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# Anti-Crisis Shield: Commercial and Office Premises

On 31 March 2020, the Polish parliament passed the Covid-19 Act (the “Act”). In its final form, the new law differs somewhat from the draft of the so-called Anti-Crisis Shield dated 21 March 2020 that we have previously reviewed, most notably in the way it regulates the issue of commercial lease agreements.

The Act introduces solutions that interfere with economic freedom to the extent that some might perceive to be unconstitutional. Arguably, only Article 288 of the Constitution could provide grounds for a legal intervention on this scale, and only through the introduction of a state of emergency. What is more, the new regulations were created hastily and there remain numerous ambiguities, the most important of which are indicated below.

## DIFFERENCES BETWEEN DRAFT LAW AND FINAL ACT

### Shopping Centres

#### Suspension of Contractual Obligations in relation to Large Shopping Centres

The legislator ultimately abandoned the idea of a 90% discount on rent for tenants leasing premises in shopping centres with sales areas exceeding 2,000 m<sup>2</sup> who had to suspend operations due to bans or restrictions introduced by the government in response to the Covid-19 outbreak.

Instead, on the basis of the Act, such agreements are currently subject to the following regulations:

- 1) **Until the ban on operations is lifted, parties to lease or similar agreements under which one party makes commercial space available for another party to use are released from their mutual contractual obligations** – it is worth noting that, even though contracting parties are temporarily discharged from their obligations, the contractual relationship itself endures. If entire agreements were to expire based on this regulation, it would put the effectiveness of any measures used to secure such agreements in question. Consequently, one might assume that what is meant here is a temporary suspension of mutual obligations that is contingent on the tenant’s offer to extend the lease beyond the point when the ban on operations is lifted (please see points 2 and 3 below). Furthermore, the Act refers only to a period for which

such obligations are to be suspended, not to the entities subject to the regulation. What the Act fails to specify is whether the above applies solely to tenants who are directly prohibited from conducting business for the duration of the current epidemic or to all tenants whose operations are affected (even indirectly) by the ban, for example, as a result of restrictions on movement in shopping centres (as suggested by the justification given for a self-correction included in the Act). Another source of doubt is the fact that the regulation concerns commercial space made available for use, without specifying the type of business conducted in such space, thus potentially giving rise to disputes with tenants as to whether a particular leasable area inside a commercial facility should be treated as commercial space within the meaning of the Act.

- 2) **Within three months of the ban being lifted, tenants should make their landlords irrevocable, binding offers to extend lease agreements on current conditions for another six months counting from the end of the ban** – only tenants are granted the right to make an offer that has the consequences envisaged by the Act. Such an offer concerns extending an existing lease agreement, and not making a new one. The Act does not address issues such as possible rejection or negotiation of the offer by the landlord.
- 3) **If the tenant does not offer to extend the lease agreement in a timely manner, the landlord will no longer be bound by the obligation described in point 1 above** – there is no logical explanation for the way this provision is structured. Its current wording might suggest that if the tenant does not make an offer, the landlord is nevertheless obliged to provide premises and may even charge rent, while the tenant's obligation to pay such rent is suspended indefinitely. Our assumption is that this provision was meant to restore the parties' mutual obligations, in which case the tenant's failure to make an offer would result in all obligations from the period covered by the ban being restored. It is also worth emphasising that the Act does not specify the manner of settlement of such obligations between the parties.
- 4) **The above regulations do not affect the provisions of the Civil Code governing contractual obligations in situations where economic freedom is restricted** – assuming that the legislator meant the possibility of invoking the *rebus sic stantibus* principle (allowing courts to modify contractual obligations in response to an extraordinary change of circumstances), it should be noted that a temporary suspension of obligations would, as a rule, effectively prevent contracting parties from invoking the said principle, which supports the interpretation of these regulations as a temporary suspension of mutual obligations between contracting parties.

According to the justification provided for the Act, the new law aims to release tenants and landlords from mutual obligations that would only serve to generate costs for both parties. Consequently, tenants will not be charged rent and other fees, including their

share of common costs. On the other hand, the Act does not envisage any form of compensation for landlords who are about to lose their income while being forced to bear the costs of maintaining commercial facilities, which can no longer be transferred to tenants.

## SIMILARITIES WITH DRAFT LAW

### Stores Allowed to Restock on (Most) Sundays

As long as the threat of epidemic or an official state of epidemic persists, as well as for a period of 30 days after the restrictions are lifted, stores will be able to restock on Sundays unless there is a public holiday that happens to fall on a given Sunday. This means that stores will now be allowed to accept, unload, and display basic products on most Sundays, instructing their regular staff to perform these tasks or hiring someone else to do it.

### Commercial and Office Premises

#### No Lease or Rent Rate Termination

Until 30 June 2020, landlords will not be able to terminate lease agreements or rent rates unless the tenant breaches contractual provisions or violates legal regulations on the manner of using premises or unless the building in which the premises are located needs to be demolished or renovated.

#### Lease Extension by Tenants

Tenants will be able to extend lease agreements made before the Act entered into force and set to expire after its enactment but before 30 June 2020 without changing lease conditions. As long as the tenant informs the landlord about the intended extension no later than on the planned expiry date, the lease term will be extended until 30 June 2020.

No such extension is possible if any of the following is the case:

- (i) the tenant has been in delay with payment of:
  - rent, or
  - other amounts due on account of using the premises, or
  - amounts that the landlord collects on behalf of another person or company

for (at least) a single settlement period during the last six months before the Act entered into force or – if the agreement had been concluded less than six months before the Act entered into force – during the term of the agreement, and the total amount of debt exceeds monthly rent;

- (ii) the tenant has breached the lease agreement by using the premises in a manner contrary to their agreed or intended use or has damaged the premises by neglecting to perform contractual obligations;
- (iii) the tenant has leased or subleased the premises (or a part of the premises), or allowed a third party to use them free of charge, without obtaining the landlord's prior written consent as required.

## Contact

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