Readjustment of the European Constitution in times of financial and economic crisis

Prof. Dr. Andreas Fisahn – Uni Bielefeld

Legitimation by Ignorance

Postal Vote Papers for the election of the EU Parliament in Cologne:

„Wahlschein für die Wahl des Europarates am 7.Juni 2009.“

„Voting Paper for the Election of the Council of Europe…“

Legitimation by Ignorance

„Legitimationsprobleme im Spätkapitalismus „
„Legitimation Crisis“ in advanced capitalism
(Habermas 1973)

- One of the most famous mistakes
  - Capitalisms was not advanced – compared with the alternative, „communist“ system
  - Capitalism started a comeback, had a neoliberal rebirth
  - “Kolonialisierung der Lebenswelt” (Colonisation oif the cicivil society) by state influence was not a real problem for the people

Legitimation an Direspect of the law

Financial and economic crisis leads to legitimation Crisis of the EU, symptoms are:

- Intentional disrespect:
- Or new interpretation:
- Restriciton of opportunities to act:

By the European Constitution, i.e. self made rules

Economic stimulus package

No Competences and financial ressources for anti-cyclical crisis intervention in the treaties

Economic stimulus package of the Union in November 2008:

Capital Investment of 200 Mrd, splitted in:

⇒ 30 Bio. EU Investment

- ⇒ Foreseen in the budget for other things or for a later date

⇒ National econonomic investment packages in Germany:

- ⇒ 80 Bio. Investment in Infrastructure and car scrappage bonus
- ⇒ 480 Bio. Rescue Package for German Banks,

Economic stimulus package

Result: European and/ or solidary economic policy in the Crises:

Negative report

Motto:

Rescue yourself, if you can!!!

Maastricht-Criteria

Stability and Growth Pact adopted two limits:

- ratio of the planned or actual government deficit to gross domestic product = < 3%
- ratio of government debt to gross domestic product = < 60 %.

Maastricht-Criteria

Germany:

Actual government deficit 2009 = 3,2% GDP

Actual government deficit 2010 = 5% (EU) 4% (BMF) GDP

Actual government deficit 2011 = 4,6 (BMF)

Maastricht-Criteria

Worse is Ireland:
Actual government deficit 2009 = 12,5% BIP
Actual government deficit 2010 = 32 % BIP
Actual government deficit 2011 = 14,7 % BIP

Except Finland no Euro-State stays below the 3 % limit in 2009, in 2010 al Euro Sates will be above the limit.

Forecast:
Unemployment Ireland 2010 = 14 %
Unemployment Spain 2010 = 20 %

Maastricht-Criteria

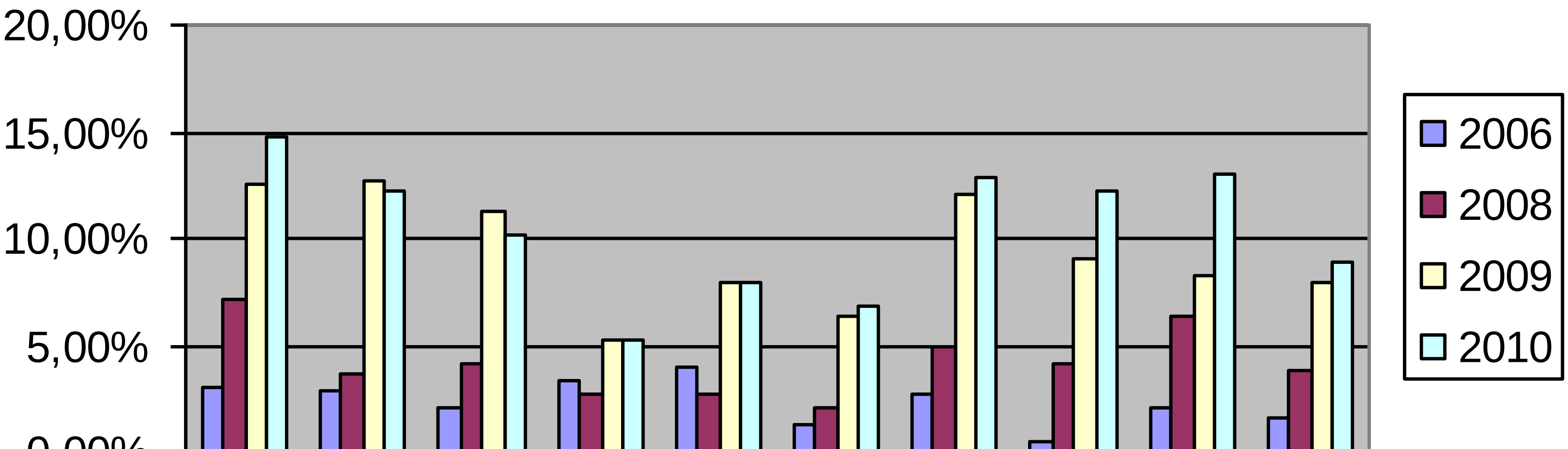
Government debt Germany in percent of the GP

2005	2006	2007	2008	2009	2010	2011
68,0	67,6	65,0	65,9	73,1	76,7	79,7

FTD 1.1.2010: Because of HRE problems, the government debt will increase in 2010 to 84 % GDP

Maastricht-Criteria

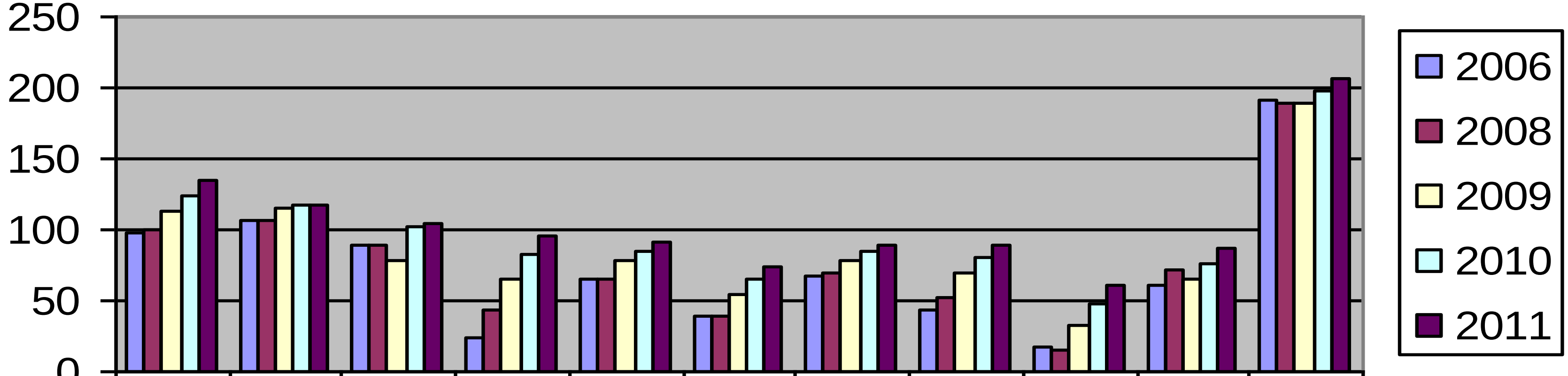
Neuverschuldung in % des BIP



	Irland	Griechenla	Spanien	Italien	Portugal	Euro-Rau	Großbrita	Lettland	USA	Japan
2006	3,00	2,90	2,00	3,30	3,90	1,30	2,70	0,50	2,00	1,60
2008	7,20	3,70	4,10	2,70	2,70	2,00	5%	4,10	6,40	3,80
2009	12,50	12,70	11,20	5,30	8,00	6,40	12,10	9,00	8,30	8%
2010	14,70	12,20	10,10	5,30	8,00	6,90	12,90	12,30	13%	8,90

Maastricht-Criteria

Schulden in % des BIP



	Griechen	Italien	Belgien	Irland	Portugal	Spanien	Euro-Rau	Großbrit	Lettland	USA	Japan
2006	97,1	107	88,1	25	64,7	39,6	68,3	43,2	18	61,2	191
2008	99,2	106	89,8	44,1	66,3	39,7	69,3	52	15,6	70,7	190
2009	113	115	79,2	65,8	77,4	54,3	78,2	68,6	33,2	65,2	190
2010	125	117	101	82,9	84,6	66,3	84	80,3	48,6	75,5	198
2011	135	118	104	96,2	91,1	74	88,2	88,2	60,4	87,8	206

Maastricht-Criteria

Box 3. Public debt in the EU (%of GDP)

	2007	2008	2009
Austria	59,5	62,6	66,5
Belgium	84,2	89,8	96,7
Bulgaria	18,2	14,1	14,8
Cyprus	58,3	48,4	56,2
Czech Republic	29,0	30,0	35,4
Denmark	27,4	34,2	41,6
Estonia	3,8	4,6	7,2
Finland	35,2	34,2	44,0
France	63,8	67,5	77,6
Germany	65,0	66,0	73,2
Greece	95,7	99,2	115,1
Hungary	65,9	72,9	78,3
Ireland	25,0	43,9	64,0
Italy	103,5	106,1	115,8
Latvia	9,0	19,5	36,1
Lithuania	16,9	15,6	29,3
Luxemburg	6,7	13,7	14,5
Malta	61,9	63,7	69,1
Netherlands	45,5	58,2	60,9
Poland	45,0	47,2	51,0
Portugal	63,6	66,3	76,8
Romania	12,6	13,3	23,7
Slovenia	23,4	22,6	35,9
Slovakia	29,3	27,7	35,7
Spain	36,2	39,7	53,2
Sweden	40,8	38,3	42,3
UK	44,7	52,0	68,1

Source: EUROSTAT 2010b

Maastricht-Criteria

Result:

Maastricht Citeria are obsolete

Answer of the EU (Council Conclusions October 2010):

- Increase fiscal discipline

Greece and the European Crisis

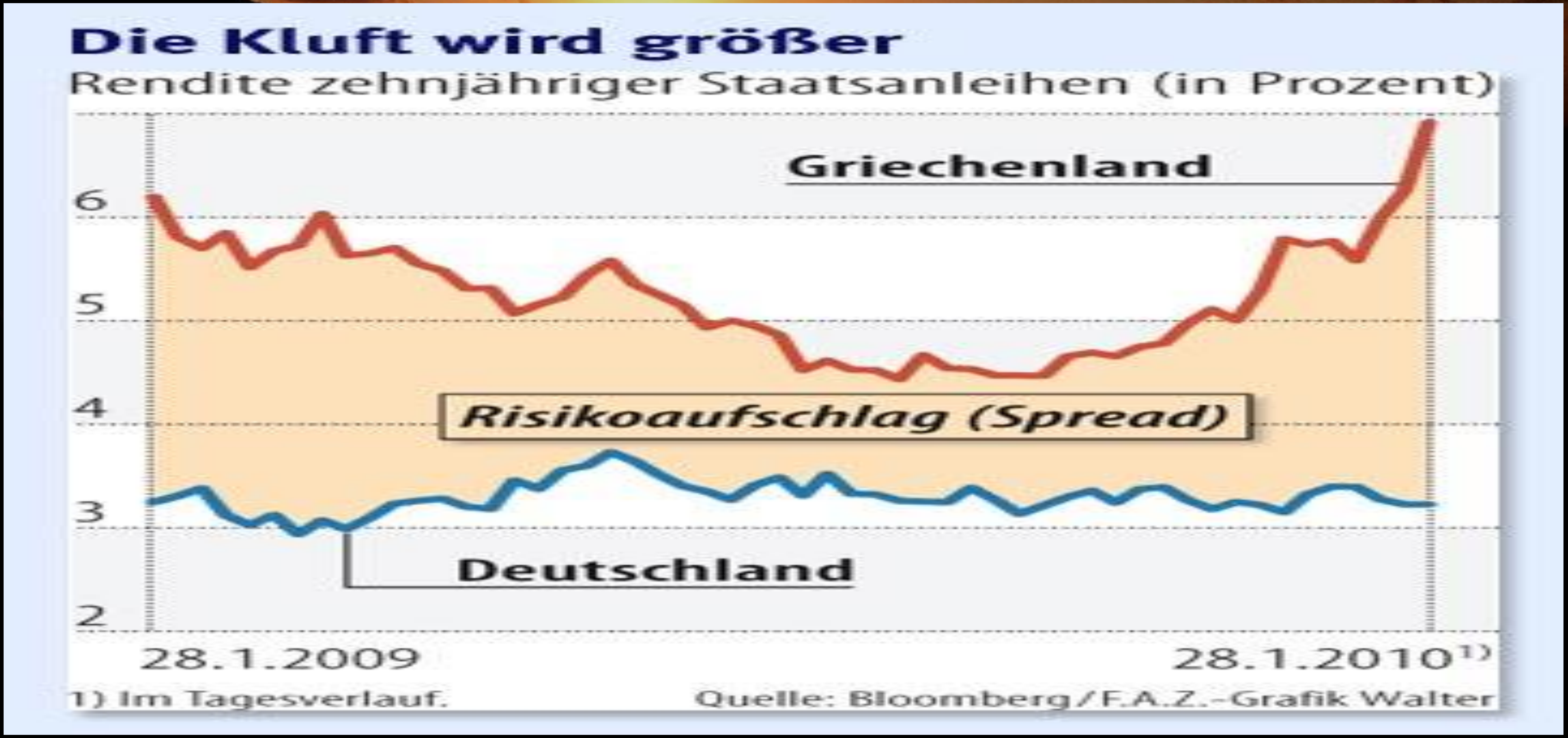
Problems in Greece were:

- Refunding of governance debt by government bonds
- Value assessment of government bond by rating agencies
- Speculation contra Hellenic bonds

Result:

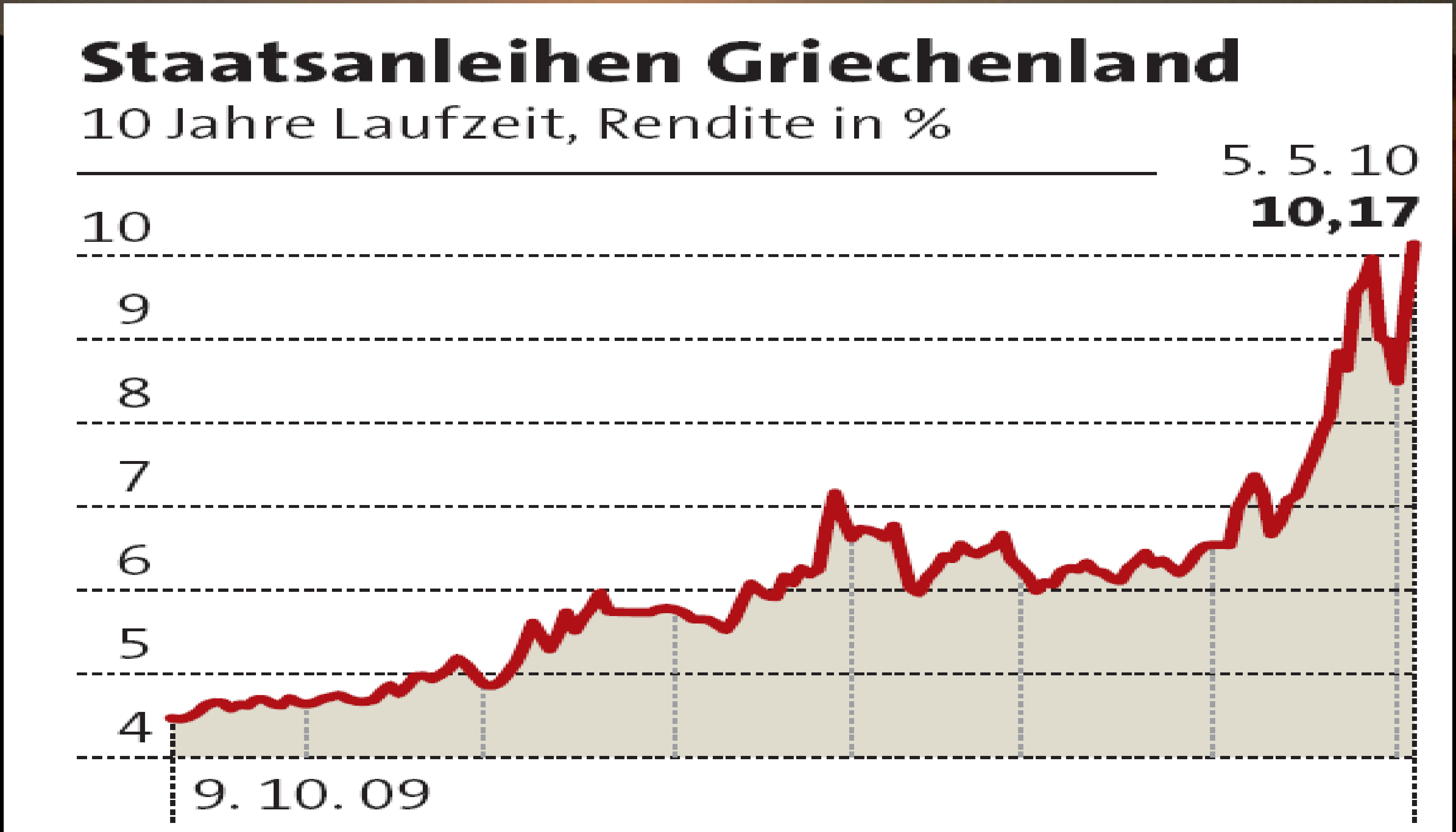
Greece and the European Crisis

Interest of German and Greek Government Bonds:

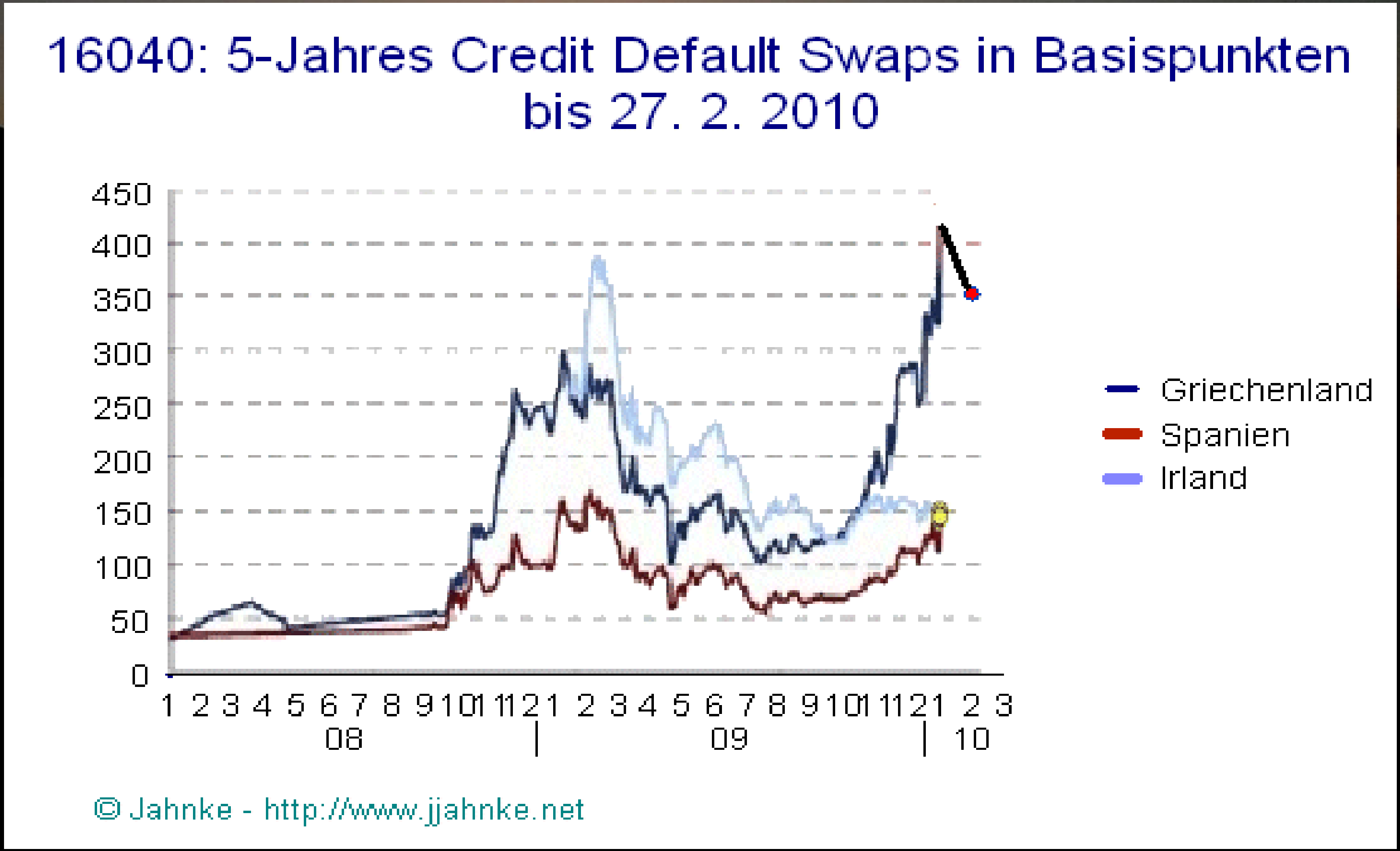


Greece and the European Crisis

Interest of Government Bonds Greece



Greece and the European Crisis

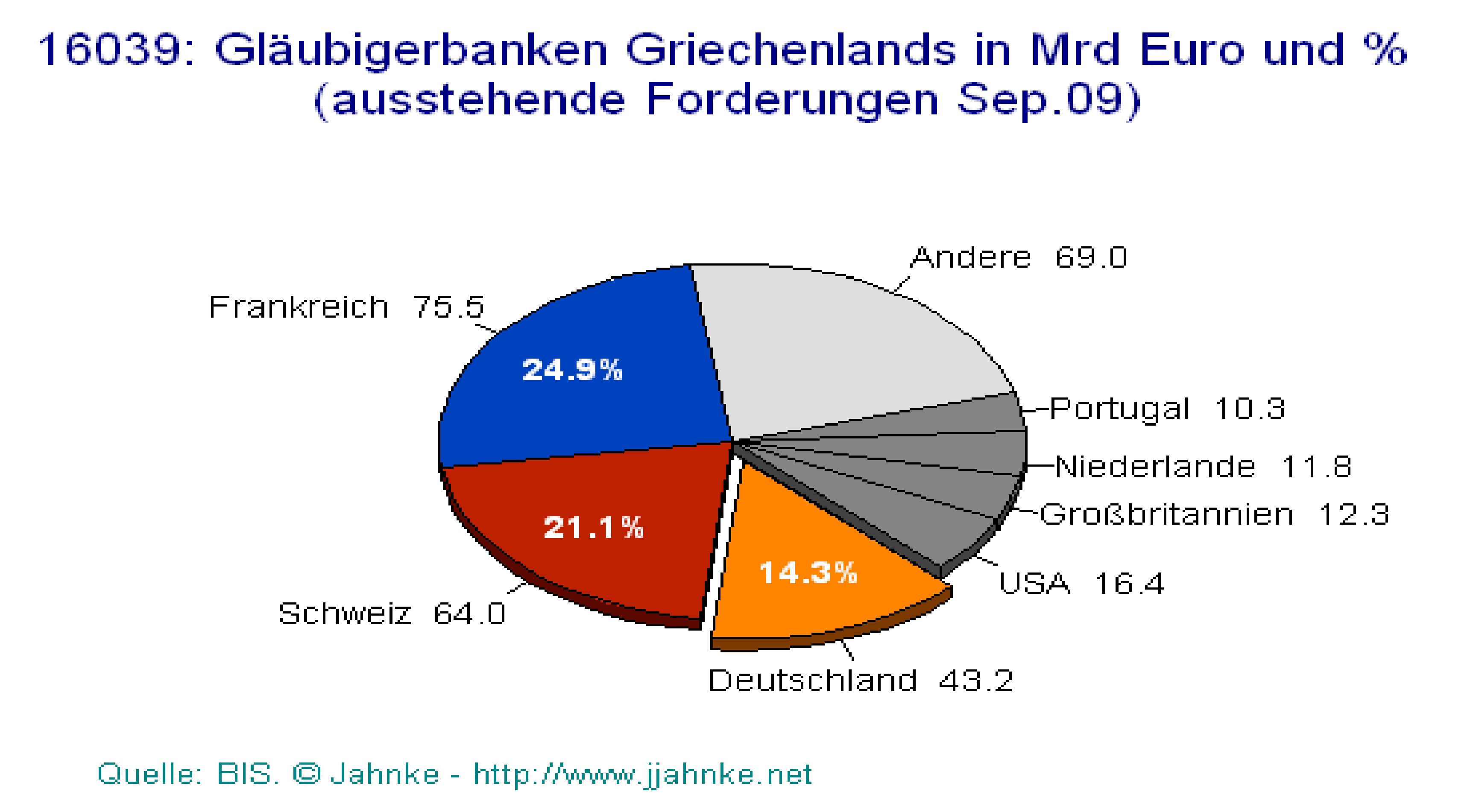


Greece and the European Crisis

No bail out

Art. 125 TFEU: 1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, ... of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, ... or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

Greece and the European Crisis



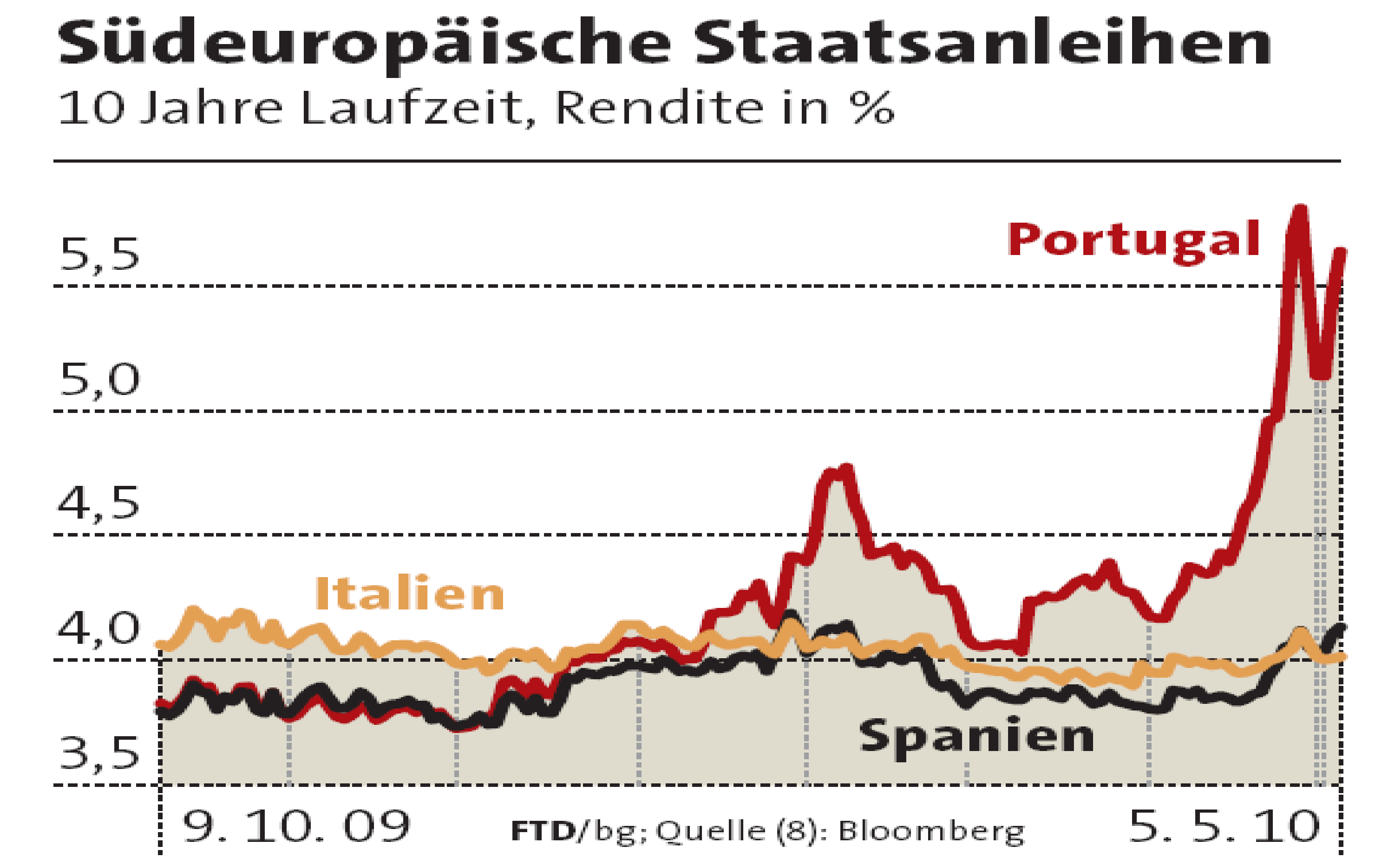
Greece and the European Crisis

The situation is still risky:

1. Still Unstable Staates in the Euro-Zone: Portugal, Irland, Greece, Spain
2. More or less insolvent Member States surviving with credits of the IMF

=> Austerity Programs during the economic crisis

Greece and the European Crisis



Greece and the European Crisis

Irish Government Bonds

Greece and the European Crisis

9. May 2010:

“The Council and the member states decided on a comprehensive package of measures to preserve financial stability in Europe, including a European financial stabilisation mechanism, with a total volume of up to EUR 500 billion.”

Greece and the European Crisis

Stabilisation Mechanism:

500 Bio. Euro EU Credits

- Direkt Credit for Greece 60 Bio
- 440 Bio Market Credits guaranteed by the memmber states

250 Bio. IMF Credit

Greece and the European Crisis

9. May 2010:

„The mechanism is based on Art. 122.2 of the Treaty and an **intergovernmental agreement** of euro area Member States. Ist activation is subject to strong conditionality, in the context of a joint EU/IMF support, and will be on terms and conditions similar to the IMF.“

Greece and the European Crisis

Art. 122 2. TFEU: Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by **natural disasters or exceptional occurrences beyond its control**, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

Greece and the European Crisis

10. May 2010:

EZB decided to buy (Hellenic) Government Bonds

Greece and the European Crisis

Art. 123 1. TFEU: Overdraft facilities or **any other type of credit facility with the European Central Bank** or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States **shall be prohibited, as shall the purchase directly** from them by the European Central Bank or national central banks of debt instruments.

Greece and the European Crisis

Council Decision 28-29. October 2010:

1. „The European Council endorses the report of the Task Force on economic governance. Ist implementation will allow us to increase fiscal discipline, broaden economic surveillance, deepen coordination, and set up a robust framework for crisis management and stronger institutions.“

i.e.: sharpening the teeth of the growth and stability pact

Greece and the European Crisis

Council Decision 28-29. October 2010:

2. “Further to the report of the Task Force, and in order to ensure balanced and sustainable growth, Heads of State or Government agree on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invite the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect, not modifying article 125 TFEU ("no bail-out" clause).”

i.e.: Modifying Art. 122.2

Conclusion of the (Hellenic) Crisis

Monetary Union can not be founded only on a deregulated internal market and anti-inflation policies

Needed is:

- Common economic policies (not only the coordination – Art. 5 TFEU)
- Common tax and fiscal policies
- Re-Regulation of the capital market
- Equal living Condition in the Member States

Conclusion of the (Hellenic) Crisis

Problems:

- Conflict between expansion of economic competences (Tax; Budget) and the democratic legitimacy
- Need of economic Government contra member state strategies - in particular Germans export orientation and economic balances in the EU

Re-Regulation of the capital market

EU constitution provides a general duty to establish free capital movement and a “free” capital market

Art. 53 TFEU: Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

Re-Regulation of the capital market

Art. 64 3 TFEU: Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may **unanimously**, and after consulting the European Parliament, adopt measures which constitute a **step backwards** in Union law as regards **the liberalisation of the movement of capital** to or from third countries.

Re-Regulation of the capital market

Article 59 TFEU: 1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.

=> Prohibition of the most restriction of capital movement

Re-Regulation of the capital market

Exampel:

- Hedge-Funds Manager makes a short trip to Berlin carrying a trunk of cash
- He uses the money for intransparent “investments” in some companies and flies back to Cayman Isles

Dissolution: Capital transaction control, i.e. obligation to obtain a permit for the transfer big amounts of money

Re-Regulation of the capital market

EuGH C-163/94, C-165/94 und C-250/94, 14. December 1995:

Articles 73b(1) and 73d(1)(b) of the Treaty, which prohibit restrictions on movements of capital between Member States and between Member States and non-member countries, on the one hand, and authorizing Member States to take all requisite measures to prevent infringements of national law and regulations, on the other, **preclude national rules which make the export of coins, banknotes** or bearer cheques **generally subject to prior authorization** but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration.

Re-Regulation of the capital market

European legislative action since 2008:

1. EU Regulation No. 1060/2009 of 16.9.2009 on credit rating agencies :
    - registration and certification,
    - transparency and information disclosure,
    - quality of ratings,
    - avoiding conflict of interests
  - Not: Rating by public agencies

Re-Regulation of the capital market

2. Establishing a Capital Market supervising system with 3 committees (amendment of different directives),

- the *Committee of European Banking Supervisors (CEBS),*
- the *Committee of European Insurance and Occupational Pensions Committee (CEIOPS)* and
- the *Committee of European Securities Regulators (CESR*).

Binding decision for the member states under a lot of conditions – member states can appeal against the decision

⇒ Intervention will be to late, no sufficient control system to avoid risky deals – the market will do the best

⇒ Mediator not Sheriff

Re-Regulation of the capital market

3. Amendment Directive 2006/48 on capital requirements (Directive 2009/111)
   – For securitisation position: duty to retain a material net economic interest which shall not be less than 5 %.

=> No Prohibition of securitisation positions or special purpose entities

Re-Regulation of the capital market

4. Basle III requirements are:

- the core capital will be increased from 2% to 4.5% of total capital;
- a *capital conservation buffer* of 2,5% will be introduced, bringing the requirements all in all to 7%. Banks are allowed to draw on this buffer to absorb losses during periods of financial and economic stress. While using this buffer, there are restrictions to pay dividends;
- as a third component countercyclical buffer ranging from 0 - 2,5% according to the conjuncture should be implemented. This buffer will only be in effect when there is excess credit growth that is resulting in a wide system of built up risk. The obligation to accumulate the countercyclical buffer will absorb capital in a boom phase and work as a break to build up bubbles;

Re-Regulation of the capital market

- A leverage ratio of 3%. This means that leverage is limited to 33 times the banks core capital;
- An essential issue is the definition of capital. According to the new agreement only own and liquid assets of the bank, i.e. equity capital and disclosed reserves, will be accepted as core capital, or *common equity*. This improves the quality of the core capital.

Re-Regulation of the capital market

Problems:

- Basle III should be implemented from 2013 to 2018
- Unclear, if it will be implemented by all states (USA)
- Legitimacy of the Basle Committee (Group of Central Bank and Bank Supervisors)
- Doubt, if financial bubbles will be avoided by this measures

Re-Regulation of the capital market

5. Proposal Directive on Alternative Investment Fund Managers:
   - AIFM should act honestly, with due skill, care and diligence (Art. 9)
   - The AIFM shall implement risk management systems and appropriate liquidity management systems (Art. 11, 12)
   - There are minimum capital requirements: either 25% of the running costs of the previous year, or in case the assets go beyond 250 million Euro, the additional own resources have to be 0,02% of the excess amount (Art. 14)
   - AIFs which hold a share above 30% in a company have an obligation to inform the stakeholders, including employees, of the company about the basic lines of their strategy

Re-Regulation of the capital market

Problems:

- Business Model itself is not questioned
- Typical Activities, which are not necessary, are not prohibited (in FRG before 2004 and again 2010) like bear sales
- No effective limit of the leverage ratio

– The AIFM Directive in October 2010 was accepted by the council

– On 15. September 2010 the commission presented a draft regulation on *Short Selling and certain aspects of Credit Default Swaps and a Regulation on OTC derivatives, central counterparties and trade repositories*

Re-Regulation of the capital market

The EU Regulation makes the casino perhaps a bit safer, in particular for gamblers, but it does not close it.

⇒Re-Regulation of the financial markets is more or less rhetoric because the regulation is restricted by the Treaties

⇒Still alive: good faith in the market, which works, if only transparency can be established

Merci

Gracie

Thanks

ευχαριστώ

Tak

Tesekür ederim

Спасибо

Gracias

Dank u well

Danke fürs Zuhören