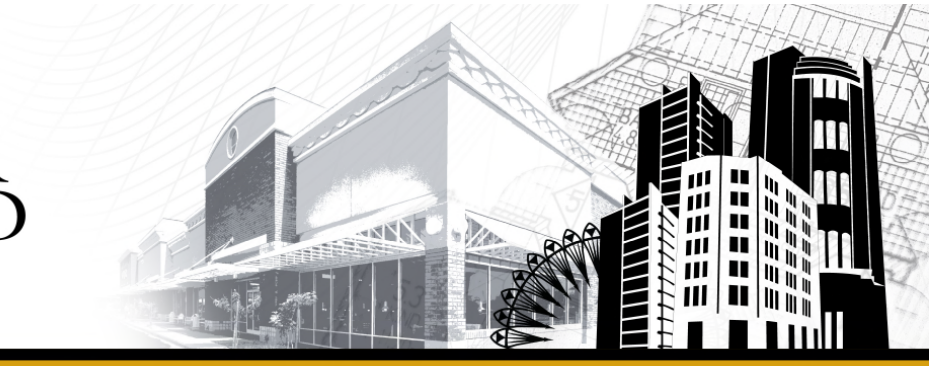

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"ANTI-CRISIS SHIELD" REGULATIONS REGARDING COMMERCIAL LEASE AGREEMENTS

1. Background and reasons for the introduction of new regulations.

Due to the state of epidemics declared in Poland, and previously the state of epidemic danger, trade operations of the majority of tenants operating in shopping centres having sales area exceeding 2,000 square metres, as well as many tenants of spaces located outside such facilities, have been banned or restricted. As a result, many tenants have lost the opportunity to generate revenue from their operations, yet remaining bound by lease agreements of closed shops. Such restrictions also indirectly affect the tenants whose business activity has not been banned or restricted, but who are still suffering losses due to drastic decrease in the number of customers.

Polish law system provides for solutions regulating the effects of extraordinary changes of legal relations that could be applied in such circumstances. However, the legislator has found these solutions insufficient and decided that finding suitable solutions should not be left to the entrepreneurs being party to relevant lease agreements. As a result, the legislator has decided to intervene into the civil law relations shaped by the parties to such agreements. Under the so called "anti-crisis shield" legislation, for the period of duration of the restrictions described above, a solution has been introduced consisting in expiry of mutual obligations of the parties to lease agreements and other agreements of similar nature related to the use of retail areas. This solution has been included in the Act of March 31, 2020 on amendment of the Act on special solutions related to the prevention, counteraction and eradication of COVID-19, other contagious diseases and relating crisis situations, and other acts (Journal of Law 2020, item 568, hereinafter referred to as the **"Act"**).

The aim of this study is to analyse the scope and legal effects of the above regulations, including potential legal problems related to their application. The authors' views presented in this study are only of general nature, so in order to assess any individual case in responsible manner all relevant details of such case, such as the content of a given lease agreement or the specifics of the leased premises and tenant's operations, will have to be taken into consideration.

2. Main content of the new regulations.

Pursuant to Article 15zе section 1 of the Act, during the period of restrictions on business activity conducted in shopping centres having sales area exceeding 2,000 m^2 (hereinafter referred to as the

"large format retail facilities"), i.e., as of March 14, 2020, the mutual obligations of parties to lease, tenancy or other similar agreement, by which the retail space is let for use (hereinafter, for simplification, collectively referred to as the **"lease agreements"**) shall expire.

The above provision has been formulated in a way deviating from the proper legislative art and, as a result, raises many interpretation doubts. It should be noted that these doubts are so material that their final resolution or clarification would require a statutory correction. Otherwise, it is likely that the interpretation of Article 15ze of the Act will be developed no sooner than by judicial decisions made as a result of most certainly unavoidable disputes as to the actual content of the legal norms resulting from this provision.

3. Scope of application

Significant doubts concern the very scope of application of the provision of Article 15ze of the Act. These may be reduced to three fundamental questions: (1) whether the provision applies only to the lease agreements of the premises and spaces in large format retail facilities or does it also apply to lease agreements in smaller retail facilities, lease agreements of standalone facilities or retail premises located in larger buildings intended for other purposes (such as office buildings or residential buildings, etc.); (2) whether this provision applies only to lease agreements of retail space *sensu stricto*, which means shops, or should it also be applied to lease agreements of mixed retail-services space (e.g. restaurants or cafes), or finally to pure services (e.g. beauty services, health services, fitness, etc.); (3) whether this provision applies only to the lease agreements concluded with tenants who are prohibited or restricted from carrying out their business operations or also to those tenants that are allowed to carry out their business as usual or in a limited scope, but whose revenues have decreased due to the restrictions.

As it is clear from the published reasons for the draft Act, the legislator, when introducing the provision in question, had in mind only the space in large format retail facilities, since most of the restrictions of business activity related to the epidemic concern just these facilities. However, a literal wording of this provision refers to a definition of such facilities only with respect to the term of expiry of contractual obligations, and not to the location of the premises being subject of the lease agreements covered by the provision, which is probably one of the legislator's omissions. Based on the literal wording of the provision, one may state that this provision refers to all lease agreements pertaining to retail space, including those located in retail facilities having sales areas not exceeding 2,000 m^2, standalone facilities or retail premises in buildings intended for other purposes (residential or office buildings). It is, however, very likely that in practice a literal interpretation of this provision will be amended to reflect to the deemed intention of the legislator i.e. to apply this provision only to lease agreements of premises in the large format retail facilities only.

Reading the discussed provision literally, it should be stated that it applies only to agreements of lease of retail space and therefore it does not apply to agreements relating to space intended for provision of services, although it is possible that it applies to agreements of lease of mixed use – retail and services space (e.g. restaurants). However, it would appear from the published reasons of the Act that the legislator sought to extend this solution also to lease agreements of premises used for services in the large format retail facilities, which is not reflected in the provision. In the absence of a normative definition of the concept of "retail space", it is possible that judicial decisions in the disputes arising of

the application of this provision may adopt a broader understanding of the concept of retail space, covering not only the space used for sale but also the space (premises) where the service activity is carried out.

It is also not clear from this provision whether the expiry of obligations under the lease agreements applies only to the agreements with tenants whose business operations are restricted or also to the lease agreements with tenants who are not restricted in their operations (e.g. food supermarkets, DIY, catering, pharmacies, health, banking, insurance, postal, laundry services, etc.). Although it is known that the above mentioned restrictions have been the main reason for adoption of the provision in question, the legislator has omitted a wording which would limit its application to the agreements with tenants affected by such restrictions and/or those actually not operating because of them. It should be noted that such limitations were included in the original draft of this provision but were subsequently omitted in the course of legislative work. The justification of the Act indicates that the legislator wanted to extend the application of this provision also to the tenants that were not directly restricted to operate but their revenues decreased significantly due to a smaller number of customers visiting shopping centres. However, taking into consideration the objectives of the Act and the principle of equity, it would be difficult to accept that the tenants continuing to make full use of the leased premises should also be exempted from the contractual obligations, even if their turnover and revenues have been affected by the closure of other shops and other epidemic-related restrictions. In the absence of a clear definition of the scope of this provision, it is possible that tenants of this type of premises will also invoke the expiry of their lease obligations arising from this provision, and a final answer on the application of the provision in this respect shall be provided no sooner than by the courts' rulings.

4. Expiry of the contractual obligations or expiry of the whole agreement.

Focusing on the effects of the provision of Article 15ze, the meaning of the term "expiry" which usually means a final termination of the agreement (i.e. legal relationship of lease), raises doubts. An analysis of the provision in question, also in the context of its reasons, leads to the conclusion that the legislator's intention was only to temporarily release the parties from their contractual obligations for the period of restrictions imposed on business activity, while maintaining the continuity of the contractual relationship itself, only temporarily devoid of most of its legal content (mutual obligations and related rights). It should be assumed that the legislator did not use here the term "suspension", which would seem more appropriate, deliberately , so that the mutual obligations of the parties for the duration of restrictions would be completely abolished and not just postponed.

5. Elements of the agreement subject to expiry.

According to the exact wording of the provision, all obligations of both parties, i.e., the tenant and the landlord, arising from the lease or rental agreement, both main and additional ones, are subject to temporary expiration. Consequently, the obligations that expire on the part of the tenant are first and foremost those to pay rent and other lease payments, including maintenance charges, utility charges paid to the landlord, marketing fees, etc., the obligation to provide and maintain certain rent collaterals or the obligation to continue to operate without interruption. On the other side, the landlord's obligations to make the object of lease available and accessible to the tenant and to maintain it in a condition suitable for the agreed use will expire.

In the absence of an explicit exclusion in the provisions of the Act, it may be considered that the principle of expiry of obligations under lease agreements applies without any exception also to obligations of the parties with respect to the period before the commencement of business activity in the leased premises by the tenant, i.e., the obligations to hand over and accept the premises, to carry out the fit-out works by one of the parties, payment of the landlord's fit-out contribution to the tenant (if any) or payment of fee for such works by the tenant to the landlord (depending on the lease agreement). However, if we were to assume consistently that the expiry of obligations under the lease agreements should always be a derivative of the restrictions imposed on business activity in such premises, the obligations of the parties to the lease agreement concerning the period before the commencement of tenant's operations in the premises, which are not directly affected by the restrictions, should not expire. This is another doubt as to how the provision of Article 15ze of the Act should be applied.

Moreover, in our opinion, only the parties' obligations under the lease agreement and the rights of the parties that correspond with the other party's obligations are subject to temporary expiry under this provision. Therefore the expiry does not apply to other elements of the legal relationship, in particular to legal relation shaping rights (e.g. the right to terminate the agreement or the right to extend the lease term if reserved by the agreement), which should remain in force unless they are expressly excluded by another provision of the Act (e.g. Article 31t of the Act).

6. Invoicing and settlements related to expiry of the obligations.

It should be assumed that due to expiry of the tenant's obligation to pay rent and other charges arising from the lease agreement for the duration of expiry of the obligations, the landlord should also refrain from issuing VAT invoices to the tenant for rent and other charges for that period, and will not be obliged to pay VAT on the above uncollected amounts of rent and charges.

In the case of monetary payments for the duration of the restrictions, paid by tenants in advance (e.g., rent and maintenance charges paid for March 2020), tenants may claim reimbursement of its respective parts due for the period of restrictions on the business activity (over half a month) on the basis of the provisions on undue monetary payment being a form of unjust enrichment (Article 410 of the Civil Code). However, this could be opposed by the landlord, depending on the specific situation, arguing that although it received such monetary payment, it used it in such a way that it is no longer enriched (Article 409 of the Civil Code). If the landlord itself considers that the rental payments paid to him in advance for the period of expiry of his obligations were not due, it should make an appropriate adjustment (correction) to the VAT invoices issued on that account.

It is unclear to what extent the provision applies to the tenant's obligation to pay a possible surcharge for the reconciliation of service charges for 2019. Most such reconciliations for past year take place between April and June. Given that this is a payment which will relate to the previous year not covered by the period of restrictions on business activity, it would not be right to consider that it has also expired as a result of the application of Article 15ze of the Act. However, it can be assumed that for practical reasons during the period of restrictions the landlord might be not able to effectively require the tenant to pay the above payment.

7. The landlord's possibility to demand payment from the tenant on other legal basis.

The above mentioned regulation exempts the tenant from the obligation to pay any fees under the lease agreement, including rent, service charges or charges for utilities provided by the landlord during the period of restrictions on business activity. At the same time, as part of proper management of a shopping centre, the landlords, despite being released by the Act from the obligations to provide any services to tenants, including making the premises available and accessible for tenant, protecting them, heating, cooling, ventilating, or supplying electricity to the premises, actually continue to provide some of these services, acting in the best interest of both their own and, above all, the tenants. Failure to provide these services would often lead to damage to the premises themselves or to the tenant's property left within. It is also likely that there will be situations in which the tenant, despite being prohibited from carrying out its main business, will continue to use the premises as for some surrogate or incidental business to the extent permitted by law (e.g. by packaging goods for shipping). Another form of use of the premises by the tenant is the mere storing goods and other tenant's property in the shopping centre, which the tenant would otherwise have to store in its own premises or at another entity's premises against payment. Therefore, there is a lively discussion in the trade press as to whether there is a legal basis, other than the suspended lease agreement, for the landlords to demand reimbursement of the above benefits or remuneration for the use of premises to a limited extent (e.g. storage of goods in the premises).

It should be noted that there are several legal grounds which, depending on each given situation, provisions of a given lease agreement, and the fulfilment of additional conditions, may be invoked by the landlord to justify a claim for payment of compensation for the limited use of premises or reimbursement of costs corresponding to the sum of expenses and expenditures incurred by the landlord directly or indirectly for given premises during the period of restrictions on business activity, despite being exempted from the obligation to bear such costs by the Act. Depending on the specific situation, it may be justified to base such claims of the landlord on the provisions on managing another person's affairs without mandate (Article 752 et seq. of the Civil Code), unjustified enrichment (Article 405 et seq. of the Civil Code), remuneration for the non-contractual use of the property (Article 224 of the Civil Code), or an alleged storage agreement (Article 835 et seq. of the Civil Code). However, the application of each of these solutions shall require additional legal actions to be taken by the landlord, and the legitimacy of their application shall depend on the specifics of the premises, the situation, the sort of property left by the tenant in the premises, the type of tenant's business activity, the manner of using the premises by the tenant during the period of the restrictions, the services provided by the landlord and other factors.

It should also be noted that in addition to the above non-contractual legal grounds for the landlord's claims, depending on the provisions of a specific lease agreement, it may be possible to settle the service charges incurred by the landlord in connection with the premises during the term of expiry of the contractual obligations, based on the provisions of the lease agreement itself. In the case of lease agreements in shopping centres, provisions on annual settlement (reconciliation) of paid monthly service charges and actually incurred operational costs attributable to the tenant are a standard, as a result of which the tenant may be obliged to pay the landlord the part of such costs not covered by service charges paid during a given year (shortfall). The admissibility and possibility of defending the inclusion of operating costs incurred during the months when the lease obligations are expired shall depend on the provisions of a given agreement, including the question whether the service charge is

constructed as an annual charge prepaid monthly or rather a monthly payment settled annually. By referring to the objectives and intentions of Article 15ze of the Act (i.e. full exemption of the tenant from any payments for the duration of the restrictions), tenants may question the validity of such service charge reconciliation by indicating that the operating costs incurred by the landlord during the period of the restrictions should not be included in the annual reconciliation at all, and even that the operating costs incurred by the landlord for the entire year 2020 in advance (such as property tax, annual perpetual usufruct fee, insurance premium, etc.) should be included only partially in the annual reconciliation (the part corresponding to the period not covered by the restrictions). This issue is also likely to be resolved no sooner than by judicial decisions.

In pursuing payment claims against tenants both on the basis of the non-contractual grounds mentioned above and on the basis of the provisions of a given lease agreement concerning the annual reconciliation of service charges, the landlord must take into account the possible allegations of circumvention of the law or abuse of the law (Article 5 of the Civil Code) that may be raised by the tenants defending themselves against such claims, the legitimacy of which will require a court assessment each time.

8. Mandatory offer to extend the lease term.

According to the legislator's assumptions, depriving the landlords of rental fees for the duration of the trade restrictions was to be compensated to them by the possibility to extend the term of the lease by six months. As indicated above, it should be assumed that despite the fact that the obligations of the parties to the lease agreement during the period of restrictions on trade activity cease to apply, the lease term is still running, it is not suspended, withheld or interrupted, but runs continuously despite the temporary expiration of mutual obligations, which means that the landlord loses part of the assumed income from a given lease agreement. On the other hand, the consequences of not suspending the lease term may also prove unfavourable to the tenant, especially if the duration of the period of restrictions on business activity coincides, in part or in whole, with the duration of the financial incentives, i.e. rent free period or reduced rent (rent rebate) period – it may not be possible for the tenant to "recover" such lost financial incentives after the restrictions expire.

According to Article 15ze sec. 2 of the Act, the tenant is obliged to submit to the landlord, within 3 months from the date of lifting the restrictions on conducting trade activity, an unconditional binding offer of extension of the term of the lease agreement on the existing terms and conditions by the period of the restrictions extended by 6 months (e.g. in the case of restrictions lasting 3 months, the term of the lease extension should be 9 months). The tenant's obligation to submit the above offer arises on the day of lifting the restrictions on trade activities. It seems that the above offer cannot be effectively submitted by the tenant voluntarily before the above date, especially since it could not be made definitive at that time, as the final lease extension period resulting from the actual time of restrictions on trade activities will not be known yet. If the lease period expires before the restrictions are lifted, especially if it is not extended under Article 31s of the Act, which provision we describe below, the former tenant shall not be obliged to submit the above-mentioned offer, which means that in such a case the landlord will be deprived of the opportunity to compensate the forfeited payments under the lease agreement by extending its term.

Contrary to the wording of the provision and the content of the Act's published reasons, the submission of an offer by the tenant is not absolutely obligatory, but depends on the decision of the tenant. The Act provides that in the event of failure to submit an offer, the provisions of Article 15ze sec. 1 of the Act cease to bind the landlord at the moment of ineffective expiry of the deadline for submitting the offer, which means that the above provision on temporary termination of contractual obligations ceases to apply, but only in relation to the tenant's obligations, with retroactive effect, as if it had not been introduced at all. In such a case, all expired obligations of the tenant for the duration of the trade ban are revived and should be fulfilled immediately, and the landlord can and should issue a VAT invoice to the tenant for outstanding contractual receivables. Thus, tenants are given the right to choose between submitting an offer which, if accepted by the landlord, will result in the aforementioned extension of the lease term with the tenant's exemption from payments under the lease agreement for the duration of the period of restrictions, or failure to submit such an offer, which will result in termination of the lease at the original date specified in the agreement, but with the obligation to pay all overdue payments under the lease agreement for the duration of the period of restrictions. It should be added that a tenant's offer to extend the lease for a period other than that provided for in the Act or under modified terms and conditions will be treated as not making such an offer at all and therefore will also result in the restoration of the tenant's extinguished obligations.

Moreover, it should be noted that, even if the obligation to pay the contractual debts for the duration of the period of restrictions is reinstated as a result of the failure to submit the above offer, the tenant may seek exemption from or a reduction in the amount of those debts on the basis of the general provisions of the Civil Code set out in 9 below, relating to the consequences of an extraordinary change of circumstances, which is undoubtedly an epidemic of this scale and the restrictions and prohibitions introduced to combat it. It seems that, due to the special provisions in the Act, the landlord will not be able to claim additional compensation from the tenant for not submitting such an offer, although this will formally constitute a breach of the tenant's obligation under the Act. It should also be assumed that the landlord should not be entitled to claim interest on reinstated outstanding charges for the duration of the prohibition or to apply sanctions against the tenant for failure to pay these charges on their original due dates (e.g. to terminate the agreement for this reason), although this is not expressly provided for in the Act.

In our opinion, the landlord is not obliged to accept the tenant's offer, such an obligation does not in any way derive from Article 15ze section 2, nor from its objectives. However, if the landlord does not accept the tenant's offer, this will not (as opposed to the tenant not submitting an offer on time) result in reversion of the 'expiration' of the contractual obligations for the duration of the restrictions.

9. Possibility to apply other provisions of the Civil Code.

By virtue of Article 15ze section 4 of the Act, in cases covered by this provision, the possibility of applying the provisions of the Civil Code governing the parties' obligations in situations where legal restrictions on the freedom of business activity are introduced, is maintained. The above reference is unclear and misleading, as the Civil Code does not contain any provisions specifically addressing the effects of restrictions on the freedom of business activity. However, depending on the specific factual state, the general provisions of the Civil Code concerning exemption from liability for non-performance or improper performance of services, consequent impossibility of performance of services or extraordinary change of circumstances (*rebus sic stantibus*) may apply. It is most likely that these are

the provisions that the legislator actually meant here. Claims arising from these provisions may be raised both by the parties to the agreements, to which Article 15 of the Act applies, as well as to those agreements to which the provision does not apply.

10. Possibility for the parties to regulate their relations differently.

The last issue concerning the Art. 15ze of the Act, which we believe should be mentioned, is the assessment of its legal nature, i.e. whether its provisions are mandatory (*ius cogens*) or dispositive, and thus whether the parties to the lease may, by mutual agreement, adopt solutions deviating from, or even contradictory to those provided for in these provisions, for example, agree that for the period of restrictions on trade activity the tenant will pay partial rent or service charges with a simultaneous release from the obligation to submit an offer to extend the lease term. As a rule, whenever the legislator intends to make a given regulation mandatory, i.e. to exclude the possibility of its modification by the parties to the contract, it should include relevant wording to such effect, e.g. "contractual provisions contrary to § x are null and void". The provision of Art. 15ze of the Act does not provide such wording. Neither does the analysis of its purpose and function justify the conclusion that the parties to the lease agreement could not agree on different solutions. Therefore, it should be considered that this provision is of a dispositive nature and the parties to the lease agreement may, by way of an addendum to the agreement or a separate agreement, agree to apply solutions other than those provided for in the Act. In such a case however, it is recommended that the parties should expressly waive the possibility of exercising more further-reaching rights which they may be entitled to under the Act.

11. Possibility of extending the lease agreements until the end of June 2020 and the prohibition of their earlier termination.

There are two provisions of the Act aiming at preservation of commercial lease agreements for the initially expected period of restrictions on trade activity, i.e. until June 30, 2020, should also be noted.

First of these provisions is Article 31s of the Act, pursuant to which, if the duration of the lease agreement of premises, concluded before the date of entry into force of the Act (March 31, 2020) expires after that date, and before June 30, 2020, such agreement shall be extended until June 30, 2020, on present terms and conditions, provided that the tenant submits to the landlord the tenant's statement of will to extend the lease term, at the latest on the date of expiry of the lease agreement. However, the tenant shall not have the right to make such an extension statement in situations described in the aforementioned provision, i.e. in cases where the tenant previously committed material breaches of the agreement (arrears in payments for at least one payment period, using the premises contrary to the agreement or intended use, negligence which may lead to damage to the premises, subletting the premises without the landlord's consent).

Second of these provisions is Article 31t of the Act, imposes on the landlords, until June 30, 2020, a ban on termination of lease agreements or termination of the amount of rent (the landlord's right under Article 685^1 of the Civil Code, often excluded in commercial leases), which does not apply in case of commercial leases, only in case of: (i) violation by the tenant of the provisions of the lease agreement or legal regulations concerning the manner of use of the premises or (ii) the necessity to demolish or renovate the building in which the premises are located. However, the above provision does not

prevent the tenant from terminating the agreement (if the tenant is entitled to such termination) or the parties from terminating it by mutual agreement.

12. Summary.

To summarise briefly the above regulations, a few points should be noted. Firstly, the above regulations, contrary to the declarations of the legislator, do not take into account the legitimate interests of both parties equally. The adopted solution is more advantageous to the tenants which may induce landlords to seek available legal solutions allowing them to cover, if not lost benefits, at least actual losses incurred as a result of the new regulation. Secondly, these provisions introduce legal solutions which have not been known so far and have not been tested in practice (temporary expiration of obligations), which, combined with their imprecise wording and ambiguous content (in particular section 1 of Article 15ze), create circumstances, which may certainly lead to long-term disputes between the parties to lease agreements. The above disputes and clarification of interpretative doubts related to these provisions by court rulings may take many years, unnecessarily burdening the relations between tenants and landlords and their business operations.

In such circumstances, it should be strongly recommended in each case that the parties seek and work out amicable solutions and conclude appropriate agreements precisely regulating mutual relations for the duration of the epidemiological restrictions and their future fallout, which is legally admissible, since, as indicated above, the provisions in question are dispositive. Professional parties to commercial leases can reasonably be expected to seek such compromise solutions. The unprecedented situation that has arisen, the adverse effects of which affect all participants of the whole "ecosystem" of commercial real estate, makes it necessary for all interested parties to exceed their business habits developed in other circumstances, bearing in mind that the current crisis, however deep, will sooner or later pass, and the attitude that individual participants will present during this difficult period will be remembered and may positively consolidate but also negatively burden future relations.

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