

April 2020

THE CRISIS SHIELD FOR TENANTS OF PREMISES IN SHOPPING CENTRES

Facts

The Polish government's anti-crisis package of acts, commonly referred to as the "crisis shield", includes i.a. the act amending the act on specific solutions linked with preventing, counteracting, and combating COVID-19, other infectious diseases and crisis situations related to them and some other acts ("Act"). On 31 March 2020, the Act was passed by the Sejm (the lower house of the Polish Parliament), signed by the President and published in the Polish Official Journal. The majority of the Act's provisions enter into force on the date of publication.

In connection with the growing threat of SARS-CoV-2 infections, a number of restrictions on business activities has been introduced by the regulations of the Minister of Health concerning the announcement of the state of epidemic threat in the territory of the Republic of Poland (the regulation of 13 March 2020) and concerning the announcement of the state of epidemic in the territory of the Republic of Poland (the regulation of 20 March 2020, amended by the regulation of 24 March 2020).

In commercial facilities with a sales area exceeding 2,000m² ("shopping centres") retail trade has been temporarily prohibited for tenants whose prevailing activity consists of trade in:

- textiles,
- clothing products,
- footwear and leather goods,
- furniture and lighting equipment,
- TV and radio-equipment and domestic appliances,
- stationery, office supplies and bookselling, as well as running restaurants and other catering activities and entertainment activities.

Restrictions have also been introduced for tenants of service areas, except for medical, banking, insurance, postal and laundry

services and catering services consisting only of food preparing and delivering. The restrictions on the retail trade and conducting service activities also include commercial aisles in shopping centres.

Comments

The Act contains solutions relating directly to tenants of premises in shopping centres whose business activity has been significantly restricted or even prohibited for the duration of the epidemic.

"Expiry" of mutual obligations of parties to the lease agreement

According to the Act passed by the Sejm for the duration of the prohibition of business activities in shopping centres *"the mutual obligations of parties to the lease agreement or other similar agreement, on the basis of which a retail area is handed over for use"*. This regulation should take effect retroactively and come into force from the day the business activity was prohibited.

The tenant (as a matter of fact *"entitled to use the trade area"*) may only make use of the "expiry of mutual obligations" if he submits to the landlord an "unconditional and binding" offer to extend the lease agreement on current terms and conditions for the duration of the prohibition extended by six months. The tenant should make the offer within three months of the cancellation of the prohibition of business activity in the shopping centre. If the tenant does not submit the offer within this time, the regulation of the Act regarding expiry of mutual obligations will cease to be binding to the landlord. This regulation should come into force on the day when the prohibition of business activity is cancelled.

This solution raises serious questions. While it is obvious that as a result of the expiry of a tenant's obligations he will not have to

pay rent (as well as other payments to which the landlord is entitled on the basis of the lease agreement), it is unclear what the result of the "expiry" of the landlord's obligation is likely to be, which consists in providing the premises/sale area and making them available for the tenant's use. Is the effect of the "expiry" of the above obligation "expiry" of the tenant's right to use the premises at the same time, even for storage purposes? The solution described above does not give a clear answer to this question.

Furthermore, the other unclear provision states that the "expiry of mutual obligations" during the prohibition of business activity ceases to bind the landlord at the ineffective expiry of the deadline for the tenant to submit the offer.

It seems that the intention of the legislator was that the exemption from rent and other payments for the period of prohibition of business activity is made as if under a resolutive condition, which is not submitting an offer to extend the lease period within the required period (3 months).

Furthermore, even though the Act does not state it clearly, if there is no offer to extend the lease, on the day following the end of the three-month period, the landlord may require payment of the rent for the time of business activity ceased in the shopping centre in the amount specified in the lease agreement. It is unclear whether in such a situation the landlord may require interest calculated from the date on which the rent should be due under the lease agreement.

The Act explicitly regulates that the above regulations do not violate the relevant provisions of the Polish Civil Code regarding the parties' obligations in states when the legal restrictions on the freedom of economic activity are introduced.

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Extension of the lease term

Moreover, the Act also states that lease agreements that should expire after the Act comes into force are extended until 30 June 2020.

This applies both to residential premises and premises used for purposes other than residential, including premises in shopping centres. A statement of consent from the tenant is required for the extension of a lease term. The tenant should declare to the landlord his desire to extend the lease term until 30 June 2020, but not later than on the day before the lease agreement expires.

The Act does not make it possible to modify the duration of the extension and 30 June is a cut-off date. It is further stated that the above mentioned solution should not apply i.a. if the tenant defaults in payments of rent, other payments for premises or payments independent of the landlord and collected by him for at least one full payment period and the total value of those defaults exceeds the value of rent for one month, as well as if the tenant has been using premises contrary to the lease agreement or purpose of the premises.

The ban on lease agreement termination and rent termination by the landlord

The Act bans the landlord from termination of lease agreements and rent until 30 June 2020. Some exceptions to the above mentioned ban are stated.

Termination of premises used for purposes other than residential, hence premises in shopping centres, is allowed with regard to a breach by a tenant of a lease agreement's provisions or law provisions relating to the use of premises or if the demolition or renovation of the building where those premises are situated is necessary.

Analysis

The regulation of lease agreements stipulated in the Act is rather positive for tenants, both of residential premises (which is not surprising) and premises for other purposes. However, the proposed solution may cause some problems of interpretation, which have been mentioned above. Aside from regulations stipulated in the Act, there are some possibilities for tenants on the basis of contract law, which enable them to amend the scope of their rights and obligations arising out of the lease agreement (i.a. exclusion of tenant's liability for non-performance or improper performance of the lease agreement due to circumstances for which the tenant is not liable and the amendment of the obligation due to an extraordinary change in circumstances on the basis on the *rebus sic stantibus* clause).

In many lease agreements for premises in shopping centres, there are explicit regulations regarding *vis maior*. The state of epidemic threat, the state of epidemic and pandemic are without doubt examples of *vis maior*. To determine the exact possibilities for the tenant, it is necessary to analyse lease agreements between parties and their provisions regarding tenants' rights and obligations, including those in the case of *vis maior*.

The coming months will show whether and to what extent the above described solutions of the Act will allow tenants to overcome the negative economic effects of the prohibition of business activity in shopping centres that is currently in force. Some disputes between tenants and landlords regarding the scope of their mutual rights and obligations will certainly continue before the court.

If you would like to receive additional information or answers to questions arising after reading, please contact us and establish cooperation:

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