Cross-border issues are becoming increasingly common in the globalised world. Significant insolvencies generally involve companies with operations or assets in several jurisdictions. The EC Regulation on Insolvency Proceedings (EC) No. 1346/2000 of 29 May 2000, introduced in 2002, determines which set of local laws should regulate insolvency proceedings that have a cross-border element within the European Union.

COMI
As a general rule, the EU Insolvency Regulation states that the debtor should commence its main proceedings in the jurisdiction where it has its centre of main interests (COMI) according to Article 3(1) of the Insolvency Regulation. Article 3(1) also provides that the courts of the member state in which the debtor has its COMI will have the power to initiate insolvency proceedings. In the case of a company, the place where it has its registered office is deemed to be the COMI in the absence of any proof to the contrary. From a practical point of view, if a debtor’s assets are located in various European Union member states, the preliminary proceedings and the determination of COMI are key, as these issues will determine the further steps prescribed by the Insolvency Regulation.

However, the Insolvency Regulation makes no provision for groups of companies, and therefore each company subject to insolvency proceedings is a “debtor” within the meaning of the Regulation. The question at hand is: what happens to a subsidiary in Poland when insolvency proceedings against the parent company are initiated in another EU country?

PRACTICAL PROBLEMS
The question can be reformulated: does the subsidiary in state A belong to the parent company in state B so that B’s insolvency proceedings include the subsidiary and its assets (a group approach), or is the subsidiary an independent entity operating autonomously in state A (where its registered office is located) and therefore the legal effects of the parent company’s insolvency proceeding do not extend to its subsidiary in state A?

Subsidiary in one member state controlled by an insolvent parent company in another member state
To answer these questions, one should first analyse how important it is that the subsidiary regularly administers its interests in the member state where its registered office is situated and the fact that the parent company is in a position to control the subsidiary by virtue of its shareholding and power to appoint directors.

According to the EU Court of Justice (case C-341/04, Eurofood), the mere fact that the economic choices of the subsidiary are, or can be controlled by a parent company in another member state, is not enough to establish that the preliminary proceedings should be initiated where the parent company has its registered office. This means that the COMI of the subsidiary is still initially assumed to be state where its registered office is located. However, an exception to this rule arises if circumstances that are both objective and ascertainable by third parties show that the COMI is different from the location of the registered office. This could be the case of a company which does not conduct any business in that member state.

POLAND - CASE STUDY
An excellent example of this is provided by the Polish case of Emtec Consumer Media CEE sp. z o.o. The Polish court decided that this Polish subsidiary’s COMI was in fact in France, not in Poland where its registered office is located and that insolvency proceedings should be conducted within the framework of the insolvency proceedings of Emtec’s French parent company. The court’s reasoning was based on the following head office functions: (i) location where the company’s board meetings took place, (ii) applicable law of the main contracts, (iii) location of the main financing banks, (iv) centralised management of supply, human resources, accounting and IT functions, (v) the company’s management resided mainly in France and (vi) the creditors of the company knew, when concluding their contracts, that the likelihood of their receivables being paid depended on the good financial condition of the parent company. Moreover, the Polish court determined that only restructuring proceedings conducted under French law would enable the preparation of a proper restructuring plan for the group of companies as a whole in favour of all of their creditors and employees.
CONCLUSION

This case is in line with the approach taken in other European jurisdictions where the courts have been prepared to determine the COMI of group subsidiaries which are largely controlled by their parent company to be in the jurisdiction where the parent company has its registered office. It demonstrates the Polish court’s willingness to address cross-border insolvency issues on a case-by-case basis. In particular, the Polish court was prepared to conduct an in-depth and careful analysis of every factor relevant to determining where the company has its COMI and which made its COMI ascertainable by third parties, including the subsidiary’s reliance on functions undertaken by its parent company. The case shows that Polish jurisprudence, in general, complies with and shares the approach adopted by the European Court of Justice. As noted in the Q3 2014 edition of Global Insight changes to the EC Regulation on Insolvency Proceedings which are likely to come into force in 2017 include radical, new proposals for the more efficient coordination of the insolvencies of groups of companies. In the meantime it is encouraging to see the Polish court’s willingness to take a pragmatic approach to COMI in a manner which should best facilitate the restructuring a whole group of companies, rather than insisting that each subsidiary must be dealt with separately.

“It demonstrates the Polish court’s willingness to address cross-border insolvency issues on a case-by-case basis.”

Krzysztof Kycia
Partner
Warsaw
+48 22 540 74 09
krzysztof.kycia@dlapiper.com

Magdalena Dec
Associate
Warsaw
+48 22 540 74 29
magdalena.dec@dlapiper.com