

Changes to obligatory ten-year liability insurance of contractors, architects and other service providers in the construction sector

The first repairs and "clarifications" are already coming in, just a few weeks after the entry into effect on 1 July 2018 of the new law on the obligatory ten-year liability insurance for contractors, architects and other service providers in the construction sector.

We already reported earlier about the scope of application and the content of the new Act of 31 May 2017.. The general "Act containing miscellaneous provisions concerning the Economy" of 30 July 2018⁽¹⁾ supplements and adapts the law (see below title 1). In the run-up thereto, the Minister cleared up several points concerning the scope of application (see below title 2). Other changes announced by the government have not yet been unveiled (see below title 3).

1. Changes by the Act containing miscellaneous provisions concerning the Economy ("Repairs Bill")

a. Certification and register

Even before it has gone fully into effect, the certification duty is being supplemented and made more flexible. The notary public and the banks no longer have to examine certificates (deletion in art. 12, § 1). The contractor no longer has to turn over certificates to the NSSO, and the principal no longer has to submit them to the lender.

The legislature has specified what must appear in the certificate (new art. 19/2). This information includes the policy number, the amount of the guarantee, the names of the insureds, the address of the real property and the nature of the works performed. There must also be a statement of the fact that the coverage for a period of 10 years applies as of the day of acceptance of the works, of the transferability, of the exclusions and of the fact that the exclusions provided by the Insurance Act also apply.

The full list for the content of the certificates is as follows:

- the type of insurance coverage;
- the number of the insurance policy;
- the amount of the guarantee per loss event for the total of the material and immaterial

damage;

- the name, the logo and the registration number of the insurance company with the National Bank;
- the address of the insurance company's registered office;
- the contact person at the insurance company;
- the signature of the person representing the insurance company;
- the last names and first names of the insured, if this is a natural person;
- the company name, if this is a legal entity;
- the office address of the insured or its registered office, if this is a legal entity;
- the VAT number of the insured or its enterprise number, if this is a legal entity;
- the insured activity;
- the address of the real property involved;
- the nature of the works performed;
- the cadastral data;
- the references to the urban development permit;
- the issue date of the urban development permit;
- the mention that the coverage applies for a period of 10 years as of the day of acceptance of the works;
- the transferability of the certificate;
- the exclusions and the mention that the exclusions provided for by the Insurance Act of 4 April 2014 apply;
- the conformity of the certificate with the law;
- the date.

There is also a new obligation with regard to the certificates, namely that they must be recorded in a register. Upon concluding an insurance contract, the insurers must immediately forward the certificate to the register (new art. 19/2). Access is granted to the architects, the notaries public, the officials who are responsible for detecting, establishing and suppressing violations, and the Belgian public authorities. Thus there is no authorisation for the principals themselves, the direct buyers, the contractors or other service providers, nor for other third-party stakeholders.

The notary public can only "receive" the notarial deed after consultation of the register, with mention of the result of the search in the deed (addition in art. 12, § 2). There is a more extensive regulation for a sale ordered by judicial decision.

With regard to the GDPR: Assuralia, as the Professional Association of Insurance Companies, is the "controller of the register". The rules for the forwarding, registration, storage and access to the data in the register still have to be defined in greater detail by the King.

b. Pricing Agency

Another change concerns the Pricing Agency that was set up by the Act of 31 May 2017 and of

which the provisions involved entered into effect early, on 1 December 2017. The agency has as its task the determination of the premium and of the conditions under which an insurance company covers a person who is bound to assume the insurance duty under this law, but who does not find coverage on the regular market (art. 10, § 1). When establishing the premium, the agency takes account of the risk demonstrated by the policyholder (art. 10, § 2).

The Repairs Bill adds to this that the agency can also impose conditions in order to limit the risk that the policyholder demonstrates. In the event that the agency declines to establish a premium, it must justify its decision. The law gives to the King the possibility of establishing conditions for the functioning of the Agency, including the method of risk management and the obligations of the insurance companies.

The Repairs Bill also provides that the Pricing Agency exercises its activities for the (already operational) Belgian Common Guarantee Fund (new art. 10, § 5). It entrusts the management of the risks priced by it to one or more insurance companies which are members of the Compensation Fund (see below) (new art. 10, § 7).

c. Compensation Fund

One of the innovations of the Repairs Bill is that it provides for a Compensation Fund, whose mission is to share the results of the management of the risks that are priced under the conditions of the Pricing Agency, and to furnish the agency's operating costs (new art. 10/1, § 1).

In addition, the insurance companies that offer to insure the ten-year civil liability are jointly and severally bound to make payments to the Compensation Fund that are necessary for the fulfilment of its mission and to bear its operating costs, with regard to the risks priced on the basis of article 10 (new art. 10/1, § 3).

2. Clarifications concerning the scope of application

The part of the Repairs Bill was only subsequently added to the Act of 30 July 2018 containing miscellaneous provisions concerning the Economy, namely via amendments by members of Parliament.

One great advantage of this is that the submitter posed several questions to Minister Kris Peeters (Deputy Prime Minister and Minister of Employment, Economy and Consumers) concerning the scope of application, namely whether now only "rough structure contractors" must insure themselves, or also other contractors who can have an (e.g. accidental) impact on the rough structure.

Minister Kris Peeters communicates that only the contractors, architects and other service providers in the construction sector "who work or perform works that create the closed rough structure" are subject to the insurance duty. This appears, according to the Minister, "indirectly from article 5, which refers to article 3". The Minister confirms that the insurance duty both on the

equipment and personnel area of application is limited to the “closed rough structure”.

Minister Kris Peeters literally defines the "closed rough structure" as follows: "the elements that contribute to the stability or strength of the structure as well as the elements that assure the “wind and watertightness” of the structure". The Minister explains that the closed rough structure thus consists of the supporting elements that constitute the stability or the strength of the residence (foundations and supporting structure = rough structure), and the elements that make the residence wind and watertight (outside joinery and roof = closing off the rough structure).

The Minister adds that this definition means "that techniques and finishing do not fall under the intended understanding of closed rough structure. Contractors who perform these works, such as the parquet installer, the painter, the plumber, the electrician and so on, play no part in the creation of the closed rough structure and consequently are not subject to the insurance duty." Of course, they do remain liable for any faults in the works they perform.

3. Other legislative initiatives for repair and supplementation

Other new legislative initiatives are being taken to amend the Act of 31 May 2017 and to impose an obligation to insure professional liability on architects, chartered surveyors, safety and health coordinators and other service providers in the construction sector. This is a matter of some urgency, because as a result of the repeal provisions of the Act of 31 May 2017, the statutory obligation for architects to insure their professional liability for defects that do not threaten stability has been eliminated, so that the only thing left to fall back on is their deontological obligation.

A draft bill on this was approved by the Council of Ministers on 27 April 2018. This draft bill was submitted for advice to the Legislation Department of the Council of State and so has not yet become law.

The above-mentioned repairs by the Act of 30 July 2018 containing miscellaneous provisions concerning the Economy are only a few repairs whose introduction was accelerated.

Not (yet) introduced are a deferment of the insurance duty through 30 June 2019 for residential construction projects under the application of the Housing Construction Act if the urban development permit application falls later than 1 July 2018, and the obligatory mentions relating to the insurance in all contractual documents of the contractor, architect and the design offices.

The new law for the obligatory professional liability insurance for the architect, chartered surveyor, safety and health coordinator or other service provider in the construction sector (other than the ten-year liability for stability-threatening defects) has not yet been voted on. We will of course keep you informed of further developments.

For more information on this topic, you can consult Siegfried Busscher (the author and head of our Private Construction Law practice group) and Bob Goedemé (head of our Insurance Law practice

group).

⁽¹⁾ Act of 30 July 2018 containing miscellaneous provisions concerning the Economy, Belgian Official Journal 5 September 2018.

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