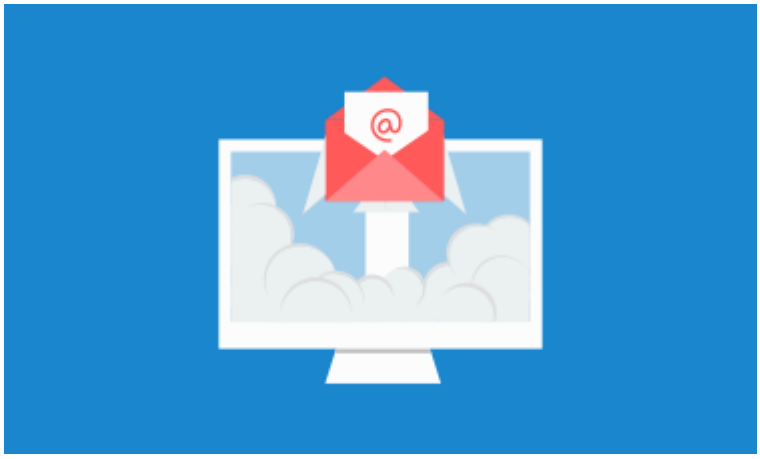
NEWSLETTER NO 68.

Of the Association of Corporate Lawyers

1. **Meeting in the Ministry of Justice**
2. **Corporate Acquisitions and Restructuring of Trading Companies – Towards a New Corporate Culture**

1. Meeting in the Ministry of Justice



Representatives of the Ministry of Justice of the Republic of Croatia in charge of rules and regulations of the civil and commercial law (further on referred to as: The Ministry) and representatives of the Union of Lawyers Members of the Croatian Chamber of Economy (further on referred to as: the Union of the Croatian Chamber of Economy) held a common meeting in the premises of the Ministry on 25th October, 2018.

The Union of the Croatian Chamber of Economy reminded the Ministry on our written proposal bound to amendments of the Civil Procedure Law regarding amendments of the Civil Procedure Law, Article 89.a, Para 2, as well as on the proposal that a lawyer employed by any of associated companies could represent all associated companies, and not only the company that employed him/her, and those proposals had been already addressed to the Ministry earlier.

The Union of the Croatian Chamber of Economy opened the question bound to proposals and lobbing of the Croatian Bar Association regarding amendments of the Civil Procedure Law, and especially regarding the allegation from the Report of the current president of the Croatian Bar Association at the Electoral Assembly that was published in the "Glasilo" – the Journal of the Croatian Bar Association – Attorney-At-Law No 7-8/2018:

- The exclusive right of compilation of sale and/or purchase contracts for real estates (page 12); and
- The introduction of the exclusive right of representation of attorneys-at-law in commercial disputes (page 13).

At the meeting, representatives of the Ministry orally stated following points regarding amendments of the Civil Procedure Law:

- They were informed about our proposals;

- The focus was on e-communication;
- Disputable proposals were bound to the legal institute of audit;
- The Jurisdiction Department would not permit any further procedures without repeated public counselling that was expected to begin in November and to end by the end of 2018;
- Proposals of the Union of the Croatian Chamber of Economy regarding the identification card at courts would be prescribed in the Court Rule Book since that issue entered into the domain of the Court Rule Book, and not into the domain of the Civil Procedure Law.

At the end, representatives of the Ministry emphasised that they were open for all the proposals and arguments, because in such a way the Ministry, cooperating with working groups, could envisage the big picture of a certain area and foresee consequences that could be expected in the practice for proposed amendments. Therefore all the proposals coming from lawyers from trading companies were welcomed.

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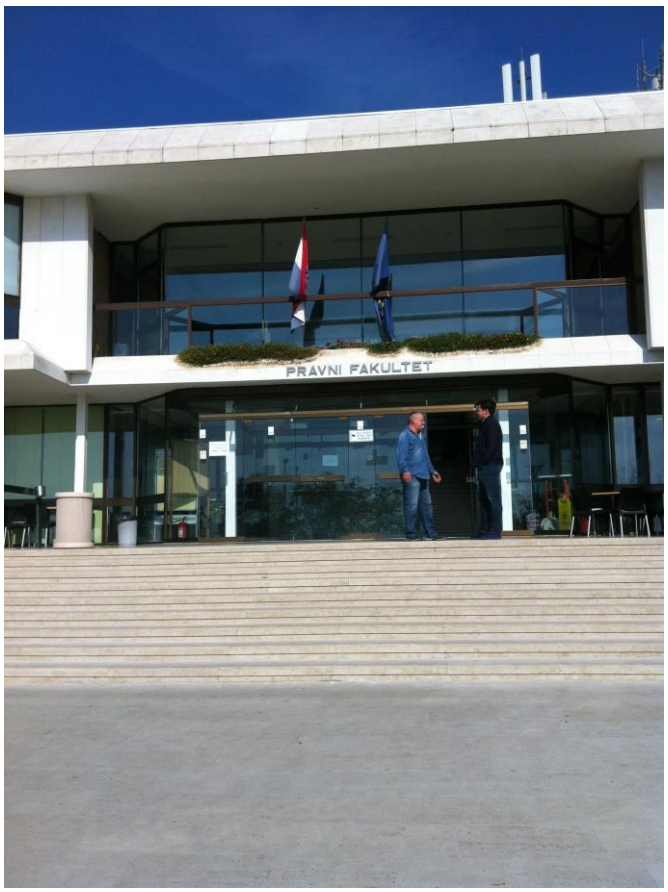

2. Corporate Acquisitions and Restructuring of Trading Companies – Towards a New Corporate Culture

The Faculty of Law of the University of Rijeka have been performing a scientific and research project of the Croatian Science Foundation in the scientific area of humanities and the scientific filed of the law under the name „Legal Aspects of Corporate Acquisitions and Restructuring of Trading Companies Based on Knowledge" (further on referred to as: the Project) during the time period from 1st February, 2015 to 31st January, 2019. An international conference was held within the frames of the Project in Rijeka on 19th and 20th October, 2018.

Topics of the Conference were harmonised with the target of the Project itself and bound to the process of acquisitions as a part of the commercial function of a trading company with the aim to conquer each time bigger part of the market of goods and services together with restructuring of the trading company, all seen from the point of view of the law of trading companies, capital market law, financial law, market competition law and intellectual property law.

After accession to the inner market of the European Union, Croatian trading companies have been facing the challenge or corporate regrouping through corporate acquisitions, i.e. restructuring. That is an inevitable consequence of the bidirectional process: entering of foreign competitors in the Croatian market and domestic trading companies in the inner European market. Cross border and/or domestic corporate regrouping can have various forms depending on the selected legal model. Therefore the main aim of the Project is to research those legal aspects and to propose those legal models that would enable restructuring of

companies based on the knowledge to trading companies when they are making decisions on selection of the best restructuring model with the aim to survive or to increase their success in the market and to the legislator when making future amendments of relevant laws and other rules and regulations.

As a general issue of the restructuring of trading companies, the issue of cross border merging of various types of joint stock companies governed by various legislations of Member States arises when individual Member States do not have the legislative prescribing that area and when they do not have the common effect of taxation either. Dario Stevanato, a professor form the University of Trieste, states that judges and academicians advocate a clearly defined taxation area as well as for intaxability of restructuring that does not include the transfer of the property. He states that every increase of the share capital is considered to be a real transfer of the property and the source of income in Italy and that it is taxable.
Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies makes cross-border mergers of joint stock companies easier defining reorganisation and restructuring (merger and division), as well as a common regime regarding tax neutralisation (deferred profit); tax credits should be differentiated from the tax neutralisation.

It was also pointed out that tax risks of mergers and acquisitions of trading companies represent a complex normative frame within which a border between a legitimate business restructuring and aggressive tax planning was estimated from one case to another. Administrative bodies of the Croatian Administrative practice refer to anti-tax avoidance rules as the base for denial of tax benefits. In addition, a provision of the General Tax Law, Article 88 (Official Gazette of the Republic of Croatia NN 115/16) that has been in force since 1st January, 2017, prescribes that the tax payer is to cover the burden of the proof of facts decreasing or cancelling a tax in a tax procedure. Since an insufficient degree of legal security of tax payers in business restructuring procedures is present, tax payers should pay attention to: the transaction substance – which is the economical ratio, documentation applications and possibilities of usage of alternative methods of conflict resolution such as obligatory legal opinions, horizontal monitoring and similar.

The role of concern rules in the function of the survival or increase of the success of trading companies in the market were also discussed. It was pointed out that the purpose of rules on associated companies was the protection of the danger that a member of the company that was also involved in a business activity would force depending companies to work in its and not in their own economic interest.
It was also pointed out that the general opinion that when we were talking about a concern, that was always a big entrepreneur in the sense of the Accounting Law (Official Gazette of the Republic of Croatia NN 78/15) that divided entrepreneurs to micro, small, middle and large depending on indicators defined on the last day of a business year preceding the business year for which financial reports were being made was not correct because when we had micro entrepreneurs that had the same founder – a member of the company, they were also associated companies.
A significant “breaking” of managing independence of the dependent company happened in a contractual concern and concern after a merge, while general corporate managing rules continued to apply in general in an actual concern pursuant which the dependant company had a bigger or a smaller managing independency (depending on the fact whether the company was a joint stock company or a limited liability company). The right of concern regulated the effective management in different manners in various forms of the concern. Those rules could approximate the concern to completely independent companies or to completely united (merged) companies.

Economic movements and trading company restructuring processes as well at the national level and at the level of the European Union brought with themselves changes in the structure of the company through transfer of companies, plants or parts of a company or plant to other employers, as a consequence of contractual transfers, mergers or union of companies.
Consequences of such a transfer of a part of the company from the employer transferor to the employer transferee are: Outside Resource Using or outsourcing, self-employed physical persons, hidden workers, opening the question of the protection of employees' vested rights.
When we talked about cross-border transfer of a part of the company, the issue of the vested right protection was governed by the Council Directive 2001/23/EC of 12th March, 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
The right had to follow changes (disintegration of the company), but also recognise and protect the employee (an economically dependent person) regarding the real employer with a special emphasise on the importance of implementation of serious and continuous inspection audits.

With the aim to increase the success in the market or the survival, companies uses state subventions that are estimated at the national level on the basis of the national rules and regulations at the level of the European Union pursuant the Treaty on the Functioning of the European Union and pursuant Guidelines of the European Union on state subventions for financial recovery and restructuring.
Each subvention awarded by a Member State or awarded through state assets in any form that undermine or threatens to undermine the market competition putting certain entrepreneurs or manufacturing of certain goods in a more advantageous position is incompatible with the inner market in proportion in which it influences the trade among Member States.
Therefore it is obligatory to inform the European Commission on all the plans for awarding or replacement of subventions to enable it to give its opinion. If the Commission considers that every of such plans is incompatible with the inner market, the European Commission initiates the prescribed procedure without any delay up to the completion of the case in which any Member State fails to apply proposed measures.

The example of Austria is given as an example of the Member State of successful business activities and restructuring of trading companies where out of 430,000 entrepreneurs, 1.2 % have conditions for bankruptcy, while 600 bankruptcy procedures open in the European Union every day. Austrian insolvency procedure models start form the target of such procedures and then certain assets are being adjusted to the target. They have court procedures – bankruptcy and financial recovery procedures and a possibility of making an out-of-court settlement in which the debtor calls every of its creditors without any public advertising to enter the out-of-court settlement.

In the European Union 50 % of all the entrepreneurs do not survive 5 years of operation, 200,000 entrepreneurs go bankrupt every year (600 daily), 1.7 million working places disappear annually and ¼ of all bankruptcies has a cross-border element – involving debtors and creditors in more than one Member State due to which a proposal of the frame for preventive restructuring and giving of the second change is being considered that would be taken in the company in which the first signs of illiquidity are being noticed. The status of (pre)insolvency of corporate groups requires "tailor made" solutions.

The importance of managing and protection of the intellectual property was also emphasised in the function of the survival or increase of the success in the market of trading companies. Namely, types of entrepreneurs on the basis of the approach to management of the intellectual property are divided into three groups: passive, reactive and active, and they are presented as a reverse pyramid in which the most numerous are passive, and there are few active. That should be changed in the future as well.

Establishment of special funds for the development of new and innovative products contributes to that as well as possible influences of the management of intellectual capital to the price of the stock of the registered company.

Personal note: CIRP business operations are recommended: careful, innovative, rentable and prompt.

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In Zagreb, October of 2018

Association of Corporate Lawyers

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