

## LEGAL ALERT

### Anti-crisis Shield – government support for businesses during the COVID-19 crisis

The announcement by the Minister of Health that Poland is in a state of epidemic,<sup>1</sup> (having previously been in a state of epidemiological threat<sup>2</sup>) has changed public and private lives and affected social relations. As the epidemic develops, further restrictions are to be introduced. On 31 March 2020, the adoption of new measures<sup>3</sup> was announced, according to which:

- a seating limit will be introduced for commuter or private passenger transporter vehicles with more than nine seats, bringing them in line with the limits on public transport (up to half the seats on a bus). The restriction does not apply to passenger cars.
- additional requirements for workplaces will be indicated. Employers will have to provide additional safety measures for their employees. Individual workstations will have to be at least 1.5 metres apart. In addition, workers will have to wear gloves or have access to disinfectants.
- hotels and short-term rental accommodation will have to close. They can only function if there are people in quarantine or self-isolation, as well as if there are medical personnel there. Guests who are in these facilities when the new rules enter into force will have to check out by 2 April 2020. However, this does not apply to anyone on a business trip and using accommodation services to carry out their duties. Hotels remain open for these people.

These restrictions will enter into force and will apply from 2 April 2020 until further notice.

The epidemic has undoubtedly also rocked the economy and created many unexpected challenges for Polish businesses. Consequently, on 31 March 2020, the Polish Sejm enacted the "Economic and Social Anti-Crisis Shield for the Security of Companies and Employees in the Face of the COVID-19 Virus Pandemic", which constitutes government support for businesses during the current crisis (the "**Anti-crisis Shield**").

The Anti-crisis Shield constitutes primarily an act<sup>4</sup> amending the Act on Specific Solutions for Preventing, Counteracting and Combating COVID-19, Other Infectious diseases and the Related Crises and Certain Other Acts adopted on 2 March 2020.<sup>5</sup> This act covers five essential pillars: employee safety (PLN 30 billion), financing companies (PLN 74 billion), healthcare (PLN 7.5 billion), strengthening the financial system (PLN 70.3 billion), and a public investment programme (PLN 30 billion). The total value of funds to be allocated to supporting businesses comes to almost PLN 212 billion.

The Anti-crisis Shield also amends the Act on the System of Development Institutions,<sup>6</sup> the Act Amending Certain Acts in the area of Healthcare Related to Preventing, Counteracting and Combating COVID-19,<sup>7</sup> as

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<sup>1</sup> Regulation of the Minister of Health of 20 March 2020 on a state of epidemic in the Republic of Poland (Journal of Laws 2020 item 491).

<sup>2</sup> Regulation of the Minister of Health of 13 March 2020 on a state of an epidemiological threat in the Republic of Poland (Journal of Laws 2020 item 433) amended on 16 March 2020 (Journal of Laws 2020 item 461).

<sup>3</sup> Ordinance of the Council of Ministers of 31 March 2020 on establishing certain restrictions, orders and prohibitions in connection with the occurrence of a state of epidemic (Journal of Laws 2020 item 566).

<sup>4</sup> Journal of Laws 2020 item 568

<sup>5</sup> Journal of Laws 2020 item 374.

<sup>6</sup> Journal of Laws 2020 item 569

well as the draft Act on Granting Public Aid to Rescue or Restructure Businesses, which has not yet been adopted.

Here is a summary of the most important issues in the particular areas of law included in the Anti-crisis Shield that are of relevance to businesses (issues of labour law, social security law and tax law are presented in separate alerts). Please do not hesitate to contact us if you need a further explanation on the issues mentioned here.

## CONTRACTS

### Expiry of contracts in shopping centres

The Anti-crisis Shield provides for the expiry of mutual obligations of the parties to commercial lease, tenancy or similar contracts for the use of commercial areas in shopping centres with a sales area exceeding 2000m<sup>2</sup> during the period of the ban on business activity.

Within three months after the government's order is lifted, tenants should submit to the Landlord an unconditional and binding offer to extend the contract on the same terms as before by the duration of the government's ban and an additional six months. If no offer is made within the three-month period, the provisions on the expiry of the obligations under the lease agreement cease to be binding on the landlord. In those circumstances, the landlord will be entitled to claim the rent from the tenant also for the period of non-operation during the government's ban and the contract would continue as if the expiry never took place.

This regulation replaces the originally proposed reduction in rent by 90% while maintaining the lease agreements in force. An amendment proposing to extend the scope of the provision to tenants of all retail premises in the event of a significant reduction in activity (drop in sales revenues by at least 75%) was rejected.

### Extension and termination of commercial leases

Commercial lease agreements concluded before the Anti-crisis Shield came into force and due to expire before 30 June 2020 can be extended until 30 June 2020 on the current terms. Before the lease agreement expires, the tenant should present the landlord with a relevant statement of intent. The Anti-crisis Shield also prohibits landlords from terminating lease agreements or increasing the rent before 30 June 2020. The prohibition does not apply in certain cases, including in the event that the tenant violated the agreement before the Anti-crisis Shield came into force.

### Maximum prices and margins

The Minister of Health, in consultation with the minister responsible for matters of the economy and the minister responsible for agriculture and rural development will be entitled to issue ordinances establishing maximum prices or maximum wholesale and retail margins used in the sale of goods or services that are significant for the protection of health or safety of people or household maintenance costs.

Anyone who applies prices or margins higher than those determined in an announcement from the Minister of Health will pay a fine of PLN 5,000 to 5,000,000. In addition, repeated or large-scale breaches of the prohibition can also lead to the President of the Office of Competition and Consumer Protection ("**President of the OCCP**") issuing a decision setting a fine of up to 10% of the turnover achieved in the financial year before the year in which the fine is imposed, even if the offence is unintentional. The President of the OCCP may also issue a decision setting a fine of up to 5% of the turnover in the financial year before the year in which the fine

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<sup>7</sup> Journal of Laws 2020 item 567

is imposed, but not more than PLN 50,000,000, on any entity that: (i) fails to provide information requested by the President of the OCCP, or provides false or misleading information; or (ii) prevents or hinders the President of the OCCP from starting or performing an inspection, even if the act is unintentional.

#### Contracts under the public procurement law

The Anti-crisis Shield entitles the parties to amend public procurement contracts if it is found that circumstances related to the occurrence of the COVID-19 epidemic affect or may affect the due performance of the contract. Any such circumstances should be reported immediately. The Anti-crisis Shield gives examples of what circumstances may have an effect; in particular the absence of employees, decisions and orders from the relevant authorities, or the suspension of supplies, and these circumstances also apply to the relationship between a contractor of a procurement order and further subcontractors. Within 14 days of receiving information from the contractor that the proper performance of a contract is affected or may be affected by the current situation, the contracting authority and the contractor may agree to amend the contract, in particular by (i) changing the deadline for performing the contract or part of it, or temporarily suspending the performance of the contract or part of it, (ii) changing how the delivery, supply or construction work is performed, or (iii) changing the scope of the contractor's performance, and a corresponding change in remuneration, though each increase in remuneration cannot exceed 50% of the value of the original contract.

By analogy, due to the circumstances caused by COVID-19, a public procurement contractor may demand that the payment of a contractual penalty or damages for non-performance or improper performance be waived, and this also applies to subcontracts. The amendment of a contract in this way, as well as a failure by the contracting authority to make claims to which it is entitled, will not, in the above circumstances, constitute a breach of the Public Procurement Law or public finances discipline, and for contracting authorities that are commercial companies, it will not give rise to liability for causing damage to the company, or constitute the offence of an abuse of trust in business transactions.

Concerning the above regulations, the construction industry recognises that the contracting authority can, but does not have to, reflect the effects of COVID-19 in the content of the public contract. The industry has been critical of the fact that it is not possible for the contractor to exercising its contractual right to withdraw from the contract solely due to the effects of the epidemic. It also suggests that the new regulations should also apply to proceedings where bids have been submitted, but the contract has not yet been concluded.

#### **SUSPENSION OF TIME LIMITS OF PROCEDURAL AND SUBSTANTIVE LAW**

The Anti-crisis Shield suspends the time limits set out under administrative law, (and so, in principle, those related to rights or obligations under public law), including: (i) those on which granting legal protection before a court or authority depends; (ii) those for the party to perform actions shaping its rights and obligations; (iii) the statute of limitations, and (iv) prescription periods, where the failure to comply brings negative consequences for the party. The suspension is for the duration of the state of epidemic announced due to COVID-19.

The first draft of the act also provided for the suspension of civil law deadlines. However, following a correction by the government and the position of the Ministry of Justice, and the Senate's subsequent amendment adopted by the Sejm, this provision was limited to time limits under administrative law. It was noted that such far-reaching interference in civil law relations could lead to a paralysis of economic life at a time when there is an epidemiological threat or a state of epidemic (debtors with unperformed obligations could invoke the suspension of time limits in order to avoid the negative consequences of the failure to fulfil their obligations on time, even if COVID-19 was not a factor preventing them from fulfilling their obligations on time). However, the mechanism introduced limits on the protection of the parties to contracts, since, regarding the statute of limitations for civil law claims, it does not introduce a general suspension during an epidemic (in order to suspend the running of a limitation period, it will be necessary to demonstrate the existence of an obstacle preventing the rights from being asserted before the courts). In addition, the prescription periods provided for

by civil law (precluding periods for the exercise of rights, e.g. the right of withdrawal from a contract, the evasion of a statement of intent made under threat or in error) will continue to run for the duration of the epidemic.

During the period of the epidemic, the procedural and judicial time limits in court proceedings (including civil, administrative, enforcement, criminal and criminal-fiscal proceedings) will not start, or will be suspended. Although the suspension does not apply to urgent cases, the catalogue of such cases does not, in principle, cover resolving commercial disputes. In any event, the courts are not hearing cases and are not making appointments for open hearings.

## **OTHER CHANGES**

### Remote meetings and resolutions of corporate bodies

The Anti-crisis Shield also introduces some amendments to the Commercial Companies Code, enabling the remote operation of management boards and supervisory boards (remote participation at meetings, remote adoption of resolutions) unless the articles of association provide otherwise, but regulations concerning the principles of distance communication will then be specified in duly adopted rules of particular governing bodies.

Shareholders' meetings (both in limited liability companies and joint stock companies) may also be organised using electronic means of communication, unless the articles of association provide otherwise. The possibility of remote participation at shareholders' meetings is decided by the person convening the meeting. In particular, participation at shareholders' meetings includes: (i) real-time two-way communication of everyone participating at the shareholders' meeting, allowing everyone to speak during the shareholders' meeting, despite being in a different location, and (ii) exercising their voting rights in person or by proxy before or during the shareholders' meeting. This solution also applies to shareholders' meetings convened prior to the date of the Anti-crisis Shield entering into force, but participants must be informed in the manner provided for convening shareholders' meetings, and at least four days before the date of the shareholders' meeting.

Distance voting at meetings of governing bodies using electronic means of communication will also be possible in foundations and associations.

### Statements of intent by members of governing bodies

Statements of intent can be made by members of the governing bodies of legal entities, other than the State Treasury or local government units, in documentary form (even if another legal act requires it to be in writing) and meetings of the governing bodies of legal entities are held using electronic means of communication without the members being present in the same place. The member's identity does not need to be verified with an electronic, or qualified or personal signature in order for the statement of intent to be valid, regardless of a reservation set out in any other legal act.

### Flexible trade restrictions on Sunday

During the period of a state of epidemic or an epidemiological threat, and for 30 days after it ends, there will be a temporary suspension of the prohibition on performing trade-related activities involving unloading, receiving and displaying essentials, and entrusting employees with performing such activities on Sundays that do not fall on a public holiday.

### Remuneration for collective management organisations and subscription fees

During the period of a state of epidemic or an epidemiological threat, the organisations ZPAV, ZAiKS, STOART, SAWP, SFP and ZASP will not collect remuneration from entities that does not directly depend on

the income or revenue of that entity for the provision of its services in a given period. The Polish TV licence fee will not be collected either.

## System of development institutions

In addition to the above, amendments to the Act on the System of Development Institutions extend the financing possibilities and the scope of activities of Polski Fundusz Rozwoju S.A. (the *Polish Development Fund; PFR*), including through the implementation of government programmes aimed at removing the effects of the COVID-19 epidemic. The amendments to the act aim to clearly distinguish the PFR's commercial activities from those commissioned by public administration institutions. Other restrictions resulting from the current regulations are also removed, e.g. by allowing businesses to be financed not only in the form of the PFR purchasing newly issued shares, but also through purchasing existing shares.

The draft sets out that, in connection with the effects of the COVID-19 epidemic, the Council of Ministers may entrust the PFR with implementing a government programme to provide financial support to businesses. The proposed amendments to the Act on the System of Development Institutions provide for solutions enabling the PFR to fully participate in actions taken in connection with combating crises arising from COVID-19.

## Central Register of Ultimate Beneficial Owners

Article 195 of the Anti-Money Laundering and Terrorist Financing Act sets out a six-month transition period for companies required to report information to the Central Register of Ultimate Beneficial Owners (UBO Register) to comply with this obligation. According to Article 195, the transitional period should end on 13 April 2020, but the Anti-crisis Shield extends this deadline until 13 July 2020.

## Extension of the time limit for engaging an auditor

The EU rules on the rotation of audit firms will apply directly to audit firms and public trust entities (i.e. banks, open pension funds, investment funds and issuers of securities), which provide for a maximum audit engagement period of 10 years. Audit firms will therefore be able to audit financial statements of public-interest entities for more than five years (but not more than 10 years).

In addition, any administrative and judicial administrative proceedings that have been initiated but have not been completed before the date of the Anti-crisis Shield coming in to force in cases of non-compliance with the maximum statutory audit engagement will be discontinued.



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