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Abstract:

The article concerns the solvency test - a new structure of Polish company law which consists in testing the company's solvency before paying (distributing) assets to shareholders. The article interprets Article 300[15] § 5 of the Commercial Companies Code and gives initial assessment of the utility of the solvency testing mechanism as an instrument to protect the company's creditors.

For this purpose, the following issues were discussed: 1) the existence of an obligation to formally assess the company's forecast solvency and the form in which the results of this assessment should be made public; 2) the subject of the assessment - the way of understanding the ability to pay debts as they fall due and its loss; 3) the time horizon and assessment criteria - in particular, understanding of the premise of normal circumstances used in the assessment of solvency; 4) the consequences of the negative result of the solvency test on the admissibility of the payment, and 5) liability for the breach of the principles of asset distribution, including failure to conduct the solvency test or conducting it in an unreliable manner.

According to the authors, the introduction of a solvency testing mechanism to the Polish Commercial Companies Code is, in principle, a positive change, but not without any drawbacks. The authors have noticed that Article 300[15] § 5 of the Commercial Companies Code expresses a simple prohibition rule, according to which the payment to shareholders may not lead to the loss by the company, under normal circumstances, of its ability to pay debts as they fall due within the defined six-month time span. Moreover, it was noticed that the solvency test

introduced into the company law system does not have to be carried out in any particular form and open procedure. The testing procedure has not been described in detail - the Code does not contain any criteria for conducting a reliable solvency test. What is more, failure to conduct the test does not *per se* prevent the company from making a payment to shareholders.

It was concluded that the new regulation stipulates too short time horizon of the solvency projection and does not create a positive obligation for the management board to test company's solvency. In fact the solvency test gains importance only when the company actually becomes insolvent, without introducing sufficient protection against its occurrence.