ECONOMIC ANALYSIS OF THE BANKRUPTCY AND RESTRUCTURING LAW IN POLISH REGULATIONS

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Abstract

The author of this article has undertaken an evaluation of the amended provisions of the Bankruptcy and Restructuring law in Poland from the perspective of the economic analysis of law. The conclusions of the article allow for formulating the statement that the applied solutions have eliminated the ineffectiveness of the provisions prior to the amendment. They have reduced the reaction time to entrepreneurs' financial problems, increased the restructuring proceedings primacy over the liquidation proceedings in case of economic downturn. The new provisions have not only contributed to the increase in transparency of regulations but also to the stabilisation of the legal system. Undoubtedly, the major factors which have influenced this situation are the greater transparency of the proposed restructuring solutions of the restructuring law, as well as the decrease in the attractiveness of the liquidation proceedings of the bankruptcy law for public law creditors by eliminating the primacy in satisfying public law claims in the distribution of the bankruptcy estate funds, thus making the creditors more willing to take part in the restructuring proceedings. As a result of the introduced amendment of the law there have been devised the instruments of a quick reaction to financial problems, whose effectiveness has been proven by the reduction of reaction time to such problems.

Keywords: economic analysis of law, restructuring law, bankruptcy law.

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1. Introductory remarks

The entry into force of the Restructuring law[2] and the amendment of the Bankruptcy law[3] has resulted in the change of the view on the effectiveness of an entrepreneur's coming out of the crisis. It seems that the new regulations, seeking the effectiveness in mobilizing entrepreneurs to undertake early restructuring actions, have achieved a considerable success. The negative experience from the time of the bankruptcy and mandatory law was the premise to introduce amendments. Until the amendment was passed, the old legal order bankruptcies had been executed in a form resulting in the liquidation of debtor's assets[4] and only a mere part of proceedings had concerned the restructuring of companies. The amendment of the bankruptcy law found its firm justification in the statistics data which unanimously showed that Poland remained behind most of the European Union economies in terms of the effectiveness of bankruptcy proceedings. The aim of the amendment was to improve and stabilise the regulation, but most importantly, to make it more effective. The effectiveness of legal regulations in the matter of processes allowing entrepreneurs to get out of a crisis is a focal point which should be taken into consideration while assessing the new solutions. The aspect of the effectiveness of legal regulations, i.e. its economic analysis of law, was brought up not only in the 1960s of the last century, but also much earlier, however, it was not until the 19th century that the contemporary wave of economic analysis of law took place. The economic analysis of law has achieved a spectacular success in the United States of America but it is becoming more and more popular in other countries of the world as well. It has brought awareness of the need to seek a proper form of institutional structures of legal regulations and is most commonly understood as "application of economics and econometric methods to examine the forms, structures, processes, as well as results of law and of legal institutions" (Ch. K. Rowley, 1989, p. 125). Attention given to the aspect of effectiveness with reference to legal regulations might not only contribute to the growth of its transparency but also to the stability of legal system, and in consequence, to the economic growth (J. Rawls, 1972, p. 15). And is in this very aspect that the author has decided to make an attempt at assessing the amended regulations of bankruptcy[5] and restructuring[6] law from the perspective of economic analysis of law. Taking into account the conducted statistical surveys reflecting the number of bankruptcy proceedings initiated during the new regulation of the restruc-

[2] Act of 15th May 2015 of Restructuring law. Journal of Laws of the Republic of Poland 2017, item 1508.

[3] Act of 28th February 2013. Bankruptcy law. Journal of Laws of the Republic of Poland 2017, item 2344.

[4] Act of 28th February 2003. Bankruptcy and restructuring law. Journal of Laws of the Republic of Poland, item 175.

[5] Act of 28th February 2013. Bankruptcy law. Op. cit.

[6] Act of 15th May 2015 of Restructuring law. Op. cit.

turing and bankruptcy law with reference to the observed economic slowdown, we can risk a hypothesis that the new legal solutions could contribute to preventing the bankruptcy of Polish enterprises. The search for the answer to this question will be the task of this article.

2. Economic analysis of law – application of the methods used in economics studies

The relation between law and economics has been a subject of study for a long time. However, it was just recently, in the second half of the 20th century that this discussion was transformed into a scientific movement, which in the global literature appears under the name of Law & Economics (R.A. Posner 1987, p. 1–13, Ch. Rowley, 2003, p. 156, Parisi E., Ch. Rowley eds. 2005, p. 46*,* Coase R., 1993, p. 239–254) and in the Polish literature functions most commonly as an economic analysis of law. In a nutshell, economic analysis of law deals with conducting the studies of law with the use of economic tools (R. Coase, op. cit. 239–254, H. Kermeeser 2000, p. 127, G. Becker, 1990, p. 67*,* E. Mackaay 2000, p. 124). Its core is constituted by a variety of concepts (Pomaskov J., 2015, p. 209–217, Chrupczalski Sz., 2008, p. 17, Mercuro N., Medena S.G, 2006 p. 34, Bartkowiak R. 2010, p. 17–29 Tokarczyk R. 2007, p. 175–184). Its fundament is constituted by a variety of concepts – the main ones include rational choice theory, transaction costs and Coase theory (B. Bouckaert, G. Geest 2010 p. 65).

With reference to law, the model of rational choice is used to describe and predict the choice between two legal norms. This action is characterised by a high similarity to the prediction of market decisions due to the fact that particular legal norms bring certain costs, which have to be covered by people behaving in such a way as to fulfil these norms. It is thus expected that the stimuli created by law should have an influence on the actions of rational entitites who make choices. By means of law a legislator may induce the members of a society to behavioural patterns allowing to achieve aims desirable from the perspective of the society. The main postulate of law economics is law efficiency. This term is a source of many misunderstandings among lawyers and economists, which concern its definition and its relation with the concept of justice; since lawyers tend to identify efficiency with effectiveness in the realisation of the aim which was determined by a legislator in a given case. Such an approach does not, however, determine the overall aim which should be realised by law (Stelmach J., Brożek B., Załuski W., 2007, p. 57). Economists set out this aim by using the term of efficiency, relating to the value produced by a society within limited resources. In case of law efficiency means that it should have a form allowing to reduce the waste of resources. By realising their goals, rational economic entities attribute specific values to given resources – presented in utility categories, welfare or wealth. Law efficiency determinants used by economic analysis of law are, among

others, *Pareto's efficiency criterion,* which is based on improving the situation of at least one entity, which it has influence on, and simultaneously not deteriorating the situation of any other entity.

The second is *Kaldor-Hicks's efficiency criterion and wealth maximisation.* Two economists – N. Kaldor and J. Hicks – formulated efficiency criterion relating to the preference of the entities engaged. A more effective solution, according Kaldor-Hicks, may cause deterioration of the situation of some entities, however, it is assumed (even just theoretically), that entities which have noticed an improvement could make a compensation in favour of those entities which have experienced loss due to the changes applied. Thus, in Kaldor-Hicks's view, such legal solution is efficient if the benefit of its implementation for the entities which it influences, is outbalanced by the related costs.

The third one is the criterion of Nash and Rawls, according to which societies are a complicated network of interactions of particular entities – generally speaking, social welfare (social utility) for a certain state of affairs is a product of individual utilities values in this state for particular entities. It means that social welfare depends on the situation of the weakest entities – the weakest chain link, which is the society itself. In an extreme case, when one of the links is given a zero value, the result of the whole chain drops to zero. The abovementioned concept thus takes into account an incomplete substitutability between utilities for individual entities. J. Rawls proposes interaction of two rules: the first one – the principle of justice – requires equality and liberty of all the participants who follow it in a state of unawareness, i.e. having no knowledge of their future financial and social status and of their other capabilities (H. Olszewski, M. Zmierczak, 2004, p. 165). As for the second one, it allows for the existence of social and economic inequality, yet only when they are most beneficial for the least privileged ones (the so called maximin principle). The criteria of Nash and Rawls are more seldom applied within economic analysis of law than the criteria of Pareto and Kaldor-Hicks. In the first half of the 20th century one could notice a great interest of the scientific environment in the interdependence between law and economics. A breakthrough did not occur in Europe but in the United States of America and, more specifically, at the Chicago University, from which the first school of Law & Economics took their name (Stankiewicz W., 2007, p. 98).

Contemporary schools of economic analysis of law are often defined as the schools of the main current of Law & Economics (the Chicago school and the New Haven school), there are nevertheless other, new approaches to the examination of law with the use of economic tools (e.g. the Virginia school, which has recently gained in significance, as well as institutional Law & Economics). The beginnings of interdisciplinary way of teaching within law studies at the University of Chicago, which included e.g. lectures on economics and accountancy, could be noticed in the late 1930s. Of vital importance was the employment of R. Coase, who became responsible for editing the first trade magazine JourLE. The date of the release of

this magazine (1958) is sometimes considered as the moment of birth of contemporary (new) economic analysis of law, which after some time expanded to the other branches of law branches. One of the crucial impulses for the creation of new Law & Economics was the transgression of traditional boundaries of economics by works of such researchers as G. Becker or R.A. Posner.

The next, after the Chicago School, is the New Haven School and the normative approach. The roots of the New Haven ought to be sought in the publications by G. Calabresi, who alongside with Coase, Becker and Posner, is thought to be the cofounder of Law & Economics. His breakthrough article entitled *Some Thoughts on Risk Distribution and the Law of Tort* (Calabresi G. 1961, p. 499) concerned the form of law system which influences the maintenance of the appropriate level of precaution in actions that could do harm to other people, and the costs of administrating this type of system. Calabresi claimed that the aim of each legal system concerning accidents is to lower three kinds of costs: primary (i.e. immediate accident costs, e.g. loss of life, estate damage), secondary (i.e. costs related with insufficient loss compensation for sufferers) as well as tertiary (i.e. costs of administrating the system). Calabresi encourages to introduce normative changes in the binding legal system so as to implement these aims. The New Haven school partially refers to the works of Calabresi but it is based to a great extent on the model and premises of the Chicago School, places a greater emphasis on market failures, which should be eliminated (Katz A., 1998, p. 189).Government intervention aiming to eliminate market failures should be based on the analysis of costs and benefits and a vital role in this process is played by the government institutions. In another view it is accentuated that the school of New Haven uses Law & Economics for the economic justification of the public intervention, realistic analysis of politic and bureaucratic institutions, and to define the role of courts in the modern system of decision making (S. Rose-Ackerman, 1992, p. 88).

In the recent years a new approach at the interface of law and economics has been developing. It is functional in character and is mainly based on the works of public choice theory, particularly on its most important school, originally connected to the Virginia University in the United States of America (thus the name – Virginia School). Public choice theory, which took its modern form in the middle of the 20th century, could be defined as an economic analysis of non-market process of decision making or – to put it in a simpler way – economic analysis of politics (J. Wilkin, 2005, p. 33). The objective scope of public theory choice corresponds to the field of politics studies (e.g. state theory, voting rules, voters' behavior, political parties actions, bureaucracy), however, in the conducted analyses, the methodology characteristic of economics studies is applied. In the main it means the acceptance of a basic assumption that political actors are typical *homo oeconomicus* and are driven by their own interest, which is to maximise their own utility. It result in adopting the rational choice model for the actions of political character. The role of

government role (authority) is to counteract the market failures. Its representatives assume at the same time that the government acts impartially in the interest of the public, intervening only there where market powers and other public mechanisms lead to unfavourable outcomes from the public interest view of politics. Thereby, in the functional approach a particular attention is paid to the imperfection of political nature in the process of creation of legal solutions. The basic assumption of the functional approach representatives within Law & Economics, which draws directly from the public theory choice, is a so called normative individualism. It means that the reflections on the public situations at the aggregate level should always be understood as a result of choices and actions of individual entities, which strive for achieving their goals, whereas in the judiciary and law-making practice the functional analysis means focusing on impulses lying on the grounds of a particular legal or public structure, which has produced certain legal solutions, and not on direct attempts at costs and benefits assessment of given solutions. It appears nonetheless that some success has already been made, as far as the matters of connections between individual preferences and outcomes at the nationwide level are concerned. What is also pointed out are the roles of institutional mechanisms and individual choice. Law analysis is treated as a part of a wider movement, which is called a new institutionalism. From the Law & Economics perspective, what seems crucial is to stress out that an economic system is a part of a wider public system and it dictates that scientific analyses of economy should deal with the last one, while taking into consideration not only economic aspects but also others, which have or may have influence on economic activities, including legal system (J. Bełdowski, K. Metelska-Szaniawska, 2007 p. 51–65). Hence, an institutional approach within the economic analysis of law consists in both influence of economy on law and juridical reasoning, as well as the influence of law and changes in legal solutions on activity and economic situation.

3. Effectiveness of the bankruptcy and restructuring law

The macroeconomic situation in Poland since 2016 has been very favourable. Above all, a very good condition of the world economy, including the economic situation of the Poland's biggest trade partner – Germany, guaranteed the retention of the Polish economy at a growth level, however, the best period in the Polish economy is already behind us. In the first quarter of this year, similarly to the previous years, a high GDP rise at the level of 5,2% YoY, yet the indicators for the market outlook in Poland do not reach such high levels as in the previous year[7]. The interdependence between bankruptcy processes intensity and macroeconomic situation of economy is a phenomenon well documented in the literature. It is indicated therein that these

[7] Figures on the basis of Central Statistical Office (GUS) and COFACE data for 2017 (initial data). Bankruptcies and restructurings of companies in Poland in the first half of 2018.

processes have a considerable influence on such factors as periodic position of economy, including dynamics of GDP, level of its openness and financialization level, availability of outside financing as well as of level of inflation of interests rates. Their actions depend largely not only on a current economic situation of companies themselves but simultaneously, as it was already mentioned, they depend on legal solutions, mainly within the bankruptcy law. Improvements of these procedures (acceleration and costs reduction) could in a short time cause paradoxical relations between GDP dynamics and bankruptcy, which is illustrated in the Fig. 1.

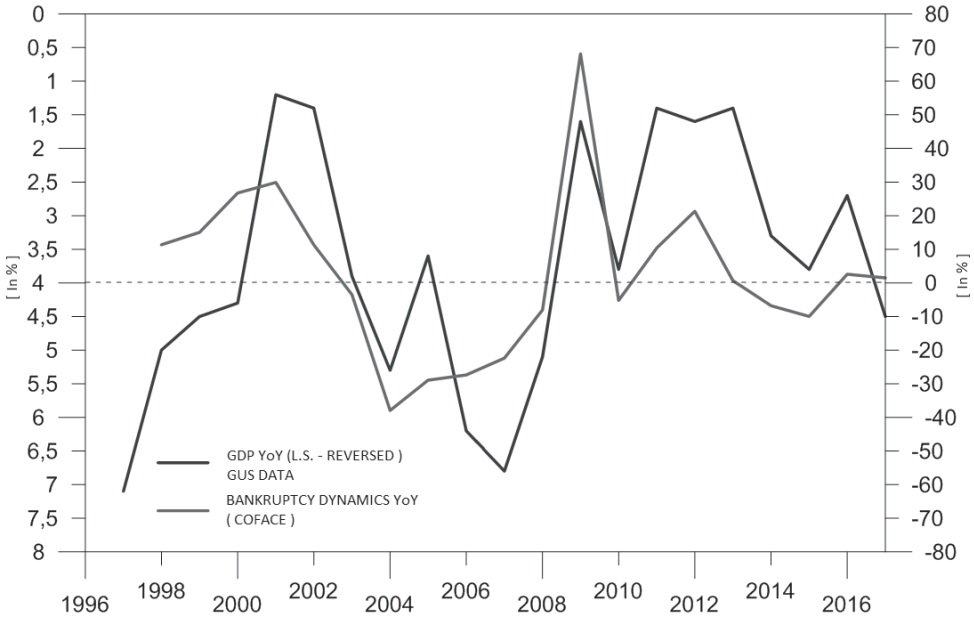

Figure 1. GDP dynamics and bankruptcy dynamics (YoY)

Source: Chart made according to the GUS and COFACE data of 2017 (initial data), after: Fijorek, K., Kaczmarek J., Kolegowicz K., IV report of monitoring the current economic situation in sectors – research 2016–2017 – joint report, The Małopolska School of Public Administration of the Cracow University of Economics

As it is clearly shown, the bankruptcy and restructuring law in that form did not guarantee transparency and fitness of the bankruptcy procedures; it did not properly fulfil a function of clearing the market from insolvent entities; it caused that in practice – against the assumptions of bankruptcy proceedings – the bankruptcy aspects prevailed and the restructuring aspects were marginalised (E. Mączyńska, 2014, p. 34). Until the amendment was passed, the bankruptcies were mostly realised in a form of liquidation of the debtor's assets (84% of proceedings opened in 2011–2015), and only a small part of the proceedings concerned the restructuring of companies (pre-packaged bankruptcies), giving hope for renewal or continuation

of the operational activity of a company, which was essential from the perspective of working out solutions of coming out of crisis. Adequately directed legislative changes were indispensable to improve the parameters of recovering the assets from an insolvent debtor. The average recovery rate in the proceedings carried out in Poland was lower than the one noted in other European Union countries. According to the World Bank data, the assets recovery rate in the bankruptcy proceedings in Poland was only a slightly more than 60%. A significantly better recovery level was characteristic of not only the strongest European economies but also some of the Central and Eastern Europe countries. Poland is ranked below the average for the EU in terms of time needed to regain dues form the insolvent debtor, but also in terms of costs of the bankruptcy proceedings in relation to the debtor's assets. In our country it is on average 15%, whereas in EU the rate amounts to 10,3% P. Dziurak, M. Lewczuk, G. Borodiuk, B. Drajczyk, 2017, p. 66). The effectiveness of the law regulating the bankruptcy processes could be then measured by the level of claiming of liability as well as by the costs of bankruptcy proceedings in relation to assets value. The experiences from time before 2016 showed that often the fact of declaring bankruptcy prevented carrying out a successful restructuring. A certain kind of stigmatisation of entities in pre-packaged bankruptcy hindered the operational activity. The former contracting parties of entity in pre-packaged bankruptcy resigned from cooperation with a bankrupt entity or changed cooperation conditions for fear of failure, which deteriorated the economic situation of the entity and decreased the chances for reaching an arrangement. The introduction of a clear division between bankruptcy and restructuring has allowed for distinction between entities driven by serious financial problems and those that stood a chance to survive and continue their activities. A new restructuring law, by offering restructuring tools, was to encourage entities to a faster reaction to financial problems, which was conducive to opening restructuring proceedings and to entering into a dialogue with creditors in order to undertake remedial actions. It could be stated on the basis of the abovementioned statistics that the introduced regulation changes have generated stimuli for entrepreneurs to undertake faster actions within the judiciary restructuring, which is undoubtedly an indicative of effectiveness of new solutions in the restructuring law. Restructuring proceedings, introduced at the beginning of 2016, are more frequently applied, and their participation in all proceedings is growing – in 2017 it was 39%, whereas in 2016 it constituted 27%. In the first half of 2018 there were 191 noted. They constitute 41% of all proceedings, therefore, similarly as it was in the first half of 2017 (38,5%).

Bankruptcy (A) and restructuring (B) provisions in Poland in the first half-years in 2008 - 2018

Type of bankruptcy proceedings	I-VI 2008	I-VI 2009	I-VI 2010	I-VI 2011	I-VI 2012	I-VI 2013	I-VI 2014	I-VI 2015	I-VI 2016	I-VI 2017	Change 2018/17	**I-VI 2018**
(A) Bankruptcies	170	274	287	290	348	388	363	350	289	238		**276**
(A) Bankruptcies with the possibility of arrangment	32	49	65	58	76	82	61	59	23	0		**0**
(B) Approval of arrangement proceedings ***									1	6		**2**
(B) Accelerated arrangement proceedings ***									43	88		**109**
(B) Arrangement proceedings ***									12	22		**19**
(B) Remedial proceedings ***									18	33		**61**
total	202*	323*	352*	348*	424*	470*	424*	409*	386*	387**	+21%	**467**

* State acc. to knowledge at the end of each year

** State acc. to knowledge at the end of the first half-year of 2017

*** Restructuring procedures which have appeared since 1st January 2016

Source: COFACE report: Bankruptcies and restructurings of companies in Poland in the first half of 2018

It could then be stated that due to law amendments entrepreneurs react faster to financial problems, which results in an earlier starting of the proceedings of a restructuring character than it was before the legislative changes. From the analytical point of view, the lack of delay in filling for restructuring proceedings should result in a decrease in liquidating proceedings. In case of material influence of law changes on the economic reality, a distinction in number of liquidation bankruptcies after 2016 is noticeable. It should be stated that although the best period of Polish economy has already passed, the number of liquidation bankruptcies has not risen, and what is more, it has maintained a lower level than in 2016. The reaction time to the financial distress i.e. lasting from the moment of the first sign of financial problems till the opening of the restructuring proceedings has been shortened from 16 to 10 months, so by more than 35% and, it could be then stated that the implemented legislative changes have reached their goal. Taking into account the fact that – apart from developing instruments of fast reaction time to the financial problems – the effectiveness of the restructuring law lies in the level of reclaiming liabilities, as well as the amount of proceedings costs, it is difficult then to refer to the last ones, as most of the arrangements made within the new law framework from 2016 have not been finished yet. It needs to be admitted though that the relation of the growing number of restructuring proceedings to the number of arrangement proceedings on the grounds of the former legal state entitles us to draw a conclusion that the solution applied in the new law regulations, both in bankruptcy law (e.g. annulment of priority of satisfaction of public receivables), as well as in restructuring law, is to increase the primacy of saving a company in crisis over liquidation, which is more beneficial from the economic point of view.

4. Conclusions

Despite a considerable economic retardation, the number of bankruptcies on the grounds of the new law has not increased and has maintained a steady tendency; whereas the number of restructuring proceedings is still growing, which is a desirable change and implicates a conclusion that the growth of those particular proceedings – in case of an economic downturn – enables not to increase the number of bankruptcy proceedings, because entrepreneurs faster and more willingly file for restructuring proceedings. Undoubtedly, of influence is here a greater transparency of the proposed restructuring solutions of restructuring law, as well as diminishing of attractiveness of liquidation proceedings of bankruptcy law for the public creditors – annulment of priority of satisfaction of public receivables within division of funds of bankrupt's estate, who currently eagerly take part in the restructuring processes. Due to the implemented law amendment, there have been generated instruments of a fast reaction to the financial problems, which is proven by reducing reaction time to them. Furthermore, the administered division of proceedings into liquidation and restructuring has enabled a distinction of entities completely insolvent from those that stand a chance of coming out of crisis and carrying out a successful restructuring. The lack of overdue applications for restructuring proceedings should result in longer term in a decrease in the number of liquidations proceedings. The main postulate of law economics is law efficiency, yet lawyers and economists put it in other words: lawyers often identify efficiency with successful realisation of the goal which was determined by the legislator, while economists set a goal using the term of efficiency referring to the worth made by society within limited resources, so as to waste them at a minimum possible scale. A legal solution is efficient when it leads towards amelioration of the situation of at least one entity which it has influence on, and simultaneously not deteriorating the situation of any other. Undoubtedly, new legal solutions comply with efficiency definition by Pareo, ameliorating the debtor's legal solution and not deteriorating the creditors' situations. At the same time they follow Calabresi's line of reasoning which emphasises elimination of market failures through government intervention, which in this situation, by the use of an amendment, has eliminated the failure of restructuring instruments from before 2016. The conclusions allow for formulating a statement that the applied solutions have eliminated the failure of regulations from before the novelisation. They have reduced the reaction time to the financial problems of entrepreneurs; they could increase

the restructuring proceedings primacy over the liquidation proceedings in case of economic downturn.

Summary

The author of the article has made an attempt to assess the amended regulations of bankruptcy and restructuring law in Poland from the perspective of economic analysis of law. The conclusions allow for formulating a statement that the applied solutions have eliminated the failure of regulations from before the novelisation. They have reduced the reaction time to the financial problems of entrepreneurs, they could increase the restructuring proceedings primacy over the liquidation proceedings in case of economic downturn. New legal regulations have not only been conducive to the increase in transparency of regulations but also to the stabilisation of legal system.

Streszczenie

Autor artykułu podjął się oceny znowelizowanych przepisów prawa upadłościowego i restrukturyzacyjnego w Polsce perspektywie zapisu na sąd polubowny. Wnioski artykułu pozwalają na przyjęcie stanowiska, ze zastosowane rozwiązanie wyeliminowały niesprawności przepisów sprzed nowelizacji. Nowe przepisy przyczyniły się nie tylko do wzrostu przejrzystości regulacji, ale i do stabilności systemu prawnego. Niewątpliwie wpływ na tę sytuację ma większa przejrzystość zaproponowanych rozwiązań restrukturyzacyjnych prawa restrukturyzacyjnego, jak również zmniejszenie atrakcyjności postępowań likwidacyjnych prawa upadłościowego dla wierzycieli publicznoprawnych – zlikwidowanie pierwszeństwa zaspokojenia wierzytelności publicznoprawnych w podziale funduszy masy upadłości, którzy obecnie chętniej uczestniczą w procesach restrukturyzacyjnych. W wyniku wprowadzonej nowelizacji prawa zostały wypracowanie instrumenty szybkiej reakcji na problemy finansowe, czego dowodem jest zmniejszenie czasu reakcji na takowe problemy.

Słowa kluczowe: ekonomiczna analiza prawa, prawo restrukturyzacyjne, prawo upadłościowe.

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