various provisions on civil law and amending the Judicial Code in view of promoting alternative forms of dispute resolution, 18 June 2018, *Belgian Official Gazet*te, 2 July 2018, p 53455.). The Law of 18 June 2018 has introduced numerous changes to the Belgian Civil Code (BCC), in particular to the section on apartment co-ownership (Arts 577-3 to 577-14 BCC). Most of these amendments came into force on 1 January 2019 (For the transitional provisions, see Art. 179 Law of 18 June 2018.). In France, the Apartment Ownership Law of 10 July 1965 has also recently been amended by the Law *Loi portant Evolution du Logement, de l'Aménagement et du Numérique* (ELAN) of 23 November 2018 (Law 'ELAN' on the evolution of housing, development and digital technology, 23 November 2018, *French Official Gazette*, 24 November 2018.). Meanwhile, the French Ministry of Justice has been planning a structural reform of the regime for apartment co-ownership by resolution ('par ordonnance') since 2017. As a result, the French government now faces a very complex legislative situation, since in the next few months, it intends to carry out a major reform of the apartment co-ownership regime while at the same time having to amend the existing Apartment Ownership Act in order to implement the ELAN Law (D. TOMASIN, 'Les dispositions de la loi ELAN relatives à la copropriété', (1) *AJDI* 2019, p 40.). Finally, the Dutch apartment legislation has also been subject to some interesting modifications in the last few years, such as the obligation for apartment owners to contribute a fixed amount to the reserve fund (Law amending Book 5 of the Civil Code in connection with improving the functioning of owners' associations, 29 May 2017, *Stb.* 2017, p 241.). By no means is this contribution intended as an exhaustive analysis of the recent changes to these three different legislations. The main objective of this publication is to give a general overview of some interesting developments regarding apartment co-ownership legislation in Belgium, France and the Netherlands, using the recent Belgian reform as a starting point for the comparative analysis.

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Résumé: Le 5 février 2018, le gouvernement belge a soumis un projet de loi à la Chambre des représentants concernant une loi contenant diverses dispositions de droit civil et modifiant le Code judiciaire en vue de promouvoir des formes alternatives de résolution de conflits. Cette loi, mentionnée ci-après comme "Loi du 18 juin 2018" a été approuvée par le Parlement belge le 7 juin 2018 et publiée au Moniteur (Journal officiel) belge le 2 juillet 2018. La loi du 18 juin 2018 a introduit de nombreuses modifications dans le Code civil belge (CCB), en particulier dans les articles concernant la co-propriété (article 577-3 jusque 577-14 CCB). La plupart de ces modifications sont entrées en vigueur le 1ier janvier 2019. En France, la loi sur la co-propriété des immeubles bâtis du 10 juillet 1965 a aussi été modifiée récemment par la loi ELAN (Loi logement) du 23 novembre 2018. Par ailleurs, le Ministère français de la Justice a planifié depuis 2017 une réforme structurelle du régime de la co-propriété par ordonnance. Le gouvernement français fait ainsi face actuellement à une situation législative complexe, étant donné que dans les mois prochains, il a l'intention de réaliser une réforme majeure du régime de la co-propriété alors qu'en même temps, il doit modifier la loi actuelle sur la co-propriété afin de mettre en application la Loi ELAN. Enfin, la législation néerlandaise sur la co-propriété a fait l'objet de quelques modifications intéressantes durant ces dernières années, comme par exemple l'obligation pour les propriétaires d'appartements de verser une contribution fixe à un fond de réserve. Le présent article ne vise en aucun cas à fournir une analyse exhaustive des changements récents apportés à ces trois législations. Le principal objectif de cette publication est de présenter une vue générale de quelques développements intéressants en matière de législation sur la co-propriété en Belgique, en France et aux Pays-Bas, utilisant la récente réforme belge comme point de départ de l'analyse comparative.

Zusammenfassung: Am 5. Februar 2018 legte die belgische Regierung der Abgeordnetenkammer einen Gesetzesentwurf vor, der verschiedene Bestimmungen zum Zivilrecht enthält und die Prozessordnung hinsichtlich der Förderung alternativer Formen der Streitbeilegung ändert. Dieser Gesetzentwurf, im Folgenden als „Gesetz vom 18. Juni 2018" bezeichnet, wurde am 7. Juni 2018 vom belgischen Parlament gebilligt und am 2. Juli 2018 im belgischen Amtsblatt veröffentlicht. Das Gesetz vom 18. Juni 2018 hat zahlreiche Änderungen im belgischen Zivilgesetzbuch (BCC) eingeführt, insbesondere im Abschnitt zum Wohnungsmiteigentum (Artikel 577-3 bis 577-14 BCC). Die meisten dieser Änderungen traten am 1. Januar 2019 in Kraft. Auch in Frankreich wurde vor Kurzem das Wohnungseigentumsgesetz vom 10. Juli 1965 durch das ELAN-Gesetz vom 23. November 2018 geändert. In der Zwischenzeit plant das französische Justizministerium jedoch schon seit 2017 eine Strukturreform des Wohnungseigentums durch Beschluss ("par ordonnance"). Infolgedessen sieht sich die französische Regierung nun einer sehr komplexen Rechtslage gegenüber, da sie in den nächsten Monaten eine umfassende Reform des Wohnungsmiteigentumsrechts vornehmen will, während gleichzeitig das bestehende Wohnungseigentumsgesetz schon geändert werden muss, um das ELAN-Gesetz umzusetzen. Des Weiteren hat auch das niederländische Wohnungseigentumsrecht in den letzten Jahren einige interessante Änderungen erfahren, beispielsweise die Verpflichtung der Wohnungseigentümer, einen festen Betrag in die Instandhaltungsrücklagen einzubringen. Der vorliegende Beitrag ist keinesfalls als erschöpfende Analyse der jüngsten Änderungen in diesen drei verschiedenen Rechtsordnungen gedacht. Das Hauptziel dieser Veröffentlichung ist es vielmehr, einen allgemeinen Überblick über einige interessante Entwicklungen in Bezug auf die Gesetzgebung zum Wohnungsmiteigentum in

Belgien, Frankreich und den Niederlanden zu geben, wobei die jüngste belgische Reform als Ausgangspunkt für die vergleichende Analyse dient.

1. A Brief Introduction to Belgian Apartment Law

1. ***Basic principles of Belgian Apartment Law*** – Contrary to the Dutch legislator, the Belgian legislator has not opted for the creation of a new specific right of apartment ownership (= monism), but for the combination of two existing rights (= dualism).[1] According to Belgian Apartment Law, every apartment owner is entitled to (1) an exclusive right of ownership to his or her 'unit' (which can be an apartment but also a garage, shop, office, etc.) and (2) the forced co-ownership of the common parts. The common parts are managed by a legal entity called the association of co-owners ('*vereniging van mede-eigenaars*'/'*association de copropriétaires*'). The co-owners' association has three and sometimes four compulsory organs, more specifically the general assembly ('*algemene vergadering*'/'*assemblée générale*'), the manager ('*syndicus*'/'*syndic*'), the auditor ('*commissaris van de rekeningen*'/'*commissaire aux comptes*') and, in all buildings and group of buildings containing more than twenty private units, a supervisory board ('*raad van mede-eigendom*'/'*conseil de copropriété*'). The general assembly manages the building according to democratic principles, with respect for strict majority rules, and the syndic executes the decisions of the general assembly.[2] The co-ownership board will supervise the syndic in the performance of his or her duties.[3] Every building or every group of buildings owned by two or more persons according to 'parcels' each containing a private unit and a share in the common parts, is subject to the same legal regime (= the Belgian Apartment Law).[4] Because of this broad definition, the Belgian Apartment Law does not only apply to classic high-rise apartment buildings, but to a great diversity of constructions, including holiday residencies, offices and business parks and shopping centres.[5]

2. ***The latest Belgian reform*** – Although the provisions introduced by the Law on Apartment co-ownership of 30 June 1994[6] were amended less than a decade ago by

1 C.G. Van der Merwe, *European Condominium Law* (Cambridge, Cambridge University Press 2015), p 6.

2 S. Snaet, 'Het beheer van de vereniging van mede-eigenaars: de syndicus en de raad van beheer', in V. Sagaert & G. Rommel (eds), *Appartementsrecht* (Bruges, Die Keure 2008), p 75, no. 1.

3 Article 577-8/1, 1st paragraph BCC.

4 Article 577-3, 1st paragraph BCC.

5 V. Sagaert, 'Kroniek privaat vastgoedrecht, met inbegrip van het nieuwe appartementsrecht', in *Themis 62, Goederenrecht* (Bruges, Die Keure 2011), p 11, no. 24.

6 Law amending and supplementing the Civil Code with respect to co-ownership, 30 June 1994, *Belgian Official Gazette*, 26 July 1994.

the Law of 2 June 2010, that reform has not been able to put an end to every uncertainty. In addition, over recent years a number of new problems have emerged. To tackle these issues, the Belgian Minister of Justice, Koen Geens, set up a working group, chaired by the professors Pascale Lecocq ULiège (ULg) and Vincent Sagaert (KU Leuven).[7] Most of the recent amendments to the Apartment Law were proposed by this working group composed of academics, representative organizations and other stakeholders. The Explanatory Memorandum to the Bill emphasized that the efforts of the working group were motivated by four main objectives, namely 1) to introduce more flexibility in the functioning of the co-owners' association and its organs; 2) to optimize the efficiency within the co-owners' association; 3) to rebalance the co-proprietors' rights and 4) to clarify the existing legislation.[8]

3. ***Main objective*** – Using the four goals of the working group as guidelines for this publication, the author will discuss a number of interesting changes in the Belgian legislation on apartment co-ownership. The objective is to analyse the latest Belgian Apartment Law reform from a comparative viewpoint. Parallels will be drawn with the French[9] and Dutch[10] Apartment Law whenever useful to illustrate significant similarities and differences. It is also insightful to point out some changes that have taken place in the neighbouring countries but are not (yet) discussed in Belgium.

2. The Law of 18 June 2018

2.1. To Introduce More Flexibility in the Functioning of the Co-owners' Association and Its Organs

4. ***More flexibility*** – The previous Law amending the Belgian Civil Code (BCC) in the field of apartment co-ownership, the Law of 2 June 2010,[11] came into effect on 1 September 2010. While most authors[12] were optimistic about the legislative changes

7 Draft Bill containing various provisions on civil law and amending the Judicial Code in view of promoting alternative forms of dispute resolution, *Parl.St.* Kamer 2017/18, 2919/001, p 42, hereinafter 'Explanatory Memorandum'.

8 Explanatory Memorandum Law of 18 June 2018, pp 42-44.

9 Mainly the Law nos 65-557 of 10 July 1965 establishing the Law on Apartment co-ownership of Buildings, *JORF* 11 July 1965, and its implementing Decree of 17 March 1967.

10 Title 9, Book 5 of the Dutch Civil code.

11 Law amending the Civil Code in order to modernize the functioning of co-ownership and to increase its transparency, 2 June 2010, *Belgian Official Gazette*, 28 June 2010.

12 Amongst others: P. Lecocq, 'Une réforme pour un meilleur fonctionnement et une plus grande transparence', in I. Durant, P. Lecocq & C. Mostin (eds), *La copropriété par appartements : la réfome de 2010* (Brussels, Die Keure 2010), pp 4-7 and 11; V. Sagaert, 'De hervorming van het appartementsrecht door de wet van 2 juni 2010', *RW* 2010(5), p 196; R. Timmermans, 'Vernieuwde Appartementswet. Een eerste verkenning', *NJW* 2010, p 454; P. Van den Eynde & I. Gerlo, 'De wet van 2 juni 2010 tot wijziging van het Burgerlijk wetboek teneinde de werking van de mede-

in 2010, there was some criticism and concern regarding the increased formalities, which the legislator imposed on all apartment buildings regardless of their size or function. The Belgian author Verbeke in particular wrote that, while the new Belgian apartment legislation offered an efficient statutory scheme for sizeable apartment buildings, it was not flexible enough for smaller buildings that are not managed by a professional syndic.[13] In his opinion, the Law of 2 June 2010 had installed a management regime that was both too rigid and too complex for apartment buildings with only a handful of private units. So it is perhaps not surprising that the first objective of the working group was *to increase the flexibility in the functioning of the co-owners' association and its organs.* However, it is important to emphasize here that – where the Law of 2 June 2010 contained some exceptions for apartment buildings with no more than twenty private units[14] – the amendments from the Law of 18 June 2018 apply to every apartment building of group of buildings without distinction.

5. ***Uniform vs. diversified legal regime –*** While the Belgian Apartment Law still has a more or less uniform scope, the French legislator recognizes that different rules should apply depending on the size and/or the use of the apartment building or group of buildings. This idea was first introduced by the Law *Loi pour l'Accès au Logement et un Urbanisme Rénové* (ALUR)[1516] With this law, the French legislator has introduced a number of exceptions to the mandatory legal regime for apartment buildings that are solely destined for non-residential purposes (for example a shopping centre)[17] . There are also exceptions for apartment buildings with less than 10 private units[18] and for apartment buildings with no more than 15 private units.[19] The Law ELAN continues in the same vein. In article, Article 215, II, 1°, the French Government is explicitly given the power to redefine the scope of application of the Law nos 65-557 of 10 July 1965 and to adapt its provisions

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eigendom te moderniseren and het beheer ervan transparanter te maken – een overzicht', *Not.Fisc. M.* 2010(9), p 266.

13 A. Verbeke, 'De krachtlijnen van het appartementsrecht getoetst', in V. Sagaert & A. Verbeke (eds), *Het nieuwe appartementsrecht : een analyse van de hervorming door de Wet van 2 juni 2010* (Bruges, die Keure 2010), pp 143-144.

14 Two provisions, Art. 577-8, § 4, 17° CC (bookkeeping) and Art. 577-8/1 BW (supervisory board), see C. Willemot, 'Does one size fit all? A comparative analysis of the mandatory legal regime for apartment co-ownership', in B. Hoops, R. Koolhoven & L. Rostill (eds), *Property Law Perspectives V* (The Hague, Eleven International Publishing 2017), pp 125-146.

15 Loi no. 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové, *JORF* 26 March 2014, p 5809.

16 D. Tomasin, 'La copropriété après la loi ALUR', *AJDI* 2014(6), p 415.

17 C. Coutant-Lapalus, 'Le principe de l'unicité du statut de la copropriété sous le prisme des lots à usage d'habitation', *Loyers et copr.* 2015(10).

18 Article 14-3, Arts 18-II and 25 a) of the French Law nos 65-557.

19 C. Willemot, in *Property Law Perspectives V*, pp 125-146.

depending on the characteristics of the buildings, their use and their size.[20] Diversifying the legal regime is not currently on the agenda in Belgium, but several amendments were adopted to facilitate the decision-making process.[21] Three of these measures will be discussed: 1) the lowering of voting majorities, 2) the introduction of developers' rights, 3) the provisional administrator.

2.1.1. The Lowering of Voting Majorities

6. ***New two third voting majority*** **–** The introduction of more flexibility in the functioning of the co-owners' association is achieved in the first place by lowering the majority voting requirements. Several amendments were aimed at decreasing and rationalizing the qualified voting majorities, thus making it easier for the general assembly to reach certain decisions. The first notable example is the replacement of the former 3/4th voting majority (meaning that 75% of the votes present or represented at the general assembly needed to vote in favour of a decision) by a new 2/3rd voting majority (where only 66.67% of the votes present or represented are needed).[22] The intention is to create a more 'balanced' system between the absolute majority of the votes cast, the new 66.67% voting majority and the 80% voting majority.[23] The new 2/3rd voting majority applies for a number of important decisions regarding the management of the common parts, such as the decision to change the by-laws as far as the changes only concern the enjoyment, use or management of the common parts.[24] It is also the new voting majority for all decisions regarding the execution of works on the common parts of the building, *unless* the works are either legally required, or needed to preserve the building or constitute as acts of provisional management. Without prejudice to Article 577-8, § 4, 4° BCC,[25] these three last decisions can be taken with an absolute majority of the votes casted by the co-owners present or represented at the general assembly.[26]

7. ***Dismantling and rebuilding*** **–** Secondly, the Law of 18 June 2018 introduces more flexibility because it allows the apartment owners to decide to voluntarily dismantle and/or rebuild the existing building. A large number of

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20 Article 215, II, 1° of the ELAN Law.

21 Article 215, II, 2° of the ELAN Law gives the French government permission to clarify, modernize, simplify and adapt the rules of organization and governance of the co-ownership, those relating to decision-making by the syndicate of co-owners as well as the rights and obligations of the co-owners, the syndicate of co-owners, the syndical council and the syndic.

22 In the new Art. 577-7, § 1, 1° BCC the words 'three fourths' will be replaced by 'two thirds'.

23 Explanatory Memorandum Law of 18 June 2018, p 212.

24 Current Art. 577-7, § 1, 1°, a) BCC.

25 Which instructs the syndic to take all appropriate protective measures and take all necessary steps to ensure provisional management.

26 New Art. 577-7, § 1, 1°, b) BCC.

apartment buildings in Belgium were built in the 1960s and 1970s. Many of these buildings are now outdated and no longer correspond to contemporary expectations in terms of comfort and convenience. Extensive renovations are often very expensive. In some cases, it would be cheaper and more efficient to opt for a total demolition and reconstruction. The Law of 18 June 2018 prescribes a 4/5th voting majority (80%) for the decision to dismantle and completely reconstruct the building, on the condition however that the demolition is necessary for reasons of hygiene or safety or when the cost for bringing the building in compliance with the legal obligations would be excessive.[27] Malicious real estate strategies to deprive one particular co-owner of its property should normally be excluded by these requirements. In order to take into account the protection of private property,[28] a remedy was created for the co-owner who is not in a position to bear the cost of the dismantling and reconstruction of the building.[29] If that is the case, the co-owner may relinquish his or her private unit to the other co-owners, on the condition that its value is less than the share that he or she will have to bear in the total cost of the works, in return for a compensation fixed by mutual agreement or court order.[30]

There is no similar provision in the French Apartment Law, where the general assembly is not entitled to decide on the demolition and reconstruction of the entire building.[31] Nevertheless, it is possible for the president of the *tribunal de grande instance* to declare that the co-owners' association is '*en cas d'état de carence*[32]', meaning that the *syndicat des copropriétaires* can no longer ensure the conservation of the building or the safety of the occupants.[33] This situation must result from specific causes, either the '*serious financial or management difficulties*' or '*the importance of the work to be carried out*[34]'. This measure allows the setting up of a procedure for expropriation of the common parts in name of the municipality or the *Établissement Public de Coopération Intercommunale* (EPCI) or other similar bodies. It may lead to the rehabilitation or demolition of the building,

27 New Art. 577-7, § 1, 2°, h) BCC.

28 Art. 1 of the first Additional Protocol to the ECHR.

29 Explanatory memorandum Law of 18 June 2018, p 216.

30 New Art. 577-7, § 1, 2°, h) BCC.

31 Article 25, f) of the French Law nos 65-557 does allow building work to save energy or reduce greenhouse gas emissions. Such work may include work of collective interest carried out on the private units and at the expense of the co-owner of the lot concerned, except in the case where the latter is able to produce proof of the performance of equivalent work in the preceding ten years.

32 G. Gil, 'Fasc. 84 : Copropriétés en difficultés – Garanties de recouvrement et syndicats de copropriétaires en difficulté', in *JurisClasseur Copropriété (actualize 8 february 2019)* (2018), no. 83.

33 P. Capoulade, D. Tomasin, F. Bayard-Jammes & J.-M. Roux, *La copropriété 2018/2019* (Paris, Dalloz 2018), p 325.211.

34 P. Capoulade et al., *La copropriété 2018/2019*, p 325.223.

depending on the case.[35] The procedure is laid out in the Articles 615-6 to 615-8 of the *Code de la construction et d'habitation* (CCH).

8. ***Critique*** **–** From the outset, the French legislator has imposed either qualified voting majorities or even unanimity for the most important decisions that the general assembly can make in order to protect the interests of the minority co-owners in the community.[36] The Belgian legislator followed suit.[37] Both legislators are now lowering these voting majorities to facilitate the decision-making process.[38] One of the goals is to prevent the degradation of buildings and group of buildings, which is certainly laudable. The result however is that ever smaller numbers of co-owners can now take decisions that are binding for all the other co-owners. French legal scholars have rightly criticized this legislative choice because it does not solve the problem of the low attendance of co-owners at the general assembly, nor does it take into account the difficulties that some co-owners might encounter to finance the approved (renovation) works.[39]

2.1.2. The Introduction of Developers' Rights

9. ***Unilateral modifications to the act of division and the by-laws*** **–** Another step towards the introduction of more flexibility, and one that is especially relevant for the building practice, is the acknowledgment by the Law of 18 June 2018 of a 'developers' right. The construction promoter(s) or more generally, the signatories to the original documents of apartment co-ownership are now entitled to unilaterally modify the constitutive act and/or the by-laws, but only up until the moment of the provisional delivery of the common parts of the building. Their capacities in that regard are strictly defined and limited by the Apartment Law.[40] The parties who have signed the original documents of apartment co-ownership will only be able to make changes to these documents under the triple condition 1) that their actions are motivated by technical circumstances or by the legitimate interest of the co-owners' association, 2) that the changes do not affect the rights of the other co-owners with regard to their private unit and 3) that it does not increase the obligations of one or more co-owners. The parties that want to modify the

35 C. Bénasse, 'Les copropriétés très dégradées : la loi ALUR n'apporte qu'une réponse partielle', *JCP N 2014*(20), pp 3–4.

36 F. Bayard-Jammes, 'La prise de décision par le syndicat des copropriétaires : constats et perspectives', *AJDI* 2019(7), p 499.

37 Bill amending and supplementing the provisions of the Civil Code concerning co-ownership, *Parl. St.* Kamer 1990–91, no. 1756-1, p 22.

38 Articles 24, 25 and 26 of the French Law nos 65–557 were heavily modified by the Law ALUR. D. Tomasin, 'Les dispositions de la loi ELAN relatives à la copropriété', *AJDI* 2019(1), p 45.

39 M. Poumarède, 'L'impact de la loi Elan sur le droit de la copropriété', *RDI* 2019(1), p 44; D. Tomasin, *AJDI* 2014, p 414.

40 New Art. 577-4, § 1/1 BCC.

constitutive act and/or the by-laws, will have to inform the co-owners of the intended changes by registered mail in advance.[41] The co-owners can oppose the proposed changes by registered mail to the acting notary within two months of receiving the registered mail. If necessary, they will have to initiate legal proceedings.[42]

2.1.3. The Provisional Administrator

10. ***A provisional administrator*** – In order to increase the flexibility in the functioning of the co-owners' association (or to put an end to deadlock situations), the Law of 18 June 2018 allows the appointment of one or more 'provisional administrator(s)' in apartment buildings where for whatever reason the general assembly is no longer able to make decisions. The amendment states that if the financial equilibrium in the co-ownership is seriously jeopardized or if the co-owners' association is unable to guarantee the maintenance of the building or its compliance with legal obligations, the syndic or one or more co-owners who own at least 1/5th (20%) of the shares in the common parts, can bring the case to court and ask for the appointment of one or more provisional administrators.[43] For this measure, the Belgian legislator has drawn heavily from French Apartment Law, where the position of the provisional administrator had already been introduced on a statutory basis a few years ago.[44] However, the French regime for the provisional administrator is much more comprehensive and detailed than the new Belgian Article 5779, § 1/1 BCC.[45]

For buildings that experience less severe financial difficulties, there is also a '*procedure d'alerte*'.[46] In the context of this warning procedure, the French apartment owners and other interested parties have the possibility to request the appointment of a *mandataire* ad hoc.[47] The mandatory makes an inventory of the situation and draws up proposals to restore the financial balance of the syndicate. The Law of 18 June 2018 has not introduced a similar procedure in het Belgian Apartment Law.

The newly created position of provisional administrator should not be confused with the existing position of provisional syndic. The provisional syndic can also be appointed by a judge and his task is to temporarily replace or help the regular syndic for a specific duration or for specific purposes.[48] The

41 New Art. 577-4, § 1/1 BCC.
42 Explanatory Memorandum Law of 18 of June 2018, p 204.
43 New Art. 577-9, § 1/1 BCC.
44 Article 29-1 of the French Law nos 65–557.
45 Articles 29-1 through 29-14 of the French Law nos 65–557.
46 C.G. Van der Merwe, *European Condominium Law*, p 29.
47 Articles 29-A through 29-C of the French Law nos 65–557.
48 For a recent example: Vred. Charleroi (3), 30 Decembre 2016, *T.App.* 2017, no. 2, p 40.

appointment of a provisional syndic by the judge in accordance with Article 577-8, § 7 BCC gives him the same status as the regular syndic in all his rights and obligations.[49] According to the Explanatory Memorandum the provisional administrator can be given the powers that would otherwise be vested in the general assembly and/or the syndic.[50] Nevertheless, the actual Article 577-9, § 1/1 BCC is drawn up in such a way that the provisional administrator could replace all the organs of the co-owners' association, not just the general assembly and/or the syndic.[51] In the French system, the provisional administrator has the same broad capacity to replace the general assembly, the syndic and the supervisory board, with two notable exceptions. The provisional administrator cannot decide on acts of acquisition or disposal of immovable property, because these decisions are left to the appraisal of the general assembly. The same applies for the modification of the by-laws insofar as they concern the enjoyment, use and administration of the common parts.[52]

2.2. To Optimize the Efficiency Within the Co-owners' Associations

11. ***More stability*** – According to the Explanatory Memorandum the second objective of the Law of 18 June 2018 is to increase the efficiency within the co-owners' associations.[53] Better efficiency requires, first of all, better and more accessible information for the whole community[54] and secondly, acquiring the financial means to ensure the subsistence of the building and proper functioning of the association.[55] At least three different types of measures are aimed at improving the efficiency within co-owners' association with regard to the recovery of contributions. Firstly there are some additional tools for the syndic, secondly there is the mandatory contribution to the reserve fund and thirdly a legal charge on the private unit of a defaulting apartment owner.

2.2.1. Better and More Accessible Information

12. ***Downsizing the by-laws*** – Every co-owner must be able to know his rights and obligations, but also the working methods of the co-owners' association and its

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49 Vred. Etterbeek 15 March 2012, *T.Vred.* 2014/3-4, p 133.

50 Explanatory Memorandum Law of 18 of June 2018, pp 42–43 and 221–222.

51 Explanatory Memorandum Law of 18 of June 2018, p 222.

52 Article 29-1 of the French Law nos 65–557: '*A cette fin, il lui confie tous les pouvoirs du syndic dont le mandat cesse de plein droit sans indemnité et tout ou partie des pouvoirs de l'assemblée générale des copropriétaires, à l'exception de ceux prévus aux a et b de l'article 26, et du conseil syndical*'.

53 Explanatory Memorandum Law of 18 of June 2018, p 43.

54 P. Lecocq, 'Les grands axes de la réforme et le champ d'application du régime de la copropriété forcée des immeubles ou groupes d'immeubles bâtis', in *La copropriété après la loi du 18 juin 2018* (Brugge, die Keure 2018), p 7, no. 8.

55 P. Lecocq, in *La copropriété après la loi du 18 juin 2018*, p 8, no. 9.

organs.[56] This is why before the reform the notaries sometimes decided to draw up very extensive by-laws for the benefit of the co-owners, in which they reproduced all the legal information about the (administration of the) building in a way that made it easier to read. However, since these 'maxi-by-laws'[57] are drawn up by notarial act, they then had to be revised by notarial act each time the Apartment Law was amended or a decision to that effect was taken by the general assembly. These revisions take up time and generate costs.[58] As a result, there was always a risk that the general assembly would not formalize the by-laws, which would then lead to incoherence and opacity.[59] The Memorandum admits that is not easy to reconcile the need for reform in the apartment legislation with the need for transparency towards the apartment owners, without increasing the costs.[60] Although the Law of 2 June 2010 imposed an obligation on the co-owners' association to bring the by-laws up-to-date with the new legislation, it is now clear that compliance has been sub-optimal, even after the transition period was extended several times.[61] For all of these reasons, the Law of 18 June 2018 has slimmed down the content of the by-laws so that they can acquire a greater stability.

Specifically, the elements enumerated in points 3, 4 and 5 of the former Article 577-4, § 1 BCC, are removed from the by-laws and transferred to the house rules.[62] This means that the rules governing the convocation, operation and decisions of the general assembly and the provisions concerning the appointment of the syndic, his powers and the duration of his mandate no longer belong in this notarial act, but are incorporated in the house rules.[63] The advantage is that a (costly) notarial act no longer necessary when the law changes or when the general meeting takes a decision that modifies these elements.[64] Amendments to the house rules can be made by private act.[65] Since future

56 Explanatory Memorandum Law of 18 of June 2018, p 204.

57 N. Carette & S. Snaet, 'Het gewijzigde appartementsrecht: aandachtspunten voor de notaris', in Vlanot (ed.), *Verslagboek Vormingsnamiddag Potpourri* (2018), p 8, no. 11.

58 Explanatory Memorandum Law of 18 of June 2018, p 204.

59 Explanatory Memorandum Law of 18 of June 2018, p 204.

60 Explanatory Memorandum Law of 18 of June 2018, p 43.

61 The Law of 2 June 2010 initially introduced a one-year coordination period. By the Repair Act of 13 August 2011 (*BS* 29 August 2011), the coordination period was extended to three years, a second Repair Act of 17 August 2013 (*BS* 22 August 2013) provided for an additional one-year extension.

62 Article 577-4, § 2 BCC.

63 For sharp criticism of the transfer of these provisions from the by-laws to the house rules, see R. Timmermans, 'Het op basis van de "Waterzooiwet" van 18 juni 2018 uitgebeende reglement van mede-eigendom: op weg naar desintegratie van het zakelijk statuut van appartementseigendom?', *T.App.* 2018(3), pp 3-11.

64 Report on behalf of the Committee on Justice by Ms Ozen, *Parl.St.* (Kamer 2017-18), no 2919/006, p 113.

65 C. Willemot, 'De syndicus in het appartementsrecht', in N. Carette & V. Sagaert (eds), *Appartementsrecht III. Hervorming 2018 en actuele ontwikkelingen* (Antwerpen, Intersentia 2018), p 110, no. 34.

amendments to these provisions no longer automatically require a notarial modification of the by-laws, the co-owners can vote more based on the content of the resolution.[66]

2.2.2. More Efficient Financial Management

13. ***Reserve fund –*** One of the major changes in the financial management is the introduction of the mandatory contribution to the reserve fund. All co-owners' associations must build up a reserve fund for which the annual contribution may not be lower than 5% of the total common contributions from the previous financial year.[67] For existing buildings – these are buildings where the common parts have been 'provisionally accepted' for at least five years on the date of entry into force of this Act (1 January 2019) – the new obligation to constitute a reserve fund applies immediately from the first full financial year following the entry into force of this Act. For new(er) buildings, the obligation to build up a reserve fund arises no later than five years after the date of provisional acceptance of the common parts of the building. The mandatory contribution is a fair legal measure, because the benefits from major repairs are of a long-term nature and therefore the costs should also be divided over a longer period of time.[68] A similar obligation to make minimum contributions to a reserve fund was recently implemented in Article 14-2-II of the French Law nos 65–557 of 10 July 1965 and in Article 5:126, section 2 of the Dutch Civil code.

The Belgian legislator was clearly inspired by Article 14-2-II of the French Apartment Law as it contains the same 'exemption period' of 5 years after the delivery/acceptance of the common parts.[69] The French Apartment Law is more precise, because it allows the general meeting, voting under the majority conditions provided for in Articles 25 and 25-1, to allocate all or part of the sums deposited in the reserve fund ('*fonds de travaux*') to finance certain works. This allocation must take into account the existence of special common areas or special charge allocation keys.[70] However, the French apartment owners do not have a possibility to opt-out of this legal obligation to constitute a reserve fund, unless the purpose of the

66 Explanatory Memorandum Law of 18 of June 2018, p 43.

67 New Art. 577-5, § 3, 4th section BCC.

68 M. Lujanen, 'Legal challenges in ensuring regular maintenance and repairs of owner-occupied apartment blocks', *International Journal of Law in the Built Environment* 2010(2), p 182.

69 Article 14-2-II of the French Law nos 65–557 states: « *Dans les immeubles à destination partielle ou totale d'habitation soumis à la présente loi, le syndicat des copropriétaires constitue un fonds de travaux à l'issue d'une période de cinq ans suivant la date de la réception des travaux pour faire face aux dépenses résultant 1° Des travaux prescrits par les lois et règlements ; 2° Des travaux décidés par l'assemblée générale des copropriétaires au titre du I du présent article. Ce fonds de travaux est alimenté par une cotisation annuelle obligatoire versée par les copropriétaires selon* les mêmes modalités que celles décidées par l'assemblée générale pour le versement des provisions du budget prévisionnel ».

70 Article 14, 3rd section of the French Law nos 65–557.

building is entirely non-residential or when the building is partially or entirely used for residential purposes but it contains less than 10 private units.[71] The Belgian apartment owners have the liberty to opt-out of the compulsory reserve fund if there is a 4/5th majority voting in favour of that decision.[72] As a consequence, the reserve fund has only become semi-compulsory, where before it was entirely optional.[73]

In order to encourage apartment owners to set aside sufficient resources for the maintenance and renovation of the apartment building, the Dutch Civil Code also requires a minimal contribution to the reserve fund.[74] In accordance with the new Article 5:126, section 2 of the Dutch Civil Code, since 1 January 2018, all owners' associations of buildings, which are partially or totally intended for habitation must reserve a certain amount each year for the necessary maintenance, and renewal of '*the parts that are not intended to be used as a separate unit*'.[75] Just as in France, the legal obligation is limited to buildings that are wholly or partially intended for habitation.[76] The general assembly of the owners' association has the choice of reserving based on a multi-annual maintenance plan (MJOP[77]) or based on the reconstruction value of the building. If no MJOP is drawn up by the general assembly,[78] then according to the new Article 5:126 section 2 of the Dutch Civil Code, at least half a percent (0.5%) of the rebuilding value of the apartment complex must be reserved annually.[79]

14. ***Collecting charges*** – The Law of 18 June 2018 has given two new 'tools' to the *syndic* in order to improve the process of collecting the co-owners' contributions. On the one hand, the law now explicitly confirms that the syndic has an autonomous power take all judicial and extrajudicial measures to ensure due payment.[80] On the other hand, when collecting contributions, the syndic can now invoke the joint liability of the bare owner and the *usufructuary.*[81] Before, the bare owner and *usufructuary* could not be held jointly for contributions, unless the by-

71 Article 14-2-II of the French Law nos 65-557.
72 New Art. 577-5, § 3, 4th section BCC.
73 Explanatory Memorandum Law of 18 of June 2018, pp 207-208.
74 New Art. 5:126, 2nd and 3rd DCC.
75 Article 5:126 s. 1 DCC.
76 Article 14-2-II, 1st section of the French Law nos 65-557.
77 A multi-annual maintenance plan (MJOP) is a report which states when what maintenance of the common cases should take place and what the cost of this - spread over the years – will be.
78 Drawing up an MJOP is not a legal obligation for an owners' association. However, the drawing up of an MJOP is included as an obligation in the Model Regulations 2006, see www.notaris.nl/stream/splitsingsreglement-2006, more specifically Art. 10, paras 2 and 3.
79 Article 5:126, 3rd section DCC.
80 New Art. 577-5, § 3, 6th section BCC.
81 New Art. 577-5, § 3, 7th section BCC.

laws would stipulate thus.[82] Under the previous legislation it was uncertain whether the co-owners' association, more specifically through the intervention of the syndic, has the competence (or indeed the obligation) to operate a ventilation of the costs between the *usufructuary* and the bare owner of the private unit.[83] Since the Law of 18 June 2018 came into force on 1st January2019, the bare owner and the *usufructuary* of an apartment share a legal joint liability for the contributions. The syndic can call on both of them for the full amount. The joint liability imposed by the Law of 18 June 2018 does not in any way exclude the right of recourse between the *usufructuary* and the bare owner. On the contrary, when calling for contributions, the syndic will inform the parties of the share allocated to the reserve fund precisely in order to enable the *usufructuary* and the bare owner to better determine and value their respective shares.[84]

15. ***Legal charge –*** Another remarkable change regarding the financial management is the creation of a new charge, giving the co-owners' association a preferential right on the proceeds of the debtor's private unit. The charge only applies for the arrears owed by a co-owner to the co-owners' association with regard to the current and previous financial year. This charge did not appear in the original draft bill but was introduced by separate amendment.[85] It has been inserted in Article 27, 7° of the Mortgage Act of 16 December 1851 (and not in the BCC). It is evident that the inspiration from the Belgian legislator for this new charge came from the French Apartment Law, where a similar charge against the co-owner who defaults on his contributions had already been created by a Law of 12th July 1994.[86] The French co-owners' association's charge is also limited in time and subject. It gives the *syndicat des copropriétaires* a privilege for the outstanding contributions from the current year and the four years that have previously expired, as well as for damages awarded by the courts and costs.[87]

2.3. To Rebalance the Co-proprietors' Rights

16. ***More certainty*** – A third line of action is to rebalance the co-proprietors' rights.[88] The Law of 18 June 2018 has introduced different measures in order to

82 Vred. Anderlecht 28 July 1992, *T. Vred.* 1994, p 133, note Mostin, C.; Vred. Elsene (2) 8 September 1999, *T. Vred.* 2000, p 400, note Lecocq, P.

83 A. Salve, 'Paiement des charges de copropriété afférentes à un lot sur lequel porte un usufruit', *T. App.* 2015, no. 3, p 21; P. Lecocq, 'Des obligations de l'usufruitier et du nu-propriétaire face aux charges de la copropriété forcée d'immeubles bâtis', *T. Vred.* 2000, p 404.

84 Explanatory Memorandum Law of 18 of June 2018, pp 207-208.

85 Amendment no. 173 by Schepmans, Clarinval, Goffin and Foret, *Parl.St.* Kamer 2017-18, 2919/008, p 76.

86 C.G. Van der Merwe, *European Condominium Law*, p 29.

87 Article 19-1 of the French Law nos 65-557 and Art. 2374, 1° *bis* French Civil Code.

88 Explanatory Memorandum Law of 18 of June 2018, p 43.

achieve a better balance between the rights and duties of the various parties involved inside and outside of the co-owners' association. For instance, each owner of an apartment now has a legally recognized right to be assisted by an advisor, for instance a lawyer or technical expert during a general meeting, on the condition that the syndic is notified by registered mail at least 4 working days before the day of the general meeting. This person will not be allowed to lead nor monopolize the general meeting.[89]

17. ***Internal notifications –*** The obligations and responsibilities of the members of the general assembly are intensified with regard to the transfer of information within the community. The Law of 18 June 2018 introduced an important change with regard to the notification of the decisions of the general meeting to the holders of a right in rem or a right in person. The notification used to be a legal duty of the syndic,[90] but now has to happen according to a cascade system. Within 30 days after the general meeting the syndic has to communicate the decisions of the general meeting to the holders of a right in rem on a parcel.[91] From now on, it is their obligation – and no longer the syndic's – to inform the tenants and other users of the decisions of the general meeting.[92] Also very important, every decision of the general meeting is now binding on any holder of a right in rem or in person on a unit who holds or exercises voting rights in the general assembly at the time of its approval.[93] This means that the decisions of the general assembly now have an immediate effect for everyone who was present or represented at the general meeting, even if that person voted against the decision.

18. ***Right of exclusive use on the common parts –*** Exclusive rights of use are found in many by-laws but their legal qualification was disputed until the recent reform. An exclusive right, attached to a parcel, to use certain common parts (for instance a garden or a rooftop terrace) could either be intended as a strictly personal authorization or as a right in rem. Most authors agreed that exclusive rights of use could, as a rule, qualify as an easement despite some remarkable deviations from the general principles.[94] The Belgian

89 New Art. 577-6, § 1, first section BCC.

90 Former Art. 577-10, § 4, second section, 2° BCC.

91 Article 577-6, § 12 BCC.

92 Article 577-10, § 4, tweede lid, 2° BCC, V. Sagaert, 'De hervorming van het appartementsrecht anno 2018', *RW* 2018(15), p 576, nr. 57.

93 New Art. 577-10, § 4, second section BCC.

94 For instance the fact that this right allows every type of use of the common part and not a specific type of use, N. Carette, 'Exclusieve gebruiksrechten op gemeenschappelijke delen bij appartementsmede-eigendom', *Not. Fisc. M.* 2017, no. 2, p 47, P.-Y. Erneux, 'Le droit d'usage exclusif sur les parties communes dans la pratique de la copropriété', in *Actualités notariales de la copropriété* (Brussel, Bruylant 2015), p 54; M. Tordoir, 'Quelques réflexions sur le droit de jouissance exclusive attribué sur des parties communes', *T. App.* 2008, no. 3, p 9; V. Sagaert, 'De geldigheid van statutaire clausules in het appartementsrecht onder de loep: richtwijzers en voorbeeldclausules voor de notariële praktijk', *T. Not.* 2016, no. 9, pp 630-634.

Court of Cassation had also decided in its judgment of 30 January 2014 that an exclusive right of use granted to a co-owner in the by-laws could be qualified as an easement.[95] The legislator now gives a clear qualification to the rights of exclusive use established in the by-laws. He has chosen to introduce a fourth section to the first paragraph of Article 577-4 BCC: '*The apartment owners have a proportional right to use the common parts, unless the by-laws determine otherwise. Such a contractual derogation is presumed to be an easement, except when otherwise specified*'.[96] The purpose of this amendment is to confirm the qualification of the right of exclusive use as an easement by establishing it as a presumption, which can be abandoned by means of a different clause in the by-laws.[97] At the same time, through an addition to Article 577-7, § 1, 2°, e) BCC the Law of 18 June 2018 allows the general assembly to terminate such an exclusive right of use when termination is justified by the legitimate interest of the co-owners' association and on the condition that there is a 4/5th voting majority for this decision. The payment of a compensation may be necessary to make up for the damages caused to the co-owner by the decision to terminate his exclusive right of use.[98]

In France, the ELAN Law has also enacted in the Law of 10 July 1965 that is possible to establish a right of exclusive use on the common parts.[99] The new Article 6-3, first section confirms that the common parts burdened with a right of private enjoyment ('*les parties communes à jouissance privative*') are common parts assigned to the exclusive use and utility of a unit. Notwithstanding this right of exclusive use, the common parts still belong to all the co-owners jointly. The right of private use can only be an accessory to the private unit to which it is attached.[100] Contrary to the Belgian Apartment Law, it is accepted in the French doctrine that this right of exclusive use cannot be an easement.[101] The reason for this difference is that the French Court of Cassation is of the opinion that no easements can be established between one or more private units and the common parts.[102]

19. '***Payer decides'*** **–** Much anticipated by the legal practitioners is the new rule that the apartment owners who pay for the maintenance and repair of a certain common part, have sole decision power. When according to the by-laws some of the other co-owners are entirely excluded from the obligation to contribute to the costs of a particular common part of the building (e.g. an elevator in one wing of the

95 Cass. 30 januari 2014, AR C.12.0305.N, www.cass.be.

96 New Art. 577-4, § 1, fourth section BCC.

97 Explanatory Memorandum Law of 18 of June 2018, pp 202-203.

98 New Art. 577-7, § 1, 2°, e) BCC.

99 D. Tomasin, *AJDI* 2019, p 42.

100 Article 6-3, second section of the French Law nos 65-557.

101 J. François, « Qu'est-ce qu'un droit réel de jouissance spéciale ? », *D.* 2019(30), no. 9 and no. 23.

102 This is due to a general rule of law expressed by the adage '*nemini res sua servit*'; Cass. (Fr.) 11 January 1989, *Bull. civ.* 1989, III, no. 11 (« *incompatibilité entre la division de l'immeuble en lots de copropriété et la création d'une servitude sur une partie commune au profit d'un lot privative* ») and Cass. (Fr.) 11 March 2014, *AJDI* 2014(6), p 461.

building), only those co-owners who contribute can take part in the vote.[103] Each of these co-owners will vote in the general assembly with a number of votes corresponding to his or her contribution to the aforementioned costs. Yet their decision power will never be unbridled, because the decisions made by a few co-owners can never compromise the global management of the building.[104] The great advantage of this new principle is that decision power can be taken away from the general assembly and given to the apartment co-owners who are using a common part and paying for its repair and maintenance, without having to go through the process of establishing and managing a subsidiary co-owners' association.[105]

While the Explanatory Memorandum does not explicitly mention it, it is clear that Belgian legislator modelled this provision on the French Apartment Law. An almost identical provision, restricting voting powers to the co-owners who have to pay for the maintenance expenses of a part of the building or the maintenance and operating expenses of an item of equipment, can be found in Article 24, III of the French Apartment Law. Article 24, III clearly states that when according to the by-laws certain co-owners have to bear the expenses for the maintenance of a common part of the building or the maintenance and operation of an item of equipment, the by-laws can provide that they alone can take part in the vote on decisions concerning these expenses. Each of the co-owners shall vote with a number of votes in proportion to his or her share of the said expenses. It is interesting to notice that the attribution of sole decision power to certain co-owners is only a possibility offered by the French Apartment Law,[106] whereas it has now become an obligation according to the Belgian Apartment Law.

20. ***Content of the contract with the syndic*** – The Law of 18 June 2018 has imposed a more elaborate description of the content of the written contract with the syndic, in particular with regard to the fees. Since the Law of 2 June 2010, the terms governing the relationship between the syndic and the co-owners' association and the related remuneration must be included in a written contract.[107] For all new of renewed contracts since 1 January 2019 the written agreement has to include, in particular, the list of the flat-rate services and the list of supplementary services and related fees. An unlisted service or performance can never give rise to a remuneration, unless there is unless a contrary decision from the general meeting.[108] Once again, it is obvious that the French Apartment Law inspired the Belgian legislator, because the French legislator also imposes a flat-rate remuneration for the services of the syndic in Article 18-1 A. The implementing decree[109] contains a list of all

103 New Art. 577-6, § 6 BCC.
104 New Art. 577-6, § 6 BCC.
105 V. Sagaert, *RW* 2018, p 568, no. 25.
106 P. Capoulade et al., *La copropriété 2018/2019*, no. 331.81.
107 Article 577-8, § 1 BCC.
108 New Art. 577-8, § 1, second section BCC.
109 Decree no. 2015-342 of 26 March 2015.

services that are deemed to be included in the agreed annual flat rate. The list has to be annexed to the model contract that has become obligatory since 1 July 2015 for all new or renewed contracts with the syndic.[110] Contrary to the Belgian Apartment Law, the French apartment legislation contains an exception to this obligation for buildings which have 1) an entirely different purpose than habitation and 2) a co-owners' association composed exclusively of legal entities.[111] These buildings can exclude the application of the entire Article 18.[112]

2.4. To Clarify the Existing Legislation

21. ***More clarity*** – Finally, the final objective was to clarify some of the existing legislation. In a number of areas, even under the new regime introduced by the Law of 2 June 2010, legal uncertainty prevailed.[113] During the parliamentary preparation of the Law of 18 June 2018, the Belgian legislator acknowledged that the Apartment Law is sometimes difficult to understand for lay people.[114] Tackling a number of lingering interpretation problems was therefore a fourth focus of this reform.[115]

22. ***Scope of the law –*** A number of changes introduced by the Law of 18 June 2018 only aim to clarify certain aspects of the existing legislation. First of all the legislator has defined the scope of the law more accurately. Under the previous regime, the rules and regulations applied to every building or group of buildings of which the ownership is divided between several owners, according to parcels each containing a built-on private unit and a share in the common parts. The question whether the presence of one or more ***non-built*** private units in the scheme could lead to the exclusion of the Apartment Law for the entire scheme, had given rise to some uncertainty.[116] The Tribunal of Charleroi in particular decided thus in a case where the holiday park contained both parcels with chalets (buildings) as well as parcels with (standing space for) caravans and mobile homes (no buildings).[117] Other courts and tribunals used a more flexible approach, generally stating that a private unit should be considered as built-on as soon as it is susceptible to be.[118] Most authors were also in favour of a

110 Article 18-1 A of the French Law nos 65-557.
111 D.Tomasin, *AJDI* 2014, p 419.
112 Article 18-1 A of the French Law nos 65-557.
113 Explanatory Memorandum Law of 18 of June 2018, p 44.
114 Explanatory Memorandum Law of 18 of June 2018, p 204.
115 Explanatory Memorandum Law of 18 of June 2018, p 44.
116 A. Salvé, 'Loi du 2 juin: Champ d'application, modifications légales des statuts et droit transitoire ', in I. Durant, P. Lecocq & C. Mostin (eds), *La copropriété par appartements : la réforme de 2010* (Brussels, Die Keure 2010), pp 21-23, no. 2.
117 Rb. Charleroi 30 octobre 2015, *T.App.* 2017(1), p 54.
118 See N. Carette & C. Willemot, 'Erfpacht en opstal & bouwpromotie', in *Erfpacht en opstal* (Mortsel, Intersentia 2018), pp 278-281.

flexible interpretation of the condition.[119] In the first sentence of a new Article 577-3 BCC clarifies that the Apartment Law applies to every real property on which a building or a group of buildings has been or can be erected, of which the ownership is divided between several owners according to parcels each containing a private unit – thus including non-built private units – and a share in the common parts.[120]

The French legislator has also paid a lot of attention to the accurate definition of the scope of the law. The ELAN Law rewrote the iconic first article of the Law of 10 July 1965 by adding three new sentences after the existing first section. Article 1 of the law of 10 July 1965 now includes three sections. The first section now states that each parcel must include a private unit and a share of common parts, and that both elements are inseparable. The entirely new second section confirms the existence of '*lots transitoires*'. *Lots transitoires* are macro lots that are described in the constitutive act as giving entitlement to a certain number of shares in the common parts and a right to build.[121] The building right must be precisely defined as to the constructions that it allows to build on a given surface of the ground, and a corresponding proportion of common areas. The third section specifies that the creation and consistency of the *lot transitoire* must be stipulated in the by-laws.

23. ***Derogation from the law –*** When the ownership of a building or group of buildings is divided between several people, according to parcels each containing a private unit and a share in the common parts, Article 577-3, paragraph 1, *in fine* BCC used to allow the apartment co-owners to derogate from the mandatory rules and principles, if the nature of the goods did not warrant it (sic.) and all apartment co-owners agreed. The two criteria were cumulative conditions. If the apartment co-owners would have been able to decide to exclude the Apartment Law by mere consensus, the protection of third parties such as creditors and tenants would have been left entirely in the hands of the apartment co-owners.[122] Therefore, the derogation from the legal regime must also had to be justified by the nature of the goods. Unfortunately, there was much debate about the interpretation of this last condition.[123] The Apartment Law itself

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119 S. Bouly, *Onroerende natrekking and horizontale eigendomssplitsingen* (Antwerp, Intersentia 2015), p 399, no. 323; H. Casman, 'Le champ d'application de la loi: les immeubles concernés', in N. Verheyden-Jeanmart (ed.), *La copropriété forcée des immeubles et groupes d'immeubles bâtis. Cinq ans d'application de la loi du 30 juin 1994* (Louvain-la-Neuve, UCL 2001), p 12; V. Sagaert, *Goederenrecht* in *Beginselen van Belgisch Privaatrecht* (Mechelen, Kluwer 2014), pp 315–316, no. 382.

120 New Art. 577-3, first section, first sentence BCC.

121 P. Capoulade et al., *La copropriété 2018/2019*, no. 111.21; J.-M. Roux, 'Le lot transitoire en question(s)', *Loyers et copr.* 2016(6), etude 8, no. 1.

122 Draft Bill amending and supplementing the Civil Code with respect to co-ownership, *Parl.St* Kamer 1990–91, 1756(1), p 9; H. Vandenberghe & S. Snaet, *Beginselen van Belgisch privaatrecht, V, Zakenrecht, 3, Mede-eigendom*, Ghent, E. Story-Scientia (1997), pp 144–145.

123 H. Casman, in *La copropriété forcée des immeubles et groupes d'immeubles bâtis*, pp 1314; C. Mostin & J.F. Taymans, 'Le régime d'exception aux dispositions impératives de la loi sur la copropriété forcée', *JurimPratique* 2008(3), pp 103–104.

contained no indications as to what that nature should entail. During the parliamentary proceedings a few examples were given, but no clear guidelines. Only limited case law was available.[124] The Law of 18 June 2018 reformulates the conditions for derogation from the legal regime, but only in a very modest way. The current legal regime may be derogated from if the nature of the common parts justifies it, as long as all the co-owners agree to that derogation and by means of a constitutive act establishing private units.[125] The Explanatory Memorandum highlights that the number of private units does not justify a derogation.[126] The parties concerned will still have to determine whether there is a reasonable basis[127] in order to exclude the legal regime in the light of the actual circumstances, without referring to the limited number of units or apartment owners.[128]

24. ***Subsidiary co-owners' associations*** – As apartment communities become bigger and more complex, they become more difficult to manage. The Law of 2 June 2010 has brought some remedy for these difficulties in large communities of co-owners by introducing the possibility of a two-tiered management structure. When an apartment scheme consists of twenty private units or more and is divisible in areas of general common property and areas of limited common property, Article 577-3, § 4 BCC allows the second type of common property areas to be managed by one or more subsidiary co-owners' associations ('*deelverenigingen*'/'*associations partielles*') with legal personality, while the general common property areas remain under the management of the main co-owners' association. When the apartment scheme contains a group of buildings, the common parts of each building can be designated as a limited common property area (on the condition that there are twenty or more units in the scheme). The subsidiary co-owners' association, made up of all the co-owners in that building, can manage the common parts autonomously. However, if the scheme only contains one building, that building must be physically divisible into two or more clearly demarcated physical areas, e.g. two separate wings.

The previous legal conditions under which subsidiary co-owners' associations could be established, had given raise to some debate in the legal literature.[129] The uncertainty was mainly caused by a judgment of the justice of the peace of Anderlecht

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124 Brussels (16e k.) 2 April 2012, *TBBR* 2014(1), pp 27-30 (underground parking garage with 38 private units (parking areas)); Rb. Antwerp (5e k.) 28 October 2013, TBO 2013(6), pp 270-271 (the building was divided in only two private units: the ground floor and the other floors).

125 New Art. 577-3, first section BCC.

126 Explanatory Memorandum Law of 18 of June 2018, p 201.

127 H. Simon, 'Les conditions nécessaires à l'exclusion d'une copropriété du champ d'application des articles 577-3 et suivants du Code civil après la loi du 2 juin 2010', *JurimPratique* 2011(1), pp 77-78.

128 C. Willemot, in *Property Law Perspectives V*, pp 137-138.

129 M. Plessers, 'Les associations partielles', in I. Durant, P. Lecocq and C. Mostin (eds), *La copropriété par appartements: la réforme de 2010* (Brussels, Die Keure 2010), p 89, no. 36; P. Lecocq, 'Les associations de copropriétaires : des personnes morales particulières', in P. Lecocq (ed.), *La copropriété par appartements. Deux ans après la réforme* (Liège, Anthemis 2012), pp 58-59; V. Simonart, 'Les associations partielles', *JurimPratique* 2011(1), p 40, no. 16; zie hierover ook: N. Carette & M.

who ruled that the use of a plural word ('sub-associations') by the legislature in Article 577-3, § 4 BCC implies that, if a sub-association is set up for one building in the group, separate sub-associations had to be set up for each building in the group or for every distinguishable part in a divisible building.[130] The second discussion originates in the same judgment and concerns the question whether it is possible to set up *asymmetrical* sub-associations of co-owners, meaning only setting up sub-associations for the clearly distinguishable parts of a physically divisible building but not for the building, which is part of a group of buildings.[131] The Law of 18 June 2018 has put an definitive stop to both discussions because the article now stipulates that, if the building or group of buildings consists of twenty private units or more, the constitutive act can stipulate that *one or more* sub-associations are established for the units of *one or more* buildings in the group of buildings or, if a building is physical divisible in clearly distinguishable parts, for the units of one or more of those parts.[132]

The reform did not answer the question what sort of building constitutes as 'physical divisible in clearly distinguishable parts'.[133] In France this question does not arise, since the creation of subsidiary associations of co-owners ('*syndicat secondaires*') is only possible for separate buildings in a group of buildings.[134] There is no numerical criterion, so it is perfectly possible to set up secondary syndicats when the group of buildings is composed of less than twenty private units.[135]

25. ***Informal subsidiary co-owners' associations –*** Also noteworthy is the fact that the Law of 18 June 2018 repeals the sub-associations without legal personality.[136] There is a general consensus in the legal doctrine that the creation of sub-associations without legal personality does not bring any benefit, and even complicates the matter.[137] However, the legislator does not appear to want to prohibit the existing sub-associations without legal personality. In principle, these sub-associations can therefore continue to function as they did before. Nothing prevents the co-owners from continuing to organize informal informative and/or preparatory meetings of co-owners, as was customary before the entry into force of the law of 2 June 2010.[138]

Lernout, 'Vereniging van mede-eigenaars and deelverenigingen na de wet van 2010', in N. Carette and V. Sagaert (eds), *Appartementsrecht II* (Antwerp, Intersentia 2015), p 49, no. 18.

130 Vred. Anderlecht 18 April 2012, *T.App.* 2012(3), p 53.

131 Explanatory Memorandum Law of 18 June 2018, p 202.

132 New Art. 577-3, last section, first sentence BCC.

133 N. Carette & S. Snaet, 'Gewijzigd appartementsrecht: impact op statuten en overdracht van een kavel', *Not.Fisc.M.* 2019(6), p 186, no. 25.

134 Artikel 27 Franse Appartementswet.

135 G. Chantepie, 'Groupements restreints et collaborations renforcées', *AJDI* 2015, afl. 4, p 277.

136 New Art. 577-6, § 3, first section, second sentence BCC.

137 M. Plessers, in *La copropriété par appartements*, p 99, no. 49; P. Lecocq, in *La copropriété par appartements*, p 5.

138 N. Carette & M. Lernout, in *Appartementsrecht II*, p 39, no. 5.

26. ***Mediation –*** Finally, the Law of 18 June 2018 explicitly recalls the possibility of mediation and, where appropriate, collaborative negotiations. Any stipulation according the jurisdiction over disputes arising in connection with the application of this section of the law to one or more arbitrators, shall however be regarded as non-written. This prohibition does not exclude the application of Articles 1724 et seq. of the Judicial Code on Mediation.[139]

3. Conclusion

27. ***Evaluation –*** The Law of 18 June 2018 certainly does not affect the fundamental principles of the Belgian Apartment Law. By means of point-by-point adjustments, the Belgian legislator wants to achieve four main objectives: (1) to increase the flexibility in the functioning of the-owners' association and its bodies; (2) to optimize the efficiency within the the-owners' association; (3) to rebalance the co-proprietors' rights and (4) to clarify the legislation to the co-owners. It is certain that this reform has ended a number of existing discussions and that several long-term uncertainties have ceased to exist. The Law of 18 June 2018 also brings some interesting innovations, such as the obligation to contribute to a reserve fund, the joint liability of the bare owner and the *usufructuary* and the co-owners' association's charge. On closer inspection, it becomes obvious that a significant number of these novelties have been modelled on the French Law of 10 July 1965. It is therefore remarkable that the Explanatory Memorandum only recognizes the French Apartment Law as an inspiration for the introduction of the provisional administrator.[140] From this comparative analysis, it is clear that the French Apartment Law still serves as an important source of inspiration for the Belgian legislator. With another important reform of the apartment legislation on its way in France, it will be interesting to see whether the Belgian and French Apartment Law will continue along similar paths or whether they will start to develop on different trajectories.

139 New Art. 577-4, § 4 BCC.

140 For instance, Explanatory Memorandum Law of 18 June 2018, p 222.