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Changes to the definition of insolvency introduced by the 2015 reform of the Polish insolvency law

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Reform of the Polish insolvency law

- initiated in 2012, concluded with the Restructuring Law of 15 May 2015 (RL)
- substantial changes to the Bankruptcy Law of 28 February 2003 (BL), including modifications to the definition of insolvency
- new provisions apply from 1 January 2016



Structure of Polish insolvency proceedings

- **bankruptcy proceedings (*upadłość*) under the Bankruptcy Law**

→ applicable to insolvent debtors

- **4 restructuring proceedings (*postępowania restrukturyzacyjne*) under the Restructuring Law**

- arrangement approval proceedings (*postępowanie o zatwierdzenie układu*)
- fast arrangement proceedings (*przyspieszone postępowanie układowe*)
- arrangement proceedings (*postępowanie układowe*)
- reorganization proceedings (*postępowanie sanacyjne*)

→ applicable to debtors which are already insolvent or only threatened by insolvency

Insolvency as trigger for the opening of insolvency proceedings

- **bankruptcy proceedings: key provisions of Art. 10-11 BL**

- definitions in Art. 11 BL:

- cash-flow insolvency under Art. 11(1) and (1a) BL
(applicable to all debtors)

- overindebtedness under Art. 11(2)-(6) BL

(applicable to legal persons and partnerships, except partnerships where at least one fully liable partner is a natural person)

- **restructuring proceedings**

- Art. 6(2) RL refers to the definition of insolvency of the BL

- 'debtor threatened by insolvency' defined as debtor whose economic situation suggests that he/she may become insolvent in a short time



Cash-flow insolvency (Art. 11 (1)(1a) BL)

- defined as **inability to perform monetary obligations as they become due (Art. 11(1) BL)**
 - previous wording (until 2015): „The debtor is considered insolvent if he does not perform his due monetary obligations” → led to a mistaken literal interpretation, „rule of two invoices”
 - decisions of the Supreme Court (of 19.1.2011, V CSK 211/10; of 13.5.2011, V CSK 352/10) rejecting the „rule of two invoices” largely not followed by the courts
 - result: changed wording from 1.1.2016
- rebuttable **presumption of Art. 11(1a) BL**: inability to perform monetary obligations is presumed if delay in performance exceeds three months
- commentators: short term cash flow to be analyzed, with international auditing standards to be taken into account



Overindebtedness (Art. 11(2)-(7) BL)

- applicable to legal persons and partnerships, except partnerships where at least one fully liable partner is a natural person [→ all entities covered are also subject to full accounting requirements]
 - defined as a situation when monetary obligations of the debtor exceed the value of his or her estate and such state continues for more than 24 months
 - why 24 months?
 - to avoid including temporary situations (start-ups, valuation changes, companies with little tangible assets...)
 - to include in any case a full accounting year
 - even in such case the court may refuse to open bankruptcy proceedings if there is no short-term threat of loss of the debtor's ability to perform monetary obligations as they become due (Art. 11(6) BL)
- little significance of overindebtedness under Polish law after the 2015 reform



Overindebtedness – detailed rules

- assets excluded from the bankruptcy estate not taken into account in the calculation (Art. 11(3) BL)
- future obligations and obligations under a suspensive condition not taken into account (Art. 11(4) BL)
- subordinated shareholder claims not taken into account (Art. 11(4), Art. 342(1)(4) BL)
- presumption of overindebtedness if liabilities of the debtor according to the balance sheet, except provisions for liabilities and liabilities towards linked entities, exceed the value of its assets and this state exists for more than 24 months (Art. 11(5) BL)
- balance sheet valuation is significant for the presumption of Art. 11(5) BL but IS NOT binding for the analysis of indebtedness in the meaning of the BL → market value of assets to be taken into account, in the meaning of sale price that can be reasonably expected when sold to an unrelated entity
- purpose of the presumption – easier access to information by creditors (having access to yearly financial reports but not to internal information on the debtor's assets).



Deadline for filing for bankruptcy

- 30 days from the moment insolvency arises (Art. 21(1) BL)
- before the reform (until 31.12.2015): 14 days
- role of the presumption of Art. 11(1a) BL in calculating the deadline



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Thank you for your attention