Volume ownership: a major change

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Title 3 of the new Civil Code introduces the possibility of a horizontal division creating a perpetual volume ownership. This is a major change in Belgian law, although the concept already exists in other countries. However, this possibility is subject to strict conditions and its practical application remains a source of questions.

Current legal framework

The horizontal division of a building is already possible today, although the current legal framework is not optimal. Indeed, the use of co-ownership in such a scenario is sometimes "arti cial", as the parliamentary work points out. The creation of a right to build is possible but only allows for a temporary split of ownership. Moreover, the use of easements (plumb line, anchorage) does not offer a solution to all factual situations. And nally, as for the recent case law of the Supreme Court, which seems to consider that a waiver of accession should not be assimilated to the granting of a right to build: we believe that the decision is dif cult to transpose to all cases, given the particular situation referred to in the case.

Conclusion: the current legal framework does not offer suf cient possibilities and security to create a perpetual volume ownership.

Reform

The horizontal division of a building, creating a perpetual volume ownership, will henceforth be possible using an exceptional perpetual right to build. However, a red line is drawn: this type of horizontal division may not infringe the mandatory provisions on co-ownership.

<u>What is the proposed solution?</u>

The owner of the land will create a right to build for the bene t of a third party, allowing the latter

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to acquire ownership of a volume on, above or below the land. This is the classic de nition of the right to build, which allows its holder to obtain ownership of such a volume, built or not. This right to build can be perpetual, and thus give its holder perpetual ownership of this volume, in order to allow the division into volumes of a complex and heterogeneous real estate complex comprising several volumes likely to be used autonomously and in various ways, which do not have any common part between them.

Under what conditions?

The conditions are strict and the right to build in question only remains perpetual as long as these conditions are met.

- The perpetual right to build can only be granted by the owner of the land. This is the application of the principle “nemo plus iuris...”: only the holder of a perpetual right can grant a perpetual right of use. The consequence of this is that the holder of a long-term lease on a building cannot grant a perpetual right to build on the volume above this building (for example, in order to build a new volume), but that this right to build can only be temporary (whereby the building lease right may have as its maximum duration, the duration of the leasehold right). On the other hand, we do not see what would prevent the owner of the land, after having granted this perpetual right to build (for example for the volume under the land), from subsequently granting a long-term lease on the land.

- This horizontal division can only be conceived if, on the same property, at least two independent volumes coexist comprising structures intended
for different uses and capable of independent management. It is necessary that the separate volumes correspond to different uses, for example
the division of a tower into two retail floors and five residential floors. We do not believe that the destination given from the point of view of town planning is relevant here: indeed, town planning law is a regional matter and to proceed in this way would necessarily introduce differences between the three Regions. About these structures, it seems to us that the parliamentary works contradict the legal provisions when they mention that the volume must “include” structures. We believe that this should be understood as meaning that the planned constructions should be realised within the volumes, i.e. “be built”. Indeed, the essence of the right to build is to obtain ownership of a built or unbuilt volume. Limiting the perpetual building right to already built volumes has no basis in the law and would run counter to the legislator’s intention, namely the optimal use of space, including in the context of property developments.

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- These volumes, and the (future) works they contain, may not have any common parts between them. This is the red line drawn by the new regime: the parties cannot undermine the imperative nature of the rules relating to co-ownership. However, this does not prevent “collective equipment” being used by the different volumes, such as a lift linking a car park in the basement (separate volume) of a shopping center above ground (separate volume). We come back to this hereunder.

The permanence of the conditions. These conditions must be ful lled at the time the perpetual right to build is created, but the right to build remains perpetual only as long as these conditions are ful lled. This is likely to be the case about the condition relating to different uses. For example, a tower divided into two distinct volumes, retail and residential. Let us imagine the disappearance of the “retail” use, the tower becoming after several years a tower solely dedicated to residential use. The owner, via the right to build, of the “residential” volume will see its ownership become temporary, until the end of the building right. This raises the question of the duration of the right to build. The parliamentary works tell us that the right to build will have a term of 99 years from the time the different uses disappear. However, there is no legal provision for this; on the contrary, the perpetual right to build is an exception to the maximum term of 99 years. Is it to be concluded that the existing right to build ends on the moment the different uses disappear and that, immediately afterwards, a new right to build arises? The tax consequences for the owner of the “residential” volume would be signi cant. Indeed, in case the perpetual right to build would expire and a new right to build would be created, the ownership of the residential structure would be transferred to the land owner (the right of accession revives at the end of the building right) and, immediately afterwards, a new building right on the built volume comprising the residential structure would be granted. Since the building right on a built volume implies the transfer of ownership of the constructions within the volume, such transfer will trigger transfer taxes. A legislative amendment on this point would be welcome.

The collective equipment. Unless this reform was to be rendered completely useless, it was inconceivable to provide for the introduction of volume ownership without introducing a speci c regime concerning utilities. In fact, merely stating that volumes cannot have any common parts between them would render the regime useless (just think of the walls, the various pipes and ducts, etc.). The existence of such collective equipment is indeed authorised, but the legislator has also provided for a new legal easement in the following terms: “the holder of a real right of use of an immovable property bene ts from all the easements necessary for the exercise of his right on the land encumbered by the said real right”.

However, one may wonder about such a provision: is it suf cient or far too broad? It seems to us that it is indeed relevant to have recourse to an easement with regard to these collective equipment, but it is also relevant not to limit oneself to this legal easement, but rather to describe and regulate the rights and obligations of the parties (for example with regard to maintenance and repairs) concerning these collective equipment.

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Volume ownership and co-ownership

A red line is drawn between volume ownership and co-ownership, as the mandatory legal provisions concerning the latter cannot be circumvented by means of the new volume ownership. However, the two gures can be combined: the residential part of the tower can be owned as a condominium, with each at being sold piecemeal to individuals. But what will be the object of the sale? The private at and a share in the common parts is the most obvious answer, but one may wonder what this “share in the common parts” will include.

First, there is the collective equipment. Let us assume that its ownership is attached to the “retail” volume and that the “residential” volume bene ts from an easement for its use. These utilities will therefore not be considered as a common part.

Then there is the perpetual right to build. In principle, this perpetual right to build is supposed to replace the land, and the purchaser of a at is allocated a share in this right to build. This raises the question of the tax treatment of this sale. If VAT does not apply, transfer taxes will be due at the rate of 2% on the price allocated to this share of the right to build. One may wonder about the justi cation for this difference in treatment: the purchaser of a at in a tower dedicated solely to residential use will bear transfer taxes at the rate of 10 or 12.50%, whereas the purchaser of a similar at in a tower of which only a part is dedicated to residential use will bear transfer taxes on part of the price at the rate of 2%, unless it is said that the entire value is allocated to the full ownership of the at. And what in case of a new building that should be sold under the VAT regime? A strict reading of the legal provisions should lead to the conclusion that there is no question of “land” adjoining a new building.

Nor should it be a question of the transfer of a real right to a new building since the subject of the right to build is a volume. Should it therefore also be concluded that the part of the price allocated to the share in the right to build is subject to transfer tax at 2% instead of VAT at 21%? What could be the justi cation for this difference in treatment, again unless it is assumed that the entire price is to be allocated to the full ownership of the at.

The introduction of volume ownership, or perpetual horizontal division, is a major reform. However, practice, case law and doctrine will probably still have to re ne the contours of this reform, as one of the obstacles, and not the least, remains the estate documentation and the land register, and the question of how these perpetual rights to build will be identi ed and transcribed.

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