

## Rent adjustment in the private housing sector – European preliminary ruling proceedings anticipated

13 April 2026

The Amsterdam District Court reportedly intends to refer questions to the European Court of Justice (the "CJEU") for a preliminary ruling on the application of the Unfair Contract Terms Directive (the "Directive") in relation to standard rent adjustment clauses in tenancy agreements in the liberalised sector.<sup>1</sup> Generally speaking, these clauses allow landlords to annually increase the rent based on the CPI (the indexation clause), plus a surcharge of a maximum percentage (the surcharge clause).<sup>2</sup> The maximum percentage is usually 3% or 5%.

Preliminary ruling proceedings have already been conducted on the subject before the Supreme Court.<sup>3</sup> At present, it is unclear what questions the Amsterdam District Court now wishes to refer to the CJEU. Still, the referral itself is reason enough for us to write this publication, addressing the purpose of European preliminary ruling proceedings and what national courts and litigants may generally expect of such proceedings.

### The purpose of European preliminary ruling proceedings

If they consider it necessary, Member State courts can refer questions to the CJEU for a preliminary ruling on the interpretation of Union law. Courts whose decisions cannot be appealed are even obliged to do so when there is doubt about the interpretation of Union law (Article 267 Treaty on the Functioning of the European Union). However, no obligation to refer questions exists if particular questions have already been clearly answered by the CJEU in the past or if Union law is sufficiently clear as to preclude all reasonable doubt about its interpretation. Preliminary ruling proceedings aim to prevent Union law from being applied differently across Member States. In view of this goal of ensuring uniform application, preliminary ruling proceedings are sometimes described as the cornerstone of Union law.

A clear allocation of tasks exists between national courts and the CJEU. The CJEU's task is limited to interpreting applicable Union law for the purpose of providing national courts with useful answers. It is up to the national courts to apply Union law, as interpreted by the CJEU, to the matter in dispute in national proceedings. This allocation of tasks inherently entails that the CJEU is not responsible for establishing or appraising the facts or applying Union law to any specific case. Those duties are the preserve of the national courts.

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1 Directive 93/13/EEC.

2 Of course, since the 2021 introduction of the Nijboer Act (*Wet maximalisering huurprijsverhogingen geliberaliseerde huurovereenkomsten*), the application of the rent adjustment clause has been capped at the CPI-based indexation or, if lower, the collective labour agreement plus a maximum of 1%.

3 [Supreme Court answers preliminary questions about rent increase clauses | Houthoff](#)

In the *Bucura* judgment (case C-348/14, grounds 46 and 47), the CJEU clarified this allocation of tasks in relation to the Directive. The CJEU held that its jurisdiction extends to interpreting the concept 'unfair term' and the criteria that national courts can or must apply when assessing a clause against the Directive. It is up to the national courts to rule on the specific qualification of a particular clause, depending on the circumstances of the case. Accordingly, the CJEU's role is limited to providing directions to be taken into account when assessing the unfairness of the clause in question. This means that the CJEU cannot express an opinion on whether the clause is unfair. That is up to the national courts.

## What are European preliminary ruling proceedings likely to achieve?

Rent adjustment clauses in tenancy agreements for liberalised housing are a very specific and largely factual matter that, moreover, should be assessed in the context of Dutch rent laws and other Dutch legislation. In view of this, we seriously wonder whether referring questions to the CJEU on the admissibility of particular rent adjustment clauses can bring any useful answers. As described above, the CJEU only gives guidance on interpreting the Directive and assessing clauses against the Directive. The CJEU has already done so in numerous judgments. The criteria are therefore already known. The CJEU will not examine whether or not a particular clause is unfair. In short, the CJEU will not express an opinion on whether a surcharge of, for example, a maximum of 5% is unfair or not. The courts will have to decide this for themselves. Consequently, nothing can be gained from any questions about the fairness or unfairness of a particular surcharge clause.

Another possibility is that, rather than dealing with the level of a particular surcharge percentage, questions will focus on the possibility of splitting rent adjustment clauses into an indexation clause and a surcharge clause. However, this question has already been answered by the Supreme Court in its preliminary ruling of 29 November 2024, in which it held that the standard rent adjustment clause can be split, and found it unnecessary to refer questions on this point to the CJEU. Union law was already clear enough.<sup>4</sup> In addition, the opinion that the standard rent adjustment clause can be split also seems to be accepted by, for example, courts of appeal.<sup>5</sup> From this perspective too, therefore, there seems little use in referring questions to the CJEU.

All in all, it is therefore very possible that European preliminary ruling proceedings will not provide the answers that the Amsterdam District Court might be looking for. It is therefore conceivable that, after conclusion of the European preliminary ruling proceedings, the District Court and litigants will find themselves simply 'back at square one'.

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<sup>4</sup> In view of the judgments CJEU 7 August 2018, C-96/16 and C-94/17, ECLI:EU:C:2018:643 (*Banco Santander and Escobedo Cortés*) and CJEU 23 November 2023, C-321/22, ECLI:EU:C:2023:911 (*Provident Polska*). Reference is also made, for example, to the Guidance on the Directive (*Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts*, OJ 2019/C 323/04), which states (p. 40): "it is, not excluded that a single paragraph/number in a contract contains more than one contract term within the meaning of Article 3(1) UCTD."

<sup>5</sup> As they generally explicitly adopt the Supreme Court's findings on this point. Cf., for example, Arnhem-Leeuwarden Court of Appeal 4 November 2025, ECLI:NL:GHARL:2025:6866, Amsterdam Court of Appeal 2 December 2025, ECLI:NL:GHAMS:2025:3213 (in Dutch), 9 December 2025, ECLI:NL:GHAMS:2025:3360 (in Dutch), 10 March 2026, ECLI:NL:GHAMS:2026:613 (in Dutch) and Amsterdam Court of Appeal 17 March 2026, ECLI:NL:GHAMS:2026:752 (in Dutch), ECLI:NL:GHAMS:2026:753 (in Dutch), ECLI:NL:GHAMS:2026:771 (in Dutch), The Hague Court of Appeal 16 December 2025, ECLI:NL:GHDHA:2025:2680, and The Hague Court of Appeal 24 February 2026, ECLI:NL:GHDHA:2026:300.

## Another route to the Supreme Court?

In our view, the Supreme Court's preliminary ruling of 29 November 2024 already provides plenty of guidance on the assessment of standard rent adjustment clauses in tenancy agreements for the private sector. The ruling essentially stated that standard rent adjustment clauses can be split into an indexation clause and a surcharge clause. Regarding the indexation clause, the Supreme Court found the clause not unfair within the meaning of the Directive.<sup>6</sup> Regarding the surcharge clause, the Supreme Court held the same. Those proceedings were about a surcharge clause of up to 3%. The Supreme Court held that this clause could not be considered unfair since, briefly put, a tenancy agreement for residential space is a continuing performance contract that is usually concluded for a longer period and can only be terminated by the landlord on very limited grounds. In addition, the Supreme Court ruled that landlords have a legitimate interest in being able to annually adjust the rent, not just due to monetary depreciation (indexation) but also to compensate for cost increases that exceed inflation levels and to align the rent with a house's value development. The Supreme Court also ruled that the financial consequences of a surcharge clause with a maximum percentage of 3% are foreseeable to the tenant, as the frequency of the rent adjustment, the calculation of the rent increase and the maximum rent increase are fixed.

This Supreme Court ruling therefore already provides clear guidance. Nevertheless, one key question remains: how to deal with surcharge clauses exceeding the 3% maximum (after all, surcharge clauses with a 5% maximum are also very common). Lower courts seem to assume for now that surcharge clauses exceeding the 3% maximum are unfair within the meaning of the Directive.<sup>7</sup> In our view, this is debatable. Moreover, the Supreme Court has not yet expressed an opinion on the matter. If lower courts are contemplating initiating preliminary ruling proceedings (or litigants are pushing for this), we can imagine that preliminary ruling proceedings before the Supreme Court on the admissibility of surcharge clauses exceeding the 3% maximum would be a more appropriate route and would therefore bring more clarity (and more quickly). This clarity would also be most welcome for tenants and landlords in the already troubled rented housing market.<sup>8</sup>

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<sup>6</sup> Indexation clauses are also expressly permitted under the Directive. Incidentally, it is also widely accepted that indexation clauses do not conflict with the Directive as such, as was the case even before the Supreme Court's ruling (cf., for example, Overijssel District Court (Subdistrict Court) 28 November 2023, ECLI:NL:RBOVE:2023:4923, ground 5.9; Noord-Holland District Court (Subdistrict Court) 10 January 2024, ECLI:NL:RBNHO:2024:213, ground 2.1; Amsterdam District Court (Subdistrict Court) 1 February 2024, ECLI:NL:RBAMS:2024:590, ground 25; Noord-Holland District Court (Subdistrict Court) 7 March 2023, ECLI:NL:RBNHO:2024:2010, ground 3.6). However, before the Supreme Court's ruling, the matter of the indexation clause was subsumed in the courts' opinion that the surcharge clause was unfair within the meaning of the Directive. As the courts ruled that there was one single rent adjustment clause, this opinion also marked the fate of the indexation clause. CBRE calculated at the time that the opinion would have disastrous consequences for the tenancy market (*Impactanalyse huurverhoging – prejudiciële vragen Hoge Raad*, in Dutch). The Supreme Court has now clarified that standard rent adjustment clauses consist of two clauses – an indexation clause and a surcharge clause – which should be assessed separately.

<sup>7</sup> See also the judgments cited in footnote 5 above. Cf. also Amsterdam District Court 24 April 2025, ECLI:NL:RBAMS:2025:2663, Amsterdam District Court 19 June 2025, ECLI:NL:RBAMS:2025:4375, Amsterdam District Court 26 August 2025, ECLI:NL:RBAMS:2025:6446 and Breda District Court 24 September 2025, ECLI:NL:RBZWB:2025:6409.

<sup>8</sup> News reports on the shrinking rented housing market are piling up (for example: *Zorgen over harde daling verhuurtransacties en verdere instorting van huuraanbod | NVM* (in Dutch), *Pararius: betaalbare huurwoningen verdwijnen van de markt | PropertyNL* (in Dutch) and *Uitpondgolf bereikt opnieuw piek: vooral sociale en middenhuur verdwijnen | PropertyNL* (in Dutch)). The shrinking rented housing market seems to be further driven by a combination of unfavourable laws and regulations and an uncertain investment climate, including the introduction of tax regulations and the Affordable Rent Act (*Wet betaalbare huur*), while case law such as that discussed here – which the Amsterdam District Court found that landlords could not have been expected to anticipate – does not help either (cf. Amsterdam District Court 5 October 2023, ECLI:NL:RBAMS:2023:6177, explanation of question 5).

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