

Legal opinion

“The mutual obligations of parties to lease agreements expire”: emergency measure on retail leases in the Anti-Crisis Shield Act

The COVID-19 epidemic has had dramatic consequences for the functioning of shopping centres in Poland. To alleviate its negative impact on mall tenants, the Polish parliament has passed a special measure. Under Article 15ze of the Act of 2 March 2020 on Extraordinary Arrangements Aimed at Preventing, Counteracting, and Fighting COVID-19 and Other Infectious Diseases, as well as Crises Caused by Them, commonly referred to as the Anti-crisis Shield Act, “during the ban on the operation of shops and services in retail facilities bigger than 2,000 sqm – as laid down in applicable regulations – the mutual obligations of parties to lease agreements in such facilities expire.”

This does not mean that the lease agreement as such automatically expires. The Act requires tenants who decide to take advantage of the expiry provision to make their landlord an unconditional and binding offer to renew the lease on existing terms for a period equal to the duration of the government-imposed closure plus six months. They have to do that within three months of the closure order being lifted. The Act, however, does not say that the landlord has to accept this offer. This opens up several possible scenarios, including ones under which the lease agreement will not be renewed: the landlord might reject the tenant’s offer, or respond with a counteroffer that is rejected by the tenant.

Since the restrictions on shops and services were introduced in a gradual manner, and are being eased in a similar way – at different times for different sectors – when the offer has to be made will vary. Every case has to be considered individually. The COVID-related restrictions on the functioning of institutions and workplaces, on business operations, as well as hygiene requirements, are laid down in the Regulation of the Council of Ministers of 2 May 2020.

The stated purpose of Article 15ze was to ease the burden on mall tenants by relieving them of the obligation to pay rent during a period of business interruption. However, its wording – “the mutual obligations of parties to lease agreements expire” – raises questions over the obligations of mall landlords (i.e., lessors). Under Article 659 § 1 of the Civil Code Act of 23 April 1964, “A lease agreement is an agreement in which the lessor undertakes to transfer to the lessee an object for use over a (definite or indefinite) period of time, and the lessee undertakes to pay an agreed rent to the lessor.” What about the landlord’s obligation to allow the tenant access to the store, or to arrange for the supply of utilities, for example?

Although the Anti-crisis Shield Act thus provides for the expiry of lease agreements in shopping malls due to the epidemic under certain circumstances, it stipulates in the same article that this is without prejudice to the provisions of the Civil Code Act of 23 April 1964 regulating the mutual obligations of parties in the event of restrictions being imposed on the freedom of economic activity. This means that despite the availability of Article 15ze, tenants are still able to take advantage of – or invoke – such civil-law rules as the *rebus sic stantibus* clause (i.e. the “fundamental change of circumstances” clause), or the consequent inability to perform clause, in response to the COVID-19 situation. They may choose not to make the lease renewal offer, and to seek rent reduction or relief on other legal grounds.

Who is the regulation intended for?

In line with paragraph 1 of Article 15ze, the regulation is intended for shopping mall tenants unable to conduct business due to a government-imposed closure.

As noted, Article 15ze is not the only legal avenue for seeking rent reduction or relief over COVID-19 restrictions. The choice of a particular legal instrument should be dictated by what will best serve the interests of parties during the epidemic – and the situation of every tenant, and every landlord, can be different. It should be remembered, though, that deploying Article 15ze or any other instrument might involve a court or arbitration process, whose outcome and duration is uncertain.

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