

# Luxembourg

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## THE CORPORATE REAL ESTATE MARKET

### 1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

Positioned at the heart of Europe, the Grand Duchy of Luxembourg is one of the world's most significant financial centres. It has the second largest investment funds centre globally after the US, and is one of Europe's key private banking centres. Luxembourg has the highest GDP per capita in the world according to the IMF and World Bank. As of 31 August 2009, 146 banks from over 20 different countries reside in Luxembourg, major companies such as the ArcelorMittal Group have headquarters there, and net assets in undertaking for collective investment vehicles established in Luxembourg total EUR1,739.417 billion (about US\$2,449 billion).

Luxembourg has endured some of the impact of the global financial recession, although to a lesser extent than most other economies. In real estate, there has been a slowing of property investment and take up. However, transactions continue to take place in line with the 2008 average, and new deliveries have been implemented. Industry experts highlight 2010 and beyond as a point of recovery. The following information has been provided by Luxembourg real estate consultants, Property Partners, based on information as of the third quarter (Q3) of 2009.

#### Stock, vacancy and rents

At the end of Q3 2009, total office stock in Luxembourg passed the 3 million square metre mark. Growth in 2009 is based over the five-year average (about 5%) and is expected to rise to a 10% increase until the end of the year.

The vacancy rate in Luxembourg has been gradually rising since the beginning of 2009, from about 2% to some 5% at the end of Q3. Taking into account the new deliveries expected at the end of 2009, and the growing subletting market, the vacancy rate is expected to reach 6% to 7% by the end of 2009.

Rental levels have to a degree come under pressure due to rising vacancy rates. This downward pressure is expected to persist in the short and medium term. Prime rents in the central business district (CBD) are around EUR36 (about US\$50.7) per square metre per month.

#### Take-up

At the end of Q3 2009, take-up of office space reached about 65,000 square metres, and amounted to over 100 transactions

throughout the year. A downward trend for the total take up to 90,000 square metres is foreseen for the full year 2009.

Key districts in demand include the airport (25%) and in the city centre (40%). Banking and finance has again been the key business sector in terms of office take up (37%), followed by businesses in the professional services sector (18%), IT and telecoms (15%), and insurance and pension funds (11%).

#### Investment transactions

The total investment volume amounted to EUR320 million (about US\$451 million) across 18 transactions. EUR150 million (about US\$211 million) was spread across three transactions by owner occupiers, and the balance concerns mainly refurbishment projects bought by Luxembourgish investors. A further EUR200 million (about US\$282 million) is expected to be concluded until the end of the year by institutional investors and end-users. While the total investment volume is slightly below the five-year average, it remains in line with 2008. Prime yield stabilised at 6%.

#### Pipeline

Over 200,000 square metres of new deliveries are expected in 2009 to 2010, leading to an oversupply on speculative projects in the current market situation.

Half of the buildings in the pipeline are located in the city centre. Most of the speculative projects in the periphery have been postponed and are likely to take place in 2011. Until then, the oversupply is expected to have been assimilated by the market.

## REAL ESTATE INVESTMENT

### 2. Please briefly outline the opportunities for investing in real estate in your jurisdiction. In particular, consider:

- The structures commonly used (for example, property companies and partnerships).
- Are real estate investment trusts (REITs) available? If so, are they commonly used?
- Institutional investors.
- Private investors.

A range of structures are available, which are regulated, lightly regulated or unregulated. The choice depends on factors such as:

- The investor's requirements.
- The type of investment.

- The funding to be raised.
- Specific tax considerations.

### Regulated structures

**Undertakings for collective investment (UCIs).** UCIs are governed by Part II of the Law of 20 December 2002, and are the most common vehicles used for investing in real estate. Real estate UCIs (Real Estate Investment Funds (REIFs)) can be set up as either:

- Corporate entities with variable or fixed capital (*société d'investissement à capital variable* (SICAV)), or *société d'investissement à capital fixe* (SICAF).
- Contractual mutual funds (*fonds commun de placement* (FCP)), very similar to REITs as they are known in England.

All REIFs must:

- Invest exclusively in real estate assets, that is, real estate registered in the name of the REIF, or shares of companies investing in real estate (subject to certain conditions), and long-term rights or options related to real estate.
- Publicly place their shares or units through a public or private offering.
- Apply the principle of risk diversification.

REIFs can adopt a multiple portfolio structure (umbrella fund) under which each portfolio can be subject to its own specifications, such as a particular investment policy, fee structure, and distribution pattern.

Although not always an ideal solution, the FCP is commonly used, probably because of its resemblance to REITs and its structure is now well-known by foreign investors. It is managed by a management company acting for the FCP in the interests of the unit holders.

REIFs are subject to specific investment and leverage restrictions. Compliance with these is subject to the control and supervision of the financial regulatory authority (*Commission de Surveillance du Secteur Financier* (CSSF)).

**Specialised investment funds (*fonds d'investissement spécialisés* (SIFs)).** SIFs were introduced by the Law of 13 February 2007 on specialised investment funds. They have been very successful, with over 900 vehicles registered as at 31 August 2009, and are increasingly perceived to be one of the best tools for investment in the real estate sector.

SIFs are available to informed investors (that is, institutional and professional investors, or those persons or entities investing at least EUR125,000 (about US\$176,000) and confirming in writing they are sophisticated investors). SIF promoters and investment managers do not need to be supervised by the CSSF. However, persons directly responsible for the management of a SIF must be approved by the CSSF.

A SIF vehicle must comply with specific investment restrictions, involving a set minimum amount of risk diversification (*CSSF Cir-*

*cular 07/309* requires that no single investment can represent more than 30% of the total net assets of the SIF).

**Companies investing in risk capital (*sociétés d'investissement en capital à risque* (SICARs)).** Qualified investors (institutional, professional or informed investors in the same terms as for SIFs), who invest their assets in venture capital and private equity, can use the SICAR structure (introduced by the Law of 15 June 2004, as amended, relating to SICAR).

Real estate investments must comply with certain risk capital characteristics to be considered eligible. SICAR vehicles do not need to comply with risk diversification requirements and can, therefore, invest 100% of their assets in one target investment.

Investment in real estate assets by a SICAR must comply with specific CSSF requirements (*CSSF Circular 06/241*). Under these requirements, real estate assets acquired must fall into the category of a "risk capital" asset (that is, an "opportunistic" or "development" asset).

The Luxembourg Parliament adopted new legislation on 15 October 2008 amending some provisions of the current SICAR regime, in particular by introducing the possibility for SICARs to be composed of multiple segregated parts.

### Unregulated structures

Real estate investment can use unregulated corporate vehicles, either organised as a securitisation vehicle or simply falling under general corporate rules.

**Securitisation vehicles.** The securitisation option was introduced by the Law of 22 March 2004. A wide range of assets can be securitised (including real estate, tangible or intangible, movable or immovable assets). Securitisation vehicles can be used for the acquisition of real estate or refinancing of real estate transactions.

**Corporations.** Corporations remain the most commonly used structures for the acquisition of real estate. The following types of companies exist (*Law of 10 August 1915, as amended, on commercial companies*):

- Public limited company (*société anonyme*).
- Private limited company (*société à responsabilité limitée*).
- Partnership limited by shares (*société en commandite par actions*).
- Limited partnership (*société en commandite simple*).
- Co-operative company in the form of a public limited company (*société coopérative organisée sous forme de société anonyme*).

The most commonly used corporations are the public limited company and the private limited company.

Larger developments in the Luxembourg real estate market are usually undertaken by qualified institutional investors, rather than private investors.

## REAL ESTATE LEGISLATION

### 3. Please briefly set out the main real estate legislation that applies in your jurisdiction.

The main specific sources of real estate legislation are the laws of:

- 21 May 1999, on the organisation of the territory.
- 10 June 1999, as amended, relating to the operating permit (*commodo-incommodo*) procedures regulating the security, environmental and technical aspects of construction (see Question 40).
- 19 July 2004, as amended, relating to communal planning and urban development.

In addition, the Civil Code and the Tax Code contain the main rules on the ownership of real estate, mortgages, leases and easements, and the taxes and customs duties related to them.

Other laws relevant to real estate include the laws of:

- 20 December 2002, as amended, relating to UCIs.
- 13 February 2007, on specialised investment funds.
- 10 August 1915, as amended, on commercial companies.
- 22 March 2004, as amended, on securitisation.
- 15 June 2004, as amended, which provides a legal framework for establishing a SICAR.
- 22 October 2008 on the rights of *superficie* and *emphyteusis*, which abrogates the Law of 10 January 1824, rearranges the provisions applicable to the right of *emphyteusis* and *superficie*, and clears up the status of constructions and plantations at the end of the *emphyteusis* and *superficie*. Further, it proceeds to a standardisation and co-ordination of both rights, and innovates by introducing a pre-emption right to the benefit of the *superficiaire* or *emphytéote* (see Question 9).
- 18 December 2008 on the expropriation regime, modifying Article 545 of the Civil Code.

Other relevant rules include:

- IML Circular 91/75 Chapter I, Section III, as amended, relating to the revision and rewording of rules governing Luxembourg undertakings covered by the Law of 30 March 1988 on UCIs.
- CSSF Circular Letter 07/309, which provides guidelines on the minimum level of risk diversification that SIFs must have.
- The Grand-Ducal Regulation of 30 November 2007 on the energy performance of apartment buildings (Energy Performance Regulation).

## TITLE

### 4. Please briefly state what constitutes real estate in your jurisdiction. Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?

Real estate is composed of the land and anything affixed on it, such as buildings (*Article 517, Civil Code*), which are registered together in the same title. Ownership of the land also means ownership of the ground underneath it.

### 5. How is title to real estate evidenced, for example by registration in a public register of title? Which authorities manage the public title register?

All deeds relating to the transfer of real property rights must be recorded at the Mortgage Registry (*Bureau de la conservation des hypothèques*) (*Law of 25 September 1905 on the transcription of real rights (rights in removable and immovable property)*). Such deeds must be notarised.

The registration of deeds transferring real property gives the owner rights of opposition against third parties. It is possible to obtain an extract from the land register that shows ownership of a building.

### 6. Please briefly set out the information and documents registered in the public register of title, for example a description of the real estate, the owner, matters affecting the title and any relevant documents.

The Mortgage Registry contains information on:

- Current owners of the real estate.
- The date of transfer.
- A description of the real estate.
- Any mortgages taken over the real estate.
- Leases concluded for a period of more than nine years.

To gain access to registered information, an applicant must provide the Mortgage Registry with the name of the owner of the real estate in question (details of the real estate itself are not sufficient).

Information such as former owners can be obtained from the cadastre register. Easements are mentioned in the notarial deed of acquisition.

### 7. Can confidential information or documents be protected from disclosure in the public register of title?

This is not possible, as certain information must be published in the Mortgage Registry to provide the owner with rights of opposition against third parties (*Law of 25 September 1905*).

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**8. Is there a state guarantee of title? Is title insurance available? If so, is it commonly used?**

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Neither state guarantee of title nor title insurance are available in Luxembourg.

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**9. How can real estate be held (that is, what types of tenure exist)?**

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The following exist:

- Rights of ownership.
- *Superficie*. This right, which cannot exceed 99 years in length, is a right over land entitling the holder to construct and own buildings on the land. At the termination date, the landowners must reimburse the holder (*superficiaire*) with the market value of the buildings and items that he has built on the land.
- *Emphyteusis*, or long term lease. This is a right, capable of assignment and descent, over productive real estate. The right is coupled with the right to enjoyment of the property, on condition that the holders (*emphytéote*) take care of the real estate and pay taxes on it. It can also involve paying a small amount of rent. This lease typically relates to immovable property and:
  - grants the right to make full use of the immovable property;
  - lasts for a term of between 27 and 99 years;
  - obliges the right holder to make improvements that increase the value of the land, which will belong to the landowner at the end of lease.

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## SALE AND PURCHASE OF REAL ESTATE

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**10. What are the main stages and documents in the sale and purchase of real estate? In particular:**

- How is real estate marketed, when does commercial negotiation occur and what pre-contractual arrangements are used?
  - When is the sale contract negotiated and executed?
  - When are the parties legally bound?
  - When is the change of title registered?
  - When does title transfer and what are the formal legal requirements to transfer real estate (for example, in writing and signed by the parties)? Is notarisation required?
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### Marketing and commercial negotiation

Marketing is carried out by real estate agents whose commissions are freely negotiable. However in practice, real estate agents' fees are typically between 1% and 3% of the transaction amount.

Commercial negotiations normally take place about three to four months before the sale occurs.

### Pre-contractual arrangements

A preliminary contract (*compromis de vente*) is usually concluded between the parties. This contract contains details of the goods and the price and conditions of sale (it often contains conditions precedent). Once the conditions precedent are met, the parties sign the final deed, which is registered at the Mortgage Registry.

A seller or buyer can also make a unilateral offer to the other party, which can be accepted within a certain timeframe (set out in the offer).

Buildings are often sold through a sale of the company that holds the building (a share deal). In this type of deal, the buyer acquires the shares of the company that holds the building. In such cases, the parties usually conclude a letter of intent (LOI), which sets out the details of the sale.

### Sale contract

Luxembourg law does not require a special form for the transfer of real estate. A written contract is, therefore, not necessary to bind the parties. However, a written contract is recommended to provide evidence of the sale and purchase. In addition, a notarial deed registered at the Mortgage Registry is advisable, as this will grant the new owner rights of opposition against third parties and is always used in practice (see below, *Registration*).

### When legally binding

A real estate contract is normally binding when it has been signed. According to the Civil Code, parties are bound when they agree on the price and the goods (*Article 1589, Civil Code*).

### Registration

To ensure rights of opposition against third parties, all transfers of immovable property in Luxembourg must be registered (see *Question 5*).

### When title transfers

Title usually transfers on the date of the execution of a binding agreement. However, parties can decide to defer the transfer of ownership, for instance, to the date of the notarial deed or on fulfilment of certain conditions precedent.

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**11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate, for example to disclose real estate information, or in relation to title?**

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A seller must provide the buyer with all information related to, and which may be useful to, the real estate property and title. If the seller does not comply with this obligation, the buyer can ask for the sale to be nullified, or for the seller to pay damages based on the loss suffered as a result of the seller's omission.

The seller can also be held liable for hidden defects (*vices cachés*) under normal civil law rules applicable to sale contracts.

A specific regime applies to the sale of real estate being constructed (*vente d'immeuble à construire*). This provides that the seller is liable for hidden defects and visible defects (*vices apparentes*). A visible defect is that which appears before the latest of the two following events:

- Receipt of the property.
- Expiry of a one-month period following entry to the property.

This regime is currently being reformed (*see Question 42*).

The seller can demand rescission of the sale when the purchase price is inadequate by greater than seven-twelfths of the purchase price (*Article 1674, Civil Code*). If this action is taken, a buyer can either:

- Return the property to the seller, and be reimbursed the amount he has already paid.
- Keep the property, and pay the seller the difference between the price originally paid and the fair price as determined by a court.

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**12. Please briefly outline the real estate due diligence that is typically carried out before an acquisition (including title investigation and searches of public authorities).**

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The buyer typically performs various types of due diligence. In addition to legal due diligence, the buyer usually undertakes financial, tax, technical and/or environmental due diligence.

The legal due diligence generally covers:

- Broader matters, such as corporate issues, agreements, tax issues, and litigation.
- Specific matters, such as title deeds, easements, mortgages, authorisations (building permits, operating permits, environmental matters and so on) and leases.

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**13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover?**

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In addition to the seller's liability under the Civil Code, the seller often gives the following warranties to the buyer:

- He is the sole owner of the real estate and has the full and entire holding of that real estate.
- The building is in good working order and all necessary authorisations have been obtained.
- No pollution or asbestos exists in relation to the real estate.
- There is no easement, mortgage, lien or charge on the real estate.
- There is no claim in relation to the building.

When the sale of the real estate is carried out by way of a share deal, the seller usually provides additional warranties concerning the company.

In relation to unfinished buildings, either:

- The seller provides the buyer with a bank guarantee covering completion of the project.
- The parties put in place an escrow agreement, under which part of the sale price is deposited in an account and released on completion of construction.

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**14. Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before it bought or occupied it? For example, environmental liability, or liability under a lease.**

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As a general rule, an owner or occupier cannot inherit liability. If damage to third parties related to the real estate occurred before the sale, the buyer does not inherit liability.

If damage occurs after the sale, the buyer can be liable in relation to third parties, as owner of the real estate. However, the buyer can sue the seller for:

- Breach of any representations and warranties it granted in the sale and purchase agreement.
- Fraud.
- Hidden defects.

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**15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it? For example, environmental liability, defects in the real estate, and contractual liability to the buyer.**

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A seller can be contractually liable to the buyer for breach of representations and warranties granted in the sale and purchase agreement, and for hidden defects that originated before the sale.

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**16. What costs are usually paid by the buyer? What costs are usually paid by the seller?**

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In a share deal, the costs are usually settled by the parties in the sale and purchase agreement.

In an asset deal, the buyer pays:

- The fees of the professionals it used.
- The costs of the due diligence.
- The public notary fees for the notarial deed of sale, including registration duty.

The seller pays the fees of the real estate agent it used for the sale.

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**REAL ESTATE TAX**

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**17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate? Who pays? What are the rates? Are there any exemptions?**

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The supply of real estate is, in principle, within the scope of VAT and classified as a supply of goods. However, such supply is generally exempt from VAT (*Article 44(1f), VAT Law of 12 February 1979, as amended*) (VAT Law).

This exemption does not apply to supplies of construction work, or to supplies of real estate under a manufacturing or service contract, to the extent that the construction sold does not exist at the time the contract is signed.

Under certain conditions, taxable persons can request a waiver of their exemption and elect to have their transactions subject to VAT (*Article 45, VAT Law*). These conditions are mainly that:

- The supply or transfer of real estate is made by a VAT taxpayer to another VAT taxpayer.
- The real estate is used wholly or mainly for activities that allow the acquirer to claim a credit for input VAT.

The use of real estate for transactions in which VAT is deductible and in which VAT is not deductible often occurs when, for example, a banking institution is buying a building. These companies are considered to be partial taxpayers for VAT purposes, with a limited right of deduction.

The VAT authorities consider the term “mainly used” to apply when the company has a right of deduction of at least 50%. However, VAT levied on the sale transaction can only be deducted by acquirers in proportion to their pro-rata deduction amount.

If the parties want to elect for VAT to be paid on a sale transaction, they must obtain the approval of the VAT authorities before the official registration of the sale. It should be noted that opting for VAT on a sale does not avoid proportional registration duties (*see Question 18*).

The transfer, whether for consideration or not or as a contribution to a company, of assets or part of them including real estate, is considered to be outside the scope of VAT. In this case, the person to whom the assets are transferred is to be treated as the successor to the transferor (*Article 19, VAT Directive, implemented into Article 9(2), VAT Law*).

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#### 18. Is stamp duty/transfer tax (or equivalent) payable on the sale or purchase? Who pays? What are the rates? Are there any exemptions?

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In principle, the sale or purchase of real estate is subject to a total registration duty at an aggregate rate of 7% or 10%, depending on the location of the real estate. This is made up of:

- A compulsory proportional registration duty of 6% (applicable to the transfer of real estate other than in exchange for shares).
- A municipal surcharge of 3% if the real estate is in Luxembourg City.
- A compulsory 1% transcription tax due and collected by the Mortgages Registry (whether or not a mortgage is held on the property).

If an acquisition of real estate is financed with loans guaranteed by a mortgage over the property, the mortgage notarial deed is registered at the Mortgage Registry on payment of:

- A recording duty of 0.05% of the amount of the mortgage.
- Registration duty of 0.24% of the borrowed amount.

Any undervaluation of the sold property may be subject to additional registration duties.

The taxable basis is the price agreed by the parties. However, if the stated price is lower than the fair market value of the real estate, the tax authorities can ask for a third party valuation within a two-year period following the sale. An undervaluation may be subject to additional registration duties and penalties.

The seller and the buyer are jointly liable for payment of registration duty.

A contribution of real estate assets situated in Luxembourg to a Luxembourg company is subject to the following regime (*Law of 19 December 2008*):

- An exchange for shares is subject to a 0.6% registration duty, and a 0.5% transcription tax (a total levy of 1.1%).
- If remunerated by means other than shares, it follows the regime for the sale or purchase of real estate (*see above*).

Transfers of real estate in a corporate restructuring (such as the contribution of all assets and liabilities or one or more branches of activities) are exempt from proportional registration duties. However, such a transfer must be remunerated mainly (that is, for more than 50%) with securities which represent share capital in the acquiring company.

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#### 19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios?

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Share deals are commonly used (rather than asset deals) to mitigate registration duty, subject to general anti-abuse rules (*see Question 18*).

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### HOLDING BUSINESS PREMISES

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#### 20. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.

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The Energy Performance Regulation only deals with apartment buildings. It introduced a mandatory energy certificate for buildings (*passport énergétique*), giving tenants and buyers a clearer idea of the energy costs they will face. However, it does not impose any direct obligation to renovate the building.

Since 1 January 2008, the Energy Performance Regulation applies to new apartment buildings and to renovations of old apartment buildings that require a building permit. From 1 January 2010, it will also apply to existing apartment buildings for sale or rental. Once it has been issued, the energy certificate remains valid for ten years.

A bill aiming to transpose into Luxembourg law the aspects of Directive 2002/91/EC on the energy performance of buildings relating to functional buildings is being discussed in the Luxembourg Parliament. For the time being, a Regulation of 22 November 1995 related to thermal insulation sets the minimum criteria for the energy performance of functional buildings.

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**21. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties, for example through outsourcing transactions? If yes, please give brief details.**

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For offices that are rented, it is common to have a property manager in charge of the daily running of the building.

For buildings that have several owners, the appointment of a representative of the co-owners (*syndic de copropriété*) is required (*Law of 16 May 1975, as amended, governing co-ownership of buildings*).

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**22. Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?**

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There are no restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security.

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**23. Does change of control of a company affect its holdings of real estate?**

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Change of control of capital companies does not impact on their holdings of real estate. The transfer of interests in partnerships or economic interest groupings whose assets consist of real estate situated in Luxembourg (regardless of whether this constitutes a change of control) is considered a transfer of the underlying real estate, triggering applicable registration duties.

If the assets are held through a corporate entity by an international group, some provisions may prohibit the sale of the assets without the consent of the majority shareholder.

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**24. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?**

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State authorities can compulsorily purchase real estate for public interest purposes. The price is determined between the parties based on the market price. If the parties do not agree on a price, it is determined by a court after expert consultation. New wording in Article 545 of the Civil Code allows determination of the price after expropriation for public interests.

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**25. Are municipal taxes paid on the occupation of business premises, for example business rates? Are there any exemptions?**

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Immovable property tax is charged annually by municipalities at varying rates. The rate of this tax cannot exceed 0.9% of a property's unitary value (assessed by the Luxembourg tax authorities and depending on the location and nature of the property).

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## REAL ESTATE FINANCE

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**26. How are acquisitions of large real estate portfolios or companies holding real estate generally financed?**

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Acquisitions of large real estate portfolios are generally funded by bank facilities, shareholder loans, equity or hybrid instruments such as (convertible) preferred equity certificates (PECs or CPECs). The type of funding used depends on factors such as the form of the vehicle, the jurisdiction and nature of the issuer and the location of the real estate.

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**27. How is real estate commonly used to raise finance?**

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Mortgages are subject to restrictive formalities and often lead to higher transaction costs. Credit facilities now regularly provide that if the security interests lead to excessive costs, the security agent can decide to waive their benefit, which is not rare in practice.

As large real estate investments are generally made through special purpose vehicles for tax optimisation, there is a trend where lenders have been requesting collateral over financial instruments and/or shareholders' loans issued by the special purpose vehicles that directly or indirectly own the real estate.

The security packages often combine pledges, set-off mechanisms, subordination and intercreditor arrangements.

Financial collateral arrangements benefit from a special regime, overriding the bankruptcy rules, since the Law of 5 August 2005 regarding financial collateral arrangements.

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**28. What are the most common forms of security granted over real estate to raise finance? How are they created and perfected (that is, made valid and enforceable)?**

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Mortgages are granted by the owner of the real estate by means of a deed given in authenticated form.

Mortgages are exposed to preference period risks and lenders, among others, take account of the following:

- Luxembourg case law consistently considers a contractual mortgage granted during a preference period as null and void if granted for pre-existing debts, even if the credit facility has been granted at the same time as a promise to mortgage (*promesse d'hypothèque*), which is not considered as the mortgage itself.
- Mortgages can also be challenged if their purpose is to secure debts of parent companies or are taken as cross-collateral security interests, except perhaps when a weak corporate interest can be strengthened by an adequate corporate benefit, that is, a corresponding risk-related fee (which in practice, is quite difficult to determine).

Other common security interests granted over real estate to raise finance are indirect. They are actually set-off arrangements and pledges over financial instruments, issued by special purpose vehicles in a structure used for investing in real estate.

Such a security interest is created by a written agreement which need not be notarised, and can be granted to a third party acting for and on behalf of the beneficiaries of the security interest. It can apply to present or future assets, if the assets are clearly determined. However, to be fully enforceable, a pledge over future assets must be perfected, otherwise it only constitutes a promise to pledge.

The perfection by dispossession rules depend on the nature of the assets to be pledged.

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**29. Is real estate securitisation common in your jurisdiction? If yes, please give brief details.**

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The Law of 22 March 2004 on securitisation as amended provides a broad definition of securitisation, and includes a wide range of assets to be securitised, including real estate. In this respect, it is sufficiently flexible for promoters to develop workable and effective structures for securitisations.

The ownership of the real estate or a right related to the real estate can be transferred to the securitisation vehicle. Synthetic securitisation of rent receivables and income from sales is also possible.

## REAL ESTATE LEASES

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**30. Are contractual lease provisions regulated or freely negotiable?**

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Office leases are only regulated by the broad provisions of the Civil Code.

Only some particular aspects of commercial leases are regulated, for instance, the length of the commercial lease term is not governed by any specific provisions (see *Question 32*).

**31. How are rent levels usually reviewed and are there restrictions on this? Is VAT (or equivalent) payable on rent?**

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Commercial lease rents are freely negotiable by the parties. The lease often states that the rent can be adjusted in accordance with the inflationary index.

In principle, leases are within the scope of but exempt from VAT (*Article 45 of VAT Law*). However this exemption does not apply to certain operations, such as letting of:

- Hotels.
- Parking spaces (except when ancillary to an exempt building lease).

- Machines and tools.
- Safes

Although leases are exempt from VAT, if the tenant and the landlord are subject to VAT, they can elect, under certain conditions, to apply VAT to the rent.

Rental agreements are subject to a registration duty payable within three months of the signing of the original lease. Registration duty amounts to 0.6% for leases not subject to VAT. This duty applies to the total amount of the rental fees for the entire lease period. Leases exceeding nine years are also subject to a 1% transcription duty.

Leases subject to VAT are subject to a fixed registration duty of EUR12 (about US\$17).

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**32. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term? If yes, please give details.**

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The term of a commercial lease is freely negotiable between the parties but in practice, commercial leases are usually entered into on a 3-6-9 year basis. This is where, in a lease of nine years, the landlord and the tenant usually have an option to terminate the lease at three-year intervals, subject to giving notice.

Commercial tenants may be entitled to a preferential lease renewal right for a period of up to 15 years, on the condition that they have been conducting their business for at least three years (*Article 1762-4, Civil Code*).

Office leases were usually concluded for a total period of nine years. However, recently the trend has been to renegotiate a lease that will expire in the two coming years, in order to extend the period but reduce the rental instalments. The new types of leases currently being signed are in favour of tenants (free rental period, and fitting out offered) and the 3-6-9 year basis is the new usual practice.

**33. What provisions or restrictions typically apply to the disposal of the lease by the tenant (for example, can the tenant assign or sublet the lease with the landlord's consent)?**

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The tenant can sublet or assign his rights under the lease unless prohibited by the landlord (*Article 1717, Civil Code*).

**34. Can tenants usually share their business premises with companies in the same corporate group? If yes, on what terms?**

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To share the premises with companies of the same group, the tenant must comply with the subletting and assignment provi-

sions in the lease, and with specific rules in the Law of 31 May 1999 on the domiciliation of companies, depending on the direct ownership or not of the companies that share the same premises.

### 35. Who is usually responsible for keeping the leased premises in good repair?

Landlords are responsible for major repairs (structural repairs such as the roof, boiler and so on) and tenants are responsible for minor repairs (small maintenance repairs) (*Civil Code*). In practice, before the financial crisis, investors imposed on their tenants all costs, expenses, repairs and tax related to the real estate, as pro-rated to the actual space rented (triple net lease). The new trend is more or less to conclude double net leases (structural repairs remain with the landlord).

### 36. Who is usually responsible for insuring the leased premises?

Insurance matters are usually governed by the lease. In practice, the landlord insures the structure while the tenant insures the content.

Market practice indicates that landlords often take out insurance for all risks linked to the building, and pass on the cost of this to their tenants through the lease.

### 37. On what grounds can the landlord usually terminate the lease? Please briefly outline any restrictions or procedure that applies. Can the tenant terminate the lease in certain circumstances?

Leases with a set term automatically terminate when that term expires. The landlord and the tenant can also terminate the lease if there is any material breach by the other party (non-payment of rent, deterioration of the premises and so on). In such cases, the court must approve the termination.

### 38. What is the effect of the tenant's insolvency (under general contract terms and insolvency legislation)?

A tenant's bankruptcy does not mean that the lease is automatically terminated. However, in practice, the lease often contains a provision to the effect that the lease is automatically terminated when the tenant is declared bankrupt.

## PLANNING LAW/ZONING

### 39. What authorities regulate planning control and which legislation applies?

The Administration for Regional Development and Town Planning (*Direction de l'Aménagement du Territoire et de l'Urbanisme*), a

## REAL ESTATE ORGANISATIONS

### Administration for Regional Development and Town Planning (*Direction de l'Aménagement du Territoire et de l'Urbanisme*)

**Main activities.** The Administration, which is a division of the Ministry of the Interior, regulates zoning and matters related to the use and occupation of land and buildings. The website provides legislation and useful information related to planning and urban development.

**W** [www.miat.public.lu](http://www.miat.public.lu)

### Chamber of Notaries (*Chambre des Notaires*)

**Main activities.** The website provides general information on, and lists, public notaries in Luxembourg.

**W** [www.notariat.lu](http://www.notariat.lu)

### Administration de l'Enregistrement et des Domaines

**Main activities.** The website gives access to information relating to VAT linked to real estate operations and mortgages. The competent Mortgage Registry for a building can be found on the website.

**W** [www.aed.public.lu](http://www.aed.public.lu)

division of the Ministry of the Interior, regulates zoning and matters related to the use and occupation of land and buildings (*Law of 19 July 2004, as amended, on communal planning and urban development*).

### 40. What planning consents (for example, planning permission or building permits) are required and for which types of development?

A zoning permit or special urban plan (PAP) must be obtained for the construction of new structures.

A building permit (*autorisation de bâtir*) is also required for new buildings or extensions of existing structures, or for any activity that would result in external change to a building.

To ensure compliance with environmental regulations, projects of a certain size require an operating permit (*commodo-incommodo*). This permit, which is granted by the Ministry of Environment and the Ministry of Labour, is required for any workshop or industrial or commercial premises (including office buildings of more than 1,200 square metres) which could present a risk or inconvenience to others.

An authorisation linked to the public road network (*permission de voirie*) may also be required.

**41. In relation to planning consents:**

- Which body grants initial planning consents?
- Do third parties have the right to object? If yes, please give brief details.
- In what circumstances is there a public inquiry?
- How long does an initial decision take after receipt of the application?
- Is there a right of appeal against a planning decision? If yes, please give brief details.

**Initial consent and application**

Applications for PAPs are made to the local municipality, which makes a decision once it has received the opinion of the Ministry of the Interior and the Ministry of Development and Planning.

Once this is obtained, an application for a building permit must be submitted to the municipality, which is responsible for granting the permit.

**Third party rights**

Third parties can object to planning authorisations within a certain timeframe of their publication (the timeframe differs depending on the type of authorisation granted) (see *Question 40*). A building permit is posted at the construction site and a PAP is posted at the offices of the local municipality.

**Public inquiries**

Before an operating permit is granted, a public inquiry may be carried out, especially when the authorisation may have an impact on the environment or if dangerous activities are planned.

**Initial decision**

The timeframe varies depending on the municipality granting the authorisation. However on average, a building permit deci-

sion takes two months. The average timeframe for a final decision on a PAP is two years.

**Appeals**

Initial decisions on authorisations can be challenged before the Administrative Court within three months of their publication.

In relation to building permits only, an out of court appeal (*recours gracieux*), made directly to the body that took the decision, can be brought within three months of publication of the decision. If this results in a refusal of the permit, an appeal before the Administrative Court can still be brought, within three months of the out of court appeal decision.

**REFORM****42. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.**

A bill referenced 5704 reforming construction law liability and related Civil Code provisions was introduced to parliament on 13 March 2007 and is currently under discussion. The bill aims to clarify the extent of liability of different entities involved in the real estate market.

There is also a bill before parliament concerning energy performance of functional buildings, aiming to reform the Energy Performance Regulation (see *Question 20*).

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