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## EXPERT:

Magdalena Beza and Przemysław Kamil Rosiak write about how the government's trade ban may impact relations between landlords and tenants in retail points.

EVER SINCE ITS INCEPTION 30 YEARS AGO, ONE OF THE MOST FUNDAMENTAL FUNCTIONS OF AMCHAM HAS BEEN TO MAINTAIN **PLATFORMS FOR SHARING PROFESSIONAL KNOWLEDGE AND EXPERIENCE** BETWEEN ITS MEMBERS. THERE ARE A NUMBER OF SUCH PLATFORMS, INCLUDING AMCHAM MONTHLY MEETINGS, THE AMCHAM COMMITTEES, AND THE EXPERT SECTION OF THE CHAMBER'S MAGAZINE. WHILE MONTHLY MEETINGS HAVE BEEN SUSPENDED DUE TO EPIDEMIOLOGICAL REGULATIONS AND THE COMMITTEES HAVE STARTED USING WEBINARS, THE CONTRIBUTORS TO THE EXPERT SECTION OF THE QUARTERLY DELIVER, AS THEY ALWAYS HAVE— VIA EMAIL.

IN THIS DISPATCH, EXPERTS FROM A KPMG-ASSOCIATED LAW FIRM IN POLAND D. DOBKOWSKI SP.K., **MAGDALENA BEZA AND PRZEMYSŁAW KAMIL ROSIAK** WRITE ABOUT HOW **LEASE AGREEMENTS BETWEEN LANDLORDS AND TENANTS IN RETAIL POINTS** MAY CHANGE AFTER THE TRADE BAN IMPOSED BY THE AUTHORITIES IS OVER.

## EXPERT Retail sector during the pandemic

# THE DAY AFTER

## Lease agreements in retail will have to be redrawn when the pandemic is over.

Because of the limits on trade imposed by Poland's epidemic authorities vis-a-vis the COVID-19 pandemic the retail sector, especially in shopping malls totalling over 2,000 square meters, has been suffering considerable losses.

Since mid-March 2020, only specific shops have been permitted to operate in shopping malls, in particular, those offering food, tobacco products, dry-cleaners and pharmacies. Hairdresser's, beauty salons, pubs and entertainment facilities have been generally closed and not only those in shopping malls but also outside them.

Despite the fact that certain business operating in premises located outside shopping malls are still permitted to function, they have been facing huge losses as a result of a significant drop in the numbers of customers. Other shops closed their premises based on their own decision. Even if certain businesses switched to e-commerce or increased their income generated through e-channels, in most cases it does not compensate for the losses suffered by the traditional channel.

The Act of March 31, 2020 amending the Act on Extraordinary Measures for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Emergencies Caused by Them, and Certain Other Acts (the so-called 'Shield') provides for special regulations concerning lease agreements, in particular regarding premises located in

shopping centers, lease of residential premises as well as the lease of property (including premises) from public entities (communes or State Treasury). When it comes to commercial premises, and commercial leases impacted by the Shield, the mutual obligations of the parties under lease contracts concerning commercial premises located in these facilities are 'extinguished'.

It means that for the entire period of the ban (as from March 14, 2020), tenants affected by the ban are not required to pay any rent or maintenance (exploitation) fees, and landlords are not obliged to make premises available to tenants. The expiry of the mutual obligations of the parties to the lease agreement occurs by force of law. It means that the tenant is generally not obliged to submit to the landlord any declarations in this scope.

### EXTEND OR NOT?

Under the Shield's provisions, in order to return to the premises after the expiry of the ban, the tenant should, within three months from the date of lifting the ban on business operations, submit to the landlord an offer to extend the lifetime of the lease agreement, on hitherto binding terms, for the duration of the ban, extended by six months. It is unclear, in this context, whether the tenant's offer shall be interpreted as binding for the landlord or not, and if the landlord may refuse to accept the tenant's offer. In our opinion, the legislator's intention was rather to



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give the tenant—a party generally perceived to be weaker in the lease relation—an opportunity to decide whether it chooses not to extend the lease agreement after the expiry of the ban, or whether they prefer to continue with the lease. However, due to the unclear wording of the provision, an opposite interpretation, allowing the landlord to reject the tenant's offer, should not be excluded. With this in mind, attention should be drawn to the cases, where in accordance with the original agreement, a given lease expires during the period of the ban or within three consecutive months (when the lessee is entitled to submit an offer to the landlord). In our opinion, in such cases the lease should expire. An opposite interpretation would imply excessive disadvantage for the landlord, especially in cases where the landlord has already concluded a lease agreement for the same premises with another tenant.

At the same time, the Shield provides for a possibility for the parties to the lease agreement to take advantage from the provisions of the Civil Code "regulating the obligations of the parties in cases where limitations of freedom of business are introduced". Irrespective of the unclear wording of the provision, it seems that it opens a possibility for the parties to negotiate the terms and conditions of the lease agreement after the tenant's return to the premises in accordance with the so-called *rebus sic stantibus* clause—enabling for a modification of the terms of a legal relationship as a result of considerable changes of conditions. The clause in question may be used

by the parties in particular in order to negotiate a modification to the amount of rent for the premises due to the pandemic, as an unexpected event.

### OTHER COMMERCIAL LEASES

It should be noted that the above regulations concern only a small number of tenants of commercial premises—those who operate in shopping centers and whose business is covered by the governmental ban on operations. The regulations do not address (i) tenants whose business is not affected by the official ban, also in cases where they are located in shopping centers (such as tobacconists or dry-cleaners) and (ii) tenants of premises located outside shopping centers, irrespective whether they are covered by the ban or not.

Here attention should be drawn to the general provisions of the Shield, according to which lease agreements of premises, concluded for a definite period of time, shall be generally extended until June 30, 2020, based on the tenant's unilateral declaration. Accordingly, until June 30 it is generally inadmissible to terminate the lease agreement (both concluded for a definite or indefinite period of time) or increase the lease rent. Since these regulations concern all premises, they are also applicable to the commercial ones, except for leases in shopping centers affected by the ban on operations, covered by particular provisions referred to above.

However, the above solutions do not seem to solve the most significant problem the tenants are facing today, namely,

the enormous drop in revenues resulting from business activity. In this regard, in our opinion, the tenants should try to negotiate with their landlords for a reduction or even suspension of rent in the case of the premises being closed. They should do so even in the absence of a strict obligation to do so. The possible claims of tenants may be based on the provisions of their individual lease agreements, in particular concerning *force majeure*—an unexpected external occurrence that could not be prevented—or respective provisions of the Civil Code, such as the above mentioned change of conditions during the legal relationship.

**PUBLIC LANDLORDS**

Another category of commercial leases comprises the premises leased from public owners, such as State Treasury or local government. In fact, many municipal communes rent their premises situated in premium locations for commercial purposes. First, the solutions of the Shield related to the extension of lease agreements and inadmissibility to terminate or increase the rent seem applicable also to the category at issue. The tenants may also endeavor to benefit from the provisions of their individual lease agreements and from the solutions resulting from the general provisions. Second, the Shield contains additional preferences regarding these premises. In particular, the Shield provides a simplified mode of cancelling, deferring rents, or enabling their payment in instalments in individual cases. Unlike earlier, it will be no longer necessary to obtain an additional consent from local officials for such preferences. Furthermore, according to the Shield, the preferences at issue can be provided in a general mode, by the resolutions of the respective bodies of local governments, such as city councils.

Such resolutions can introduce a general cancellation of rents or other reliefs for entrepreneurs whose liquidity was reduced. An additional legal basis for such preferences is the Act on crisis management dated April 26, 2007, enabling the commune’s executive bodies—such as mayor and city president—to introduce particular relief for local businesses. So far, the respective general preferences have been granted with regard to real estates in Warsaw, Łódź,

Wrocław, Poznań, Gdańsk and Kraków.

**BEYOND THE SHIELD**

There is no doubt that COVID-19 pandemic contributed to an enormous decrease in revenues for businesses. Due to the short timeframe for its preparation, the Shield, while providing considerable preferences for the tenants, still leaves a considerable space for interpretation of its provisions. In order to increase their chances in potential ne-

gotiations with landlords (or in possible future court proceedings), the tenants planning to avail themselves of the Shield’s solutions should analyze their legal situation not only from the perspective of the Shield’s provisions but also taking into account the clauses included in their individual lease agreements, which can provide for more favorable solutions than those resulting from the Shield.

