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Residential rental price indexation clauses for liberalised units are upheld

On Friday, 29 November 2024, the Supreme Court clarified this issue by answering preliminary questions. The Supreme Court ruled that the indexation clause and the surcharge clause must be assessed separately. The indexation clause based on CPI is ruled permissible.

Since 2023, there has been discussion on the (validity of) residential rental price indexation clauses in (ROZ) leases for liberalised housing. This residential rental price indexation clause consists of an inflation adjustment based on CPI and an additional surcharge that in practice usually amounts to “a maximum of 5%.” Several courts have ruled that this clause would be unfair within the meaning of European Directive 93/13/EEC on unfair terms in consumer contracts. As a result, the indexation clause would be voidable. This would have a major impact for residential landlords, as future indexation would no longer be possible and past rent increases would considered not to have occurred.

On Friday, 29 November 2024, the Supreme Court clarified this issue by answering preliminary questions. The Supreme Court ruled that the indexation clause and the surcharge clause must be assessed separately. The indexation clause based on CPI is ruled permissible. In addition to indexation, the landlord has a legitimate interest in a surcharge clause, to compensate for cost increases over inflation and to keep the rent in line with the general house price value increase.

A surcharge clause of 3% is in principle not unfair, according to the Supreme Court. This is because the financial consequences of the clause are foreseeable for the tenant: frequency, method of calculation and maximum of the rent increase are fixed upfront. Moreover, the tenant usually has the option to terminate the lease if the rent is increased.
The national legislature also considers a rent increase clause permissible and can regulate its effects through, for example, the temporary cap on rent increases (as currently in effect until 2029). This reasoning of the Supreme Court is fully in line with Loyens & Loeff’s white paper.

The Supreme Court does not explicitly address the most common rent increase clause of CPI + a maximum of 5%. On 2 December 2025, the first ruling was published by a Court of Appeal in which the 5% surcharge was addressed. In this case the Amsterdam Court of Appeal considered the (maximum) 5% surcharge unfair because the potential consequences in the medium and long term were not sufficiently transparent to the tenant, the surcharge clause meets the criteria of the amendment clauses included in the indicative list for unfair clauses and it materially distorts the balance of rights and obligations to the substantial disadvantage of the tenant. Since the surcharge clause was considered unfair, that clause had to be disapplied and a surcharge was not allowed, both for the past and going forward.

Although this is only the first published ruling from a Court of Appeal regarding a 5% surcharge clause since the Supreme Court ruling in November 2024 and the outcome may vary in different cases (because of specific circumstances at the time the contract was entered into), it provides some further perspective on when a surcharge is considered unfair.

Do you have questions or want to consult in relation to the topics mentioned above? Please contact one of our colleagues.

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