

Subleasing : article 1762-6 § 4 of the Civil Code (“the Article”) violates freedom of trade and industry’s constitutional principle

Magistrates of the Esch-sur-Alzette court lodged two questions to the Constitutional Court (the “Court”) of Luxembourg for a preliminary ruling.

i. Compliance with art 11 (6) of the Constitution ?

The first question was whether the Article is compliant with article 11 (6) of the Constitution providing freedom of trade and industry.

Pursuant to a lease agreement , a company A has rented commercial premises for a monthly rent of EUR 5,000.

Company A has then sub rented this commercial premises to a company B, for a monthly rent of EUR 14,500.



The Article, as amended by the law of February 3rd, 2018 on commercial leases, which entered into force on 1 March 2018 (the “Law”), provides that: *"Except in the case of a sublease where investments specific to the sublessee's activity have been made by the lessee, the rents paid by the sublessee to the lessee may not be higher than the rents paid by the lessee to the lessor."*

As the rent paid by company B was much higher than the rent paid by the company A to his own lessor, company B lodged a claim against company A, with the aim of recovering the amounts overpaid by company B to company A, pursuant to the sublease agreement, as from March 2019.

The Article limits the possibility for the parties to a sublease agreement to freely set the sub rent to an amount, higher than the amount set in the main lease agreement, so that the Article has to be considered as a limitation to the freedom of trade and industry.

However, article 11 § 6 point 1 of the Constitution allows limitations to the freedom of trade and industry, that has to be rationally justified, appropriate and in proportion with its purpose.

The Court stated that *"By limiting the receipts that the secondary lessor, who is the main lessee in the main lease, can bank from the sublease to no more than the expense that he has to bear as a lessee under the main lease, Article 1762-6(4) of the Civil Code does not allow him either to cover his operating costs, including in particular overheads and administrative costs, or to make a reasonable profit on the economic transaction in question."*

This limitation is disproportionate, so that the Article is not in compliance with article 11 § 6 point 1 of the Constitution.

The Court further noted subject to an amendment of the Law, the balance between the legitimate aim sought by the legal provision under review and the freedom of trade and industry is achieved, if the rent of the sublease contract does not exceed the rent paid by the lessee to the principal lessor, increased by his operating costs relating to the sublease and by a reasonable profit.

ii. Compliance with the general principle of law in connection with legal certainty?

The Court responded positively to the second question.

Decision n°176 - December 23, 2022