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EJDH Asociacion Europea de los Juristas por la Democracia y los Derechos Humanos en el Mundo
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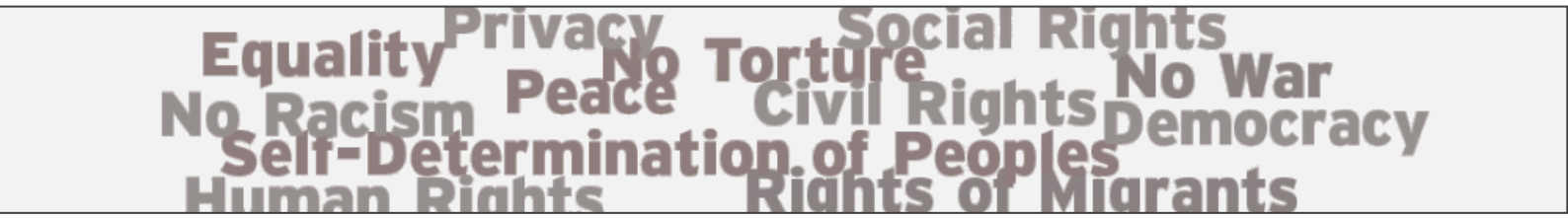
EGDU Associazione Europea delle Giuriste e dei Giuristi per la Democrazia e i diritti dell'Uomo nel Mondo



THE LEGAL IMPACT OF THE EUROPEAN 'DEBT' CRISIS

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Other speeches may be added later

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PROGRAMME

9:30 : **OPENING Theodor Symeonidis**

9:30 – 11:30 : Crisis and Labour Rights
- Coordinator: **Thomas Schmidt, Secretary General ELDH**

- **Kapsalis Apostolos, lawyer,** research associate in the Labour Institute of the Greek General Workers Confederation : changes and developments in collective labour law
- **Dimitris Perpataris, lawyer** : 'Labour Law: changes and developments in legislation and case law'
- **Andreas Mattheou, PhD, lawyer**, Social Security Law
- **Dr Zafer Yilmaz**, Ankara : 'The consequences of the 2002 crisis in labour rights and social policies'

12:00 – 14:00 : **Crisis and Criminal Law: Exceptional Law and Suppression**
- Coordinator: **Kostas Papadakis,** lawyer

- **Dimitris Belantis, PhD, lawyer** : 'Crisis and Exceptional Law'
- **Aggeliki Sarelli,** lecturer, Demokritos University of Thrace : …….
- **Giota Masouridou, lawyer** : " Criminalisation of immigration and euro- patrol'
- **Nikos Koulouris, Sofia Vidali,** criminologists, Assistant Professors of Thrace University : 'Irregular states and irregular people in a state of crisis'
- **Yiannis Rachiotis ,** lawyer
- **Professor Ralitza Dimitrova**, Sofia: Relation between Corruption and Bid-rigging and their Criminal Law Framework

16:00- 18:00 : **The influence of he crisis in the field of constitutional law and human rights**
- Coordinator: **Eugenia Kouniaki**

- **George Katrougalos,** Assistant Professor in Constitutional Law, Thrace University
- **Dimitris Sarafianos**, PhD, lawyer
- **Bill Bowring,** Professor, Birkbeck University of London, President ELDH
- **Adreas Fisahn ,** Professor of Constitutional Law, University of Bielefeld, Germany.
- **Alexandr Kuzmins,** Latvian Human Rights Committee, Riga, Latvia : 'Case-law of the Latvian Constitutional Court: bailout and the principle of legitimate expectations'

18:30 – 19:30 : **Final Remarks and Conclusion / Discussion**

- **Fabio Marcelli** : The financial crisis: solutions at international level **–**
- **Bill Bowring:** Conclusions

Managing the Crisis and Building the Hegemony: The Transformation of Labour Law, Social Security System and Social Policies in Turkey[1]

Zafer Yılmaz[2]

Introduction:

This paper aims to discuss the impact of 2001 crisis and transformation of social security system, social rights and social policies in Turkey. 2001 crisis could be seen as an important turning point in the history of Turkish neo-liberalism. As a public debt and banking crisis, it found its repercussions in every sphere of state-society and state-economy relations in Turkey. One of the most important results of the crisis was the deepening of neo-liberalism (ie. restructuration of state-society relations in line with neo-liberal mentality) and the application of second generation structural reforms in Turkey. In that context, developments after 2001 crisis could be seen as a success story of neo-liberal project in its attempt to turn crisis conditions into an opportunity to institutionalize neo-liberal mentality. Following the crisis, Turkish labour law was totally changed to open the way for a more flexible labour market. Social security system was also transformed and unified in order to produce a more "efficient" system. Meanwhile, new social policy instruments such as conditional cash transfers and social risk mitigation policies were implemented to prevent social turmoil. Hence, social assistance, social policy and legal system were partially restructured to govern the negative impacts of the 2001 crisis and to make crisis manageable.

This article attempts to unravel the basics of the articulation of this neo-liberal restructuring process. The first section of the article delineates cornerstones of this new neo-liberal politics in Turkey, which manifest itself as crisis management and neo-liberalism with a "human face"- encouraging the institutionalization of a charity mentality at the state level. The second part of the article discusses how this new politics institutionalise and increase its power via transformation and restructuring of social field in Turkey. In that context, the transformation of the legal-institutional framework of the social field with changes like new labour law (4857) and law on social security and general health insurance system will be analysed to make clear how these changes opened the way for the establishment of this new politics in Turkey. Finally, social assistance system and Islamist charity mentality of JDP will be evaluated. As will be seen shortly the latter policies share one thing in common: Indebtness. On the one hand household economic debt is increasing as a result of neo-liberal economic policies, on the other hand the Islamist charity mentality's translation into state policies have been creating a feeling of indebtness towards the state and political elite.[3] All in all, it will be argued that new neo-liberal politics as politics of managing the effects of crisis of neo-liberal debt society aims to institutionalise relations of dependency by its social policies and legal amendments.

I-) 2001 banking crisis and neo-liberal politics as crises management

The history of neo-liberalism and politics of crises management is not new in Turkey. The door was opened for neo-liberalism by a military coup in 1980. The military coup of 1980 not only led to the transformation of the political regime but also to the transformation of state-society relations and the re-structuring of the state in Turkey (Yalman, 2004). It attempted to curb down the class politics in Turkey both by closing down the political parties and trade unions in addition to restricting their activities. Military intervention was successful in its initiation in the sense that the identity politics depending on the religious and ethnic ties has taken the place of the class politics of pre-1980 period. The Post-1980 Turkish politics is characterised by

[1] This paper presented at International Conference, "The Legal Impact of European 'Debt' Crisis", Athens, organised by European Associations of Lawyers for Democracy & World Human Rights, 21st Mai 2011. I would like to thank to Asst. Prof. Ali Fıkırkoca for his stimulating comments and evaluations.

[2] Dr., Ankara University, Faculty of Political Sciences, Department of Political Science and Public Administration.

[3] For rising household debt and evolution of general structure of financial system in Turkey after 2001 crisis see, E. Karaçimen, (2009).

Islamist and ethnic issues. 1980 coup was not successful in bringing stability to Turkish politics. To suppress left politics, military directly promote Turk-Islamist synthesis and neoliberalism in Turkey. After the decline of Motherland Party (Anavatan Partisi), Turkish politics was always dominated by coalitions, which lead to a several political crises. As Coşar and Yeğenoğlu argue, "the rise of identity politics that began in the late 1980s and gained widespread appeal throughout the 1990s has served to divide the opposition and strengthen the position of neoliberals (Coşar and Yeğenoğlu, 2009: 38). This kind of identity politics both pushed further and has been supported by the redistributionary policies of governing parties for poor, which is organised in such a way that empowers the Islamist networks –as the latter have increasingly played a crucial role first at the municipal and then at the state level. One of the most important characteristics of this politics is its substitution of politics based on expansion and institutionalization of rights of subject, which has always limited impact on Turkish politics with politics of social, organised around community and religious ties. JDP has very successful in combining such kind of identity politics with neo-liberal populist paradigm that appeal the poor in crises conditions.

The Justice and Development Party (JDP) won newly hold election of June 2011 by getting more than 49.9 percent of the votes in Turkey.[4] This fascinating success was a surprise for its opponents as well as its supporters. Leftist opponents of the JDP for instance, had thought that the neo-liberal policies and reforms would cause a general discontent among the organized labour, farmers, and the poor, which would automatically lead to a loss of votes in the elections. Even though the reason behind the electoral victory of JDP is more complicated, it could be argued that the transformations of the social and political field in crisis conditions are playing a special role in rising popular support for the party. On the one hand JDP opened the political field to a certain extent by its relatively tolerant attitude towards the issues of ethic identity in Kurdish problem, supporting the accession process to the European Union and in more tolerant foreign policy on Cyprus and Armenian issue and continued the stability of Turkish economy; on the other hand it subsumed the will to change in Turkish society into economically more authoritarian neoliberal program.[5] All in all, JDP successfully convinced its voters to its new politics and the indispensability of neo-liberalism. We can not understand its success without taking into account the conditions produced by 2000/2001 crises.

To understand how JDP got the consent of people to transform social security system and passed laws that promote deepening of neo-liberalism in Turkey like new labour law, we need to glance at socio-economic conditions produced by 2001 crises. A very short sketch could give us a certain clue about social and economic impact of this twin crisis. It is well-known fact that high ratio of public sector borrowing requirement to gross national product has been main factor that make Turkish economy very fragile and vulnerable to financial crises since 1989 decision, which opened Turkish economy to short-term financial capital movements (Yalman and Bedirhanoğlu, 2010; Öniş, 2003). One of the most important results of the opening of Turkish economy to short term capital movement and rise of military spending because of the war in south-eastern Turkey was the rise of domestic debt and borrowing requirements of state in Turkey.

In that context, as Öniş argues "The financing policy of the government being based on short-term borrowing led the commercial banks to change their asset management policies. They

[4] JDP got 34.8 percent of 2002 and more than 46 percent of the votes in July-2007 elections.

[5] JDP produced a discourse that party is supporting democratization in civil-military relations, wants to eliminate the authoritarian Kemalist elites in jurisdiction, and solve the Kurdish problem. As Coşar and Yeğenoğlu states "inclusion of a Kurdish channel (TRT 6) in the state radio and television network had also reinforced this perception" (Coşar and Yeğenoğlu, 2009: 38). Meanwhile, Yalman and Bedirhanoğlu also emphasizing that "AKP government was put on stage, not only as the provider of political and economic stability which Turkey could not reach for years, but also as the bearer of a project for democratization defined on the basis of market-oriented reforms and multiculturalism". (Yalman and Bedirhanoğlu, 2010: 121). It should also be added that JDP was very successful in doing or pretended to be doing service/policy politics, which has always a constituting part of the right wing politics in Turkey.

shifted direct loan extensions to purchasing government securities. In this way domestic agents who increasingly borrowed from abroad started to finance public deficits" (Öniş, 2003: 7). As a result, banking sector began to borrow money from abroad and invested into state bonds. This system leads to Turkish banks use short-term borrowing instruments which made banking sector progressively more vulnerable to foreign exchange and interest rate risks (Öniş, 2003: 8). Finally, due to high budget deficit and inflation rate, Turkey agreed with IMF on Structural Adjustment Program. A tight fiscal policy, targeted inflation and exchange rate policies were part of this new program. After all, the program did not work and resulted with one of the deepest crises of the Turkish economy in November 2000 and February 2001. 2001 crisis primarily originated from disequilibrium in the banking sector. As Öniş argues, "it constituted the deepest economic crisis faced by Turkey in modern times. The striking magnitude of the crisis faced by Turkey may be illustrated by the fact that GNP in real terms declined by 9.4 percent during the course of the year. The result was a dramatic drop in per capita income from $ 2,986 to $ 2,110 per annum and a massive increase in unemployment by 1 million people. The crises moreover, had a deep affect on all segments of society….The crises also led to a major increase in the number of people living below the $ 400 per month poverty line and the $ 200 per month subsistence line" (Öniş, 2003: 14).

The impact of the crisis could also be seen in production, labour market (it also is estimated that 2.3 million people lost their job by another research), poverty and income distribution. In times of crisis, the real minimum wage declined substantially. Additionally, the rate of inflation rose to 68.5 percent in 2001 as opposed to 39.0 percent in the previous year (Şenses, 2003: 103). Turkish government was very inactive in preventing and eliminating the social and economic effect of the crises. Turkey's "tacit social security system which is based on intra-family and community support systems that may extend to cover close relatives, friends, neighbours, and people originally from the same place of residence meeting in a less-than-secure urban environment after a common migration experience", played a special role against negative effect of crisis (Şenses, 2003: 111). Beside of families and community networks, another most important institution, which played a crucial role in softening the effect of crisis, was informal economy. It is thought that informal economy currently covers approximately 50 percent of Turkish economy (Coşar and Yeğenoğlu, 2009). All in all, coalition government lost their political support, but they initiated a comprehensive neo-liberal program to transform state-economy relations before leaving the government. In 2002 elections, all of the coalition partners (Democratic Left Party, Motherland Party and National Movement Party) lost their political support and they stay out of the parliament in 2002 elections. Crisis opened the way for the rise of JDP (Adalet ve Kalkınma Partisi-AKP). Justice and Development Party was the new political figure, which born in conditions of the economic and political crisis.

The 2001 crisis proved that governing the economic and social effect of crisis would be very important in getting the support of people. JDP produced a kind of neo-liberal governmental logic, which depends on the idea of government as "right disposition of things", arranged so as to lead to a governing the effect of political and economic crises in an efficient way, which means turning them both into a economic and political opportunity to increase the strength of the party and new economic Islamist elites (new middle classes).[6] Things here refer to not only economic and social relations between people but also relations between state and economy, state and society. JDP produced a kind of politics, which internalise the management of crisis.[7] It combined a feeling for avoidance of crisis in society with the management of its effect by state policies. Party not only appealed to will to stability but also successfully transformed economic and social relations in crisis conditions in a way that they will be conducive to expand power of the party. On the one hand, JDP had a classic neo-liberal program, which depends on a combination of producing new areas of economic rent, transformation of "rigid" public administration structure, growth based policies to attract short-term capital and foreign

[6] For the concept of Governmentality see Foucault, (2007).

[7] As Yalman and Bedirhanoğlu emphasizes "crisis management and/or prevention has become a central concern of the neoliberal reformers in many countries so as to mitigate the adverse consequences of the market reforms". (Yalman and Bedirhanoğlu, 2010: 109).

direct investments, privatisations and populist policies which mainly includes social assistance to poor. On the other hand JDP has been very innovative in transforming the dualities like secularist and Islamist, civil and military power, which have been cutting across the political and economic field in Turkey. Additionally they have produced new dualities and sometimes directly led these dualities become main line of demarcation in political field and reason of crisis. All in all, party was very successful in governing political crises, turning around such kind of dualities and speaking on behalf of the stability, which has been main factor in Turkish politics due to Kurdish problem, economic crisis of 2000/2001 and military intervention in 1997. JDP also showed its ability in using dualities such as rigid/flexible, public administration for and against people, formal/informal. Crisis itself was used as a basis for legitimising the transformation of public policies. Without any crucial opposition, JDP changed the old labour law (1457), which was accused of being responsible from "rigid" labour market in line with above-mentioned mentality, and new labour law (4857) was introduced. Transformation of legal framework is very important in disposing new politics of social, which is a symbiosis of neo-liberal legal-institutional framework with Islamist charity mentality.

II-) Attacking labour and attracting capital: new labour law (4857) and transformation of social security system:

After 2000/2001 crisis, changing the labour law was among the first job of new assembly, dominated by JDP. The main mentality exposed in new labour law was the typical neo-liberal mentality, which aims to open the way for flexibilization of the labour market by institutionalization of subcontracting, generalizing part-time work and facilitating the cancellation of wage contracts. New labour law also paves the ground for blurring the distinction between formal and informal market by institutionalising a labour market which is structured as a corridor space between informal and formal types of work. It made passages between two areas of work more easy and pressed labour to adapt itself to conditions of crisis by imposing new institutional arrangements on the work force. One of the most important tools for this was the introduction of sub-contracting and fixed term contract into the legal system. The new labour law was supported especially organisation of capital groups like TİSK (Turkish Confederation of Employer Association); TÜSİAD (Turkish Industry and Business Association) etc. It was also evaluated as very important step to attract foreign direct investment to Turkey. New labour law was a simple revelation neo-liberal mentality. As Özdemir and Yücesan-Özdemir argues, "on 22 may 2003, the National Assembly of Turkey passed the Labour Act (No. 4857) to 'reregulate/deregulate' individual labour law in line with the neoliberal conceptualization of capital-labour relations, in which labour seen as an ordinary commodity calculable in terms of production costs. (Özdemir and Yücesan-Özdemir, 2006: 317).

First of all, as Özdemir and Yücesan-Özdemir emphasizes new labour law guaranteed the subordination of labour to capital by the very definition of work in Article 8, which states that "Employment contract is an agreement whereby one party (the employee) undertakes to perform work in subordination to the other party (the employer) who undertakes to pay him remuneration."[8] Secondly, related with the dismissal of workers, it is stated in the article 20 that "The employee who alleges that no reason was given for the termination of his employment contract or who considers that the reasons shown were not valid to justify the termination shall be entitled to lodge an appeal against that termination with the labour court within one month of receiving the notice of termination. If there is an arbitration clause in the collective agreement or if the parties so agree, the dispute may also be referred to private arbitration within the same period of time." This article introduced the concept of arbitration tribunal in the case of unfair dismissal. Introduction of this institution could be evaluated as retreat of state from its responsibility to intervene into the imbalances between labour and capital relations.

[8] For the English of the 4857 Labour Law, see, http://www.iskanunu.com/4857-sayili-is-kanunu/4857-labor-law-english/4857-labor-law-english-by-article.html.

Moreover, new labour law also changed the conditions of work substantially. As Özdemir and Yücesan-Özdemir argues, “The first important issue in the changing conditions of work is the regulation of weekly working hours; the new Labour Act allows the employer to regulate at his or her own discretion the distribution of the week’s working hours, to a maximum of 11 hours a day (Article 41)” (Özdemir and Yücesan-Özdemir, 2006: 323). This means worker can legally be obliged to work up to 11 hours a day. Additionally, Article 67, which states that “depending on the nature of activity, the beginning and ending times of work may be arranged differently for employees.”, opens the way for regulation of working hours (start and finish time) by employers. New labour law also introduced new concepts like compensatory work and overwork. It “is an ‘invention’ to prevent the worker from being paid a wage in certain cases where the employer cannot use labour power” (Özdemir and Yücesan-Özdemir, 2006: 324). It is stated in the Article 64, “In cases where time worked has been considerably lower than the normal working time or where operations are stopped entirely for reasons of suspending work due to *force majeure* or on the days before or after the national and public holidays or where the employee is granted time off upon his request, the employer may call upon compensatory work within two months in order to compensate for the time lost due to unworked periods. Such work shall not be considered overtime work or work at extra hours.” Another most important concept introduced by law was overwork. In the article 47, “in cases where the weekly working time has been set by contract at less than forty-five hours, work that exceeds the average weekly working time done in conduction with the principles stated above and which may last only up to forty-five hours weekly is deemed to be work at extra hours.” The last but not least, new labour law facilitates employers to socialize the responsibility of paying wages in times of economic crises or because of inability to meet their personal debts (Article 65). All in all, as Özdemir and Yücesan-Özdemir emphasizes “’the innovations’ in the new Labour Act aim to empower the employer in the event of any crises in production rather than creating the conditions of productivity (Özdemir and Yücesan-Özdemir, 2006: 326). The new labour law was an open transition in the mentality of labour law from protecting labour to providing security to enterprise. Labour law was just one example of JDP’s negative attitude about social rights.[9] JDP only opened issue of social rights in case of entrenching its hegemony.

One example of this attitude could be seen in 2010 referendum in Turkey. JDP insist that saying “no” would be a continuation of logic of 1980 coup and supporting status quo. Referendum was completed with the success of JDP, which canalised 58 percent of the votes to “yes”. Especially two amendments directly related with social rights in referandum. Even though there are some improvements in certain areas, the limited character of social rights has been strictly protected since 1980 coup. This limited character could especially be seen in right to strike.

JDP proposed changes in article 53, which is about “Right of Collective Bargaining” and article 54, which is about, “Right to Strike and Lockout”. To article 53, it is added that civil servants and other public employees have a right to make collective bargaining agreements. However, we should remember the fact that public employees do not have a right to strike in Turkey. Hence, this bargaining does not have a reality. In case of disagreement, parties just could apply to Public Employees Arbitration Board in the process of collective bargaining. The decision of the board will be final judgement. Meanwhile, 7th paragraph of the article 54 was also removed. It was stated in that paragraph, that “politically motivated strikes and lockouts, solidarity strikes and lockouts, occupation of work premises, labour go- slows, and other forms of obstruction are prohibited.” However, it is still not clear whether strike for political aims and expanding the sphere of rights is possible or not, since in the first article it is stated that

[9] We can detach negative attitude and policies of JDP in social rights especially in strike postponements. The legal basis for the postponements has been law number 275 which had been enacted in 1963 and the essential criteria were ‘national security’ and country’s health’. JDP never give up the attitude of 1980 coup in postponing strikes, which is seen as a detrimental to ‘national security’. Neo-liberal governmental logic exposed by JDP has always been armoured by coercion and JDP is very negative against labour movement. The exception of this attitude has been trade unions supporting JDP like Hak-İş.

“workers have the right to strike if a dispute arises during the collective bargaining process. Hence, it is up to the decision of court whether workers could make a strike for political aims or could make strike just in collective bargaining processes. Finally, to reiterate the main argument, when we consider both its social policy implementations and attitudes about social rights, it could be argued that JDP is against development of right based approach in these fields. This attitude could be traced in transformation of social security system in Turkey.

Recent developments in the social security system in Turkey should also be seen as a part of institutionalisation of the above-mentioned neo-liberal mentality. As it has been emphasized previously, Turkey has implemented a comprehensive structural adjustment program, of which social security reform has been the most important element. Social security system has been restructured in accordance with the criteria of the WB, the IMF and the European Union. Some parametric modifications like establishing the private pension system, privatization of the health system, and taking a fee from the users were realized by the previous governments. There was an agreement between internal and external actors on the transformation of social security system. It is well known that the WB and the IMF are the key institutions that push further the process of transformation and privatization of the social security systems in developing countries. Reform of the system is among the condition of new credit agreement between the IMF and Turkey, and passing the relevant law in Parliament was the structural performance criteria in 2005. It should be noted that the reform has also been influentially backed by the capital groups, especially by TÜSİAD; which is the organization of the biggest capital groups in Turkey. In spite of the resistance of labour organizations, especially KESK (Confederation of Public Employees Trade Unions) which is the biggest leftist confederation, reform was passed from the parliament. But its articles about public employees were cancelled by constitutional court and its implementation is postponed to 1 January 2008.

Before the reform, Turkey social security system was highly complicated and composed of different social security institutions, which covered state employees, wage labour, self-employed, agricultural workers, and voluntarily insured. *Sosyal Sigortalar Kurumu* (Social Insurance Institution) covered the workers and voluntarily insured, *Emekli Sandığı* (The Pension Fund) covered the state employees, and *Bağ-Kur* (Social Security Organisation for the Self-Employed) covered the self-employed. After the reform, all three were collected under one institution: Social Security Institution.

In “*Social Security Reform: Problems and Proposals for Solutions”,* which is called as the white book to legitimize the reform, the *Ministry of Labour and Social Security* referred to the aging of population, the inadequacy of the current system in covering and taking all population under protection, hence, to inadequacy of protecting the population against poverty and finally to the financial deficits of the system (Erdoğdu, 2006: 215). It is asserted that the current system is inefficient and the aims of the reform are to decrease the social security deficit to the level of 1 percent of the GNP and ensuring the norm unity of the system. JDP criticised existing social security system by emphasizing three points: its costs were out of control, the system was fragmented, and it made the labour market less flexible (Coşar and Yeğenoğlu, 2009: 39). It could be said that reform is successful in furnishing the unity of norms in social security system. However, this unity is achieved on behalf of the elimination of the rights of the members of the social security system. When the issue is standardization of three system in terms of the minimum age for gaining a right for salary, required premium day, pension rate, etc., minimum common denominator (the worst regulation) among them is always taken as a norm to standardize the system (Erdoğdu, 2006).

Reforming the pension system cleared the way for structural transformation of all social security system in Turkey. For this reason, the previous non-structural reform of the system, that aimed “to improve social security…system by strengthening its finances or/and tightening its entitlement conditions”, is complemented by a comprehensive structural reforms, which “radically transform a public system by replacing, creating an alternative to or supplementing it

with a “private” system.” (Mesa-Lago, 2002: 1310). This transformation can be seen in the structure of new pension system. New social security system will have three components: (i) continuation of the public system without a fund, which guarantees the minimum wage and depends on the defined-benefit; (ii) development of the privately administered pension system with a fund, which depends on the defined-contribution and ensures a salary that in proportion to payments; (iii) establishment of a private pension system, which also depends on defined-contribution and personal participation (Erdoğdu, 2006: 222). Turkey’s social security system will be a mixed system, which includes both public and private pension institutions examples of which are being implemented in Argentina, Uruguay and Mexico.

Even though the proponents of the structural pension reforms refer to financial deficits of the system, the reality is totally different. The problem of financing the social security system is a consequence of the low level of state contribution, low participation into the labour force, widespread informal sector, and transfer of the system’s resources to other activities (Erdoğdu, 2006). The new law has risen the retirement age (65 age and 7200 working days), lengthened the contribution period, and reduced the retirement, disability and survivor benefits and pensions. As Coşar and Yeğenoğlu emphasizes new law anticipates the gradual fixing of the retirement age at sixty-five for both men and women, with a contribution period of 7200 work days (Coşar and Yeğenoğlu, 2009: 43). However, JDP promoted new law as bringing equality to all sectors of society. Law to a certain extent brought “equality” by standardizing right to health. [10] On the one hand it brought the right of application to all (public/private) hospitals to insurers. On the other hand, it brought user fees. In that context, general health insurance system was the most important novelty introduced by new law.

As Coşar and Yeğenoğlu emphasizes, “the law has been promoted as providing a health security to the whole population and is mandatory insurance plan, which for the JDP means universal health insurance. However, everyone, except those with monthly income of less than one-third of the minimum wage, is required to pay premiums at the rate of 12.5 percent of income. The premiums for people currently holding a green card-if they still qualify for it after the means testing under the new legislation-and for those under the age of eighteen are paid by the state. The law says that those with premium debts will be denied health security benefits, and the Social Security Institution is authorised to enforce these debts through property seizure” (Coşar and Yeğenoğlu, 2009: 44).

Notwithstanding its certain positive novelties, new social security system brings direct losses in social rights. For instance, in the previous system, the daughter of the insured could continue to benefit from the salary of his father/mother when the insured passed away and in case of being single or divorcing from her husband, or in case of being a widow, but new reform ended this implementation and gave just a 25% of salary of insured as a monthly (survivor’s pension). This is only one example of the negative results of the reform for women. More importantly, reform also designates the paradigmatic shift in the mentality of social policy, from a citizen- and security based to a customer and protection based one (Özuğurlu, 2003). When we take into the consideration the reality that Turkey do not have a systematic program to prevent or alleviate poverty with the minimal and temporary character of existing programs, it can be said that this “real subsumption” of social security networks will lead to the increase of the poverty in the long-term and strengthening of informal sector in Turkey. As Coşar and Yeğenoğlu emphasizes “the new social security law (Law on Social Security and General Health Insurance) represents a significant step in ongoing process of the commodification of social security and public health in Turkey (Coşar and Yeğenoğlu, 2009: 37). The importance of this transformation lies in JDP’s successfull presentation of law as bringing equality in reaching to health service to poor and canalising support of society to amendments that weaken social rights. This process has been complemented and supported by residual neo-liberal social policies, composed of short-term social assistances to poor.

[10] It should be added that even if doctor organizations in the health sector have been criticizing the reform in the health sector, improving the health service has been seen as one of the most important reasons of increasing support of poor to JDP.

III-) Accumulating gratitude (minnet) capital via social assistances and rise of new neo-liberal debt society

JDP is the only political party since the 1990s that has been able to form a single-party majority government and increased its vote in successive three elections. Its success depends on a combination of neo-liberal program (sound monetary policy, privatization, second generation reforms, which includes health, public personal law and social security system reforms) with a populist paradigm, which attempts to attract support of the poor. For Coşar and Yeğenoğlu, party's success lies in (1) "in its liberal version of a Turkish-Islamic synthesis, which combines a neoliberal approach to poverty with Islamic charity networks" (Coşar and Yeğenoğlu, 2009: 39). JDP's matching of neoliberal anti-poverty agenda with the conservative Islamic community and charity-based anti-poverty strategies has always took attention of social scientist (Yalman and Bedirhanoğlu, 2010: 120). The secret of this match lies in JDP's new politics of the social and its policy packages. It would not be wrong to say that JDP's new politics and hegemony has been entrenched by this new politics of social. The transformation and reconstitution of the social played a special role in that context to get the support of people. One the one hand JDP changed the conditions of production of social in political economic sense by changing legal-institutional framework by new amendments like new labour law and social security system; on the other hand it substituted the market to a certain extent in production of the social by state supported short-term social assistance system.[11] It combined the process of reconstitution of the social in an entrepreneurial form with its restructuring around a newly emerged constituent, composing of conservative social and economic solidarity networks instead of classical profit-seeking individual of pure neo-liberal paradigm.[12] Its clientelistic orientation, family centralism and neo-liberal-cum-conservative welfare mentality could be described as main characteristics of this politics of the social in the Turkish context. As a result, it could be argued that JDP not only transformed the relation between social and political, but also reconfigured the relation between constituting part of the social both topographically (class relationship, composing the social) and spatially (rural-urban and socio-spatial relationship in urban sphere) by its social policies.[13]

Pro-poor policies of the party has played crucial role in canalising the support of the poor to entrench its hegemony. Because of the limited nature of welfare system in Turkey, JDP supported social policies, which consist of assistance to the poor directly by providing coal, food and education aid. These short-term and limited assistance policies are very important in attracting poor people's support. To understand what kind of pro-poor policies and tools are used by JDP, the nature of welfare regime and institutional structure in Turkey should be reviewed.

In terms of assessment criteria such as level of protection, covered population, risks and condition of benefiting, the existing welfare system in Turkey is "minimal and indirect" (Arın, 2003: 72). Moreover, it will not be wrong to say that it is an *informal security regime,* in which informal networks play an important role in provision and redistribution of welfare. In addition to the state, other institutional mechanisms have been playing an important role in contributing to the well-being of individuals, families, communities and societies (Gough, 2004).[14] Before the

11 Social assistance system is composed of charity activities of municipalities, Islamic oriented civil society organisations and Social Assistance and Solidarity Foundations in Turkey.

12 JDP could be evaluated as a matchmaker between moderate Islamism and capitalism. The social that promoted by JDP is a kind of social, being cut across by the networks of conservative Islamic communities, which have entrepreneurial sprit. JDP successfully carried this entrepreneurial sprit to its vision of politics also. For how JDP transformed the attitude of Islamic communities' and its electoral base's general attitude toward capitalism see, Tuğal (2009).

13 Social policies of JDP both diminished the social effect of changing relationship between rural and urban areas and changed the socio-spatial relationship in urban areas after 2001 crisis. These policies not only promoted but also rendered acceptable the rise of new Islamist middle classes.

14 Diverse types of welfare state, alternative ways of constituting welfare regimes, the causes of welfare state differences and the criteria with which we should judge whether and when a state is a welfare state have a been highly disputed since the emergence of the welfare states in the West and the institutionalization of Keynesian policies. The well-known intervention of Esping-Andersen in Three Worlds of Welfare Capitalism can be seen a path breaking for welfare state studies. However, it can be argued that in spite of the valuable insights of the welfare regime paradigm, it is highly questionable whether these models can be used to understand Southern countries.

reform, this welfare regime was consisted of a social security system and a social assistance system to alleviate poverty, the latter including fund (Social Assistance and Solidarity Encouragement Fund), foundation (Social Assistance and Solidarity Foundation), and the green card system. Aim of the green card is to provide a free health service to poor. However, to get green card, users should not be a member of social security system and their wage should be lower than the 1/3 of the minimum wage (currently gross minimum wage is 729 TL (320€) and net is 576 TL (253€). It is estimated that more than 10 million people had a green card in 2005.

Benefiting from resources of the Fund depends on the appreciation of a local committee, which evaluates the request of the poor. Hence, the decision to determine who is the neediest and can benefit from the fund's resources is left to these committees of local administrators. It is argued that this assistance system, which is so organized that favouritism can play decisive role, makes poor more and more dependable on personal political relations (Şenses, 1999). In 2004, the law related with green card was amended and green card holders began to benefit from all health related services without making any payments. As Coşar and Yeğenoğlu emphasizes, "while this made the JDP more popular among the poor, it also led to complaints that benefits provided through the Green Card system motivated people to misuse and abuse the system." (Coşar and Yeğenoğlu, 2009: 41).

In terms of the legal code of 3294, the main purpose of the fund is to provide fair delivery of income distribution by taking precautions which improve social justice and helping poor and needy people and, if necessary, also accepted immigrants in Turkey. The Fund helps both via direct money transfers and in kind transfers. Assistance can be given for a nutrition, heating, clothes, health, education, constructing student dormitories. Assistance also can be obtained for projects that aim to increase employment by opening up small shops in areas like agriculture, greenhouses, carpentry. The beneficiaries of the fund include students, the poor, and people who do not have enough money to open a small business. It is stated that more than 15 million people benefited from the resources of the fund just from 1997 to 2001 (Sallangul, 2002). Among the assistances, it is seen that education, health, food and heating fuels are the most important items. In 2009, 2.234.720 family benefited form coal aid, approximately 2 million student got education aid (total 180 million TL), which includes education material like books, school bag and other school materials,[15]

Decentralized Social Assistance and Solidarity Foundations were established in the provinces and districts besides the central fund. Their number increased to 931 in 2001 (Sallangul, 2002). While a special board is responsible for the distribution of resources to the foundations (waqfs), the administration of these foundations was left to the trustee committees at the local level so that decisions could be taken at that level. This local committee is comprised of the director general of public security, the mayor, the administrator responsible for health, the administrator responsible for education, and the mufti under the presidency of governor. To obtain resources from the foundations, it is necessary to apply with a letter to the committee. Hence, the decision to determine who is the neediest person and could benefit from the fund's resources is left to these committees of local administrators (Senses, 1999). Due to the ambivalence in the criteria for benefiting from the fund, forms of aid have been both arbitrary and flexible. Access to the fund in general has depended on close connections with the governing parties and other community ties (Şenses, 1999: 434;). Therefore, benefiting easily can turn into a favour of the government officials rather than being a citizenship right (Şenses, 2005). Opposition parties have emphasized that the fund has been used to create patron-client

As Midgley emphasizes, the mainstream paradigm focuses exclusively on the institutionalist framework reflecting a particularistic Western perspective (Midgley, 2004:217) Hence, the analysis of other institutional mechanisms that contribute to the well-being of individuals, families, communities and societies as a whole is neglected in the direct application of the western-explanatory framework to the South, in which informal networks play an important role in provision and redistribution of welfare. To address this problem, Ian Gough developed the idea of an informal security regime so as to produce a theoretical framework that is more appropriate to the late capitalised South country context.

15 For details see, web sites of General Directorate of Social Assistance and Solidarity , http://www.sydgm.gov.tr/tr/html/236, http://www.sydgm.gov.tr/tr/html/237, and http://www.sydgm.gov.tr/tr/html/240

relationship, protecting the party members or people who had a close ties to the party. This character of the existing assistance programs makes them usable for very specific political purposes (Arin. 2003: 71). When we take into consideration the reality that Turkey doesn't have a systematic program to prevent or alleviate poverty, it could cogently be said that this in this system selection will played always important role. The existing assistance programs are minimal and temporary. Additionally, recent studies about poverty emphasize the transformation of Turkey's welfare regime in which informal support system consisting of family, relatives and community-based support system plays an important role, after 2001 crises in Turkey[16] (Senses, 2005). This purport to importance of state support to poor will have risen.

After 2001 crises, Turkey has implemented new programs (Social Risk Mitigation Program) supported by the World Bank from September 2001 to December 2005, to alleviate poverty. The Social Risk Mitigation Program put into practice certain institutional policies and programs such as the creation of employment facilities for the poor, empowerment of institutional structure, establishing a social security network to solve the health and education problems of poor families with children, and micro-credit projects. These programs include policies such as the rapid response (the aim is to deliver in 2001 education, food, fuel and health aid to families which were affected by the economic crisis), the conditional cash transfer (the aim is to form a social security network covering the poorest eight percent of the population), institutional development component, local initiatives component and micro credits (Zabcı, 2005). In terms of this project, 500 million dollar has been taken from the World Bank. In terms of the data provided by General Directorate of Social Assistance and Solidarity Foundation, 1.951.420 student benefited from CCT in 2008. However, these transfers are very limited. It is just 45 TL (29$) for girls in secondary schools/35 TL for boys, 25TL for girls in primary school/20 TL for boys in primary school monthly.

Conditional Cash Transfer Programs are the new tool to absorb the effect of the global financial crises and to create a human capital.[17] These polices are also product of neo-liberal social policy logic, which is minimal, conditional, target oriented and aim to create a pragmatic consensus between governing parties and poor. Thus, these kinds of policies should not only be seen as restrictive and negative, but also as constitutive in the sense that they produce "a series of new technologies designed to reconfigure the relationship between citizen and state" (Hyatt, 2001: 205) in the developing country context.

The most important problem is resulting from the mentality lying behind these assistance programs. First of all, these aids are not given to poor as part of citizenship rights. Close ties and networks with the governing party have seemed crucial intermediary tools between the poor and government officials in order to benefit from such kind of aids (Şenses, 1999). In this sense, they exhibit a character of gift, which is given by governing party with a pragmatic aims. As Hickey and Breaking argues, there is "a Faustian bargain of the poor whereby they trade away their agency in search of livelihood security, usually with more empowered and potentially exploitative political actors. Relatedly, the poorest may view direct participation as a risky and time consuming strategy." (Hickey and Breaking: 2005: 852).[18] For most of the

16 Among them see, Necmi Erdogan's (2002) study about perception of the poor about poverty, Yoksulluk Halleri (States of Poverty), WBs study of the coping strategy of the poor after the 2001 crises (2003) and a study of the Turkish Social Science Association with United Nations Development Programs (2004) about the poverty alleviation measures in Southern Anatolia.

17 Social Risk Mitigation policies and Risk and Vulnerability analysis of the Bank targets to dispose managerial government of welfare at individual and state level and institutionalise a new line of dependency between poor and states in South. Bank based policies complements an institutional transformation with a social agenda. According to World Bank, "Conditional Cash Transfers (CCT) are programs that transfer cash, generally to poor households, on the condition that those households make pre-specified investments in the human capital of their children. Health and nutrition conditions generally require periodic checkups, growth monitoring, and vaccinations for children less than 5 years of age; perinatal care for mothers and attendance by mothers at periodic health information talks. Education conditions usually include school enrolment, attendance on 80-85 percent of school days, and occasionally some measure of performance. Most CCT programs transfer the money to the mother of household or to the student in some circumstances." (WB, 2009: 1).

18 As Wood argues, "the short span time preference of the poor, which reinforces their dependency and reduces long-range choice" (Wood, 2004: 50-51). Meanwhile, experiencing dependent security disables and forecloses future options for autonomous security of poor by reproducing limited room for their manoeuvre and limited voice (Wood, 2004: 51).

people in Turkey, state officials directly mean representative of governing party in Turkey. Hence, aids are taken not as a result of citizenship rights but as a result of JDP's logic of Islamist charity and benevolence. Meanwhile, it could be argued that there is a tacit reciprocity in these kinds of aids between giver/donor and receiver of the aid. Aid creates/produces a kind of tacit debt on the side of beneficiary/poor, since they take the aid as product of the benevolence of the party.[19] It would not be wrong to say that this kind of aids aimed to create a kind of gratitude (minnet) on the side of receiver.[20] They would pay this debt back in the elections as vote to maintain pragmatic consensus between governing party and poor also. It is well known fact that JDP inherited and developed this assistance style from municipalities of Islamist Welfare Party and organised it as state policy. These kind of social policies are organized around the constitution of social, which is in religious and community character, against the political, which depends on existence of autonomous citizens.

Conclusion: Managing crisis and building hegemony in the Turkish context

Within the limits of this article, it is discussed that governing the social and economic effects of the 2001 crisis has been one of the most important cornerstone of entrenchment of JDP hegemony in Turkey.[21] JDP produced a kind of politics, which pragmatically oriented toward restructuring of state-society and state-economy relations so as to govern crisis and increase the strength of the party and new Islamist middle classes. JDP has also been very successful in provoking, governing and regulating political crisis, which has been represented as a clash between sectarian laicist elites of old, supporting the continuation of status quo and new authentic conservative democrat elites working for change and development, comes from inside of people.

It could be argued that governing effects of the crisis successfully has become an important factor in Turkish politics to attract the support of both losers and gainers of neo-liberalism. In that context, Justice and Development Party have produced a new project of hegemony, which depends on special combination of the enlargement of neo-liberal logic and institutionalization of mentality of charity with Islamic sentiments at state level. Maybe these social networks of charity do partially alleviate and compensate for the losers of neo-liberal policies. To make explicit cornerstone of this project, the politics of social policy applications of Justice and Development Party in Turkey following 2001 crisis has been evaluated. If we take into consideration Turkish minimal welfare system, it could be argued that these policies, which have been supported by parallel welfare networks of civil society organizations and municipalities, have been directly producing a relationship of dependency between state and citizen and creates a kind of implicit "political" debt. The character of short-term, minimal and selective social policy instruments aims to create a pragmatic consensus as well as political link between governing parties and poor in the Turkish context. Even if we could not say that 2001 crisis directly lead to erosion of human rights in Turkey, it could be argued that it undermined especially the capacity of the poor in reclaiming both their social and political rights. Hence, the financial burden on the poor has been compounded with the political ones, even though they are ready to pay this burden by their support to JDP to sustain their lives.

19 We have inclined to think debt as an economic and legal relation because of the dominance of economic-legal paradigm. However, debt should also be seen as a social and political relationship, which creates a relation of dependency between partners. For evaluation of gift and debt from such kind of perspective, see Bourdieu, (1998).

20 It could be said that poor not only pragmatically support governing party because of their short-term subsistence concern, but also they feel a moral obligation to give their support. Affect of the community ties should also be added to this equation in the Turkish context. However, I am aware of the fact that this explanation needs to be supported by empirical analysis. I am just trying to explicate general mentality lying behind this framework.

21 For an evaluation of JDP's passive revolution from a different perspective, see Tuğal, (2009), Yalman and Bedirhanoğlu, (2010), and for general policies and politics of JDP, see E. Özbudun, and W. Hale, (2010).

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Relation between Corruption and Bid-rigging in Public Procurement and their Criminal Law Framework

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Summary. *Public procurement (in particular public procurement at least partially financed by EU funds) is a reliable source of significant profits for a broad scope of individuals and entities especially during the financial crisis. Public procurement is particularly vulnerable to unlawful practices like bribery and bid-rigging in a variety of forms: passive corruption of both national and foreign public officials; passive and active corruption in the private sector, as well as different bid-rigging schemes. The passive corruption of public officials, i.e. bribery in the public sector, is especially harmful to the whole public procurement process. There are at least two negative results of such an unlawful behavior. First, the contract is awarded not to the bidder, who submits the best offer, and second, bidders are discouraged to take part into the public procurement. Besides, bid-rigging in all its forms results in harm for the Bulgarian and EU taxpayers who bear the costs.*
At EU level there are a lot of legal instruments for the criminal law protection against the public and private sector corruption, but there are no such instruments for the fight against bid-rigging.
Most of the Member States have already transposed the provisions of the EU legal instruments adopted in the area of combating corruption in the public and private sector. As regards bid rigging, all Member States have introduced their own regulation. However, only a few national legislations provide for criminal law protection against all forms of such criminal behavior. We should underline that the different states have different approaches in tackling corruption and bid-rigging.

1. Introduction

The present article analyses the possibilities for criminal law protection of the financial interests of the European Union through measures against two interrelated illegal activities – corruption practices and collusive practices (and particularly bid-rigging) in public procurement.

Public procurement comprises government purchasing of goods and services required for State activities, the basic purpose of which is to secure best value for public money[1]. Public procurement in the EU accounts for 17% of EU's GDP (around €2,000 billion)[2]. So it is of great importance for the Member States' governments to use this money more efficiently, leading to more innovation, jobs and environmentally friendly growth[3]. Extra savings of public funds are especially important when public funds are under pressure from a weakened economy and calls to cut spending. Member States should ensure that public funds are used in public procurement according to the purposes intended. Public contracts are, in the financial crisis, more important than ever to the private sector especially in countries as Bulgaria where there is a lack of contracts except for the public procurement. In summary, obtaining optimal public procurement outcomes through effective functioning of the European Procurement Market is of great importance in the context of the severe budgetary constraints and economic difficulties in EU Member States[4].

[1] See "Collusion and Corruption in Public Procurement 2010", The OECD Global Forum on Competition – http://www.oecd.org/dataoecd/35/19/46235884.pdf
[2] See http://ec.europa.eu/news/business/110128_en.htm.
[3] See "Collusion and Corruption in Public Procurement 2010", The OECD Global Forum on Competition – p. 137
[4] See "GREEN PAPER on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market", Brussels, 27.1.2011, COM(2011) 15 final.

The EU's single market rules[5] have already helped public authorities to save taxpayers' money by enabling companies to compete for contracts across the Union's internal borders. The awarding of contracts with values above certain thresholds (representing around 3.25% of EU GDP) is governed by the EU public procurement Directives 2004/17/EC[6] and 2004/18/EC[7]. These directives[8] aim to implement the principles of the EC Treaty[9]. The directives are designed to ensure the effects of these principles and to guarantee the opening up of procurement to competition.

They set out basic procedural requirements for the procurement of goods, services and works in the EU Member States in order to guarantee free and non-discriminatory access of all European undertakings to public contracts. European public procurement rules apply to all public contracts that are of potential interest to operators within the Internal Market, ensuring equal access to and fair competition for public contracts within the European Procurement Market[10].

Public procurement also plays a key role in the Europe 2020 strategy[11] as one of the market-based instruments that should be used to achieve the objectives of the strategy.

2. Effectiveness of Public Procurement

There are two main aspects of the public procurement that have to be taken in consideration in order to guarantee the effective functioning of the public procurement markets:

- the integrity in the procurement process that can be destroyed by the corruption on the part of public officials; and
- the effective competition among suppliers that can be eliminated by collusion among potential bidders.

3. The Corruption Problem in Public Procurement

The purpose of public procurement is awarding of the contracts in such a way so as to maximise public welfare. On the other hand, the purpose of corrupted officials is just the opposite - i.e. awarding of the contracts in such a way not to maximise the social benefits, but to maximise their own welfare (obtaining the largest bribe). So, the corruption in public procurement hinders efficient and effective management of public resources and undermines public confidence.

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[5] Between 1992 and 2001 the EU issued seven Directives on public procurement. The EU adopted a new legislative package on public procurement in 2004.

[6] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1). Directive as last amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ L 314 , 1.12.2009, p. 64).

[7] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on thecoordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114). Texts available under: http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

[8] The current generation of public procurement Directives, namely Directives 2004/17/EC and 2004/18/EC, are the latest step in a long evolution that started in 1971 with the adoption of Directive 71/305/EEC (Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ No L 185, 16.8.1971, p. 5)).

[9] The principles are: Freedom of movement of goods; Freedom of establishment; Freedom to provide services; Equal treatment; Non-discrimination; Mutual recognition; Proportionality; Transparency.

[10] EU public procurement directives only constitute a basic legal framework, which is implemented into national law by the EU Member States. Contracting authorities in the EU Member States do not apply the directives as such but the national rules transposing these directives. The implementing national law often contains additional rules and principles complementing those of the EU public procurement directives, also with regard to measures to prevent and to fight corruption and collusion in public procurement.

[11] See Communication from the Commission of 3 March 2010 - COM(2010) 2020. Europe 2020 strategy for smart, sustainable and inclusive growth.

In common, corruption in public administration may be defined as the abuse, by public officials, for private gain, of power that has been entrusted to them through statutory or other means[12]. In the context of public procurement markets, such abuses refer to a conduct such as the awarding of contracts, the placing of suppliers on relevant lists or other administrative actions taken not for objective public interest reasons, but for improper compensation or other reciprocal benefits (i.e. bribes).

Corruption in public procurement often takes the following form: “a person within the contracting authority calling for tenders engages in improper communication with one (or more) of the bidding companies and transmits crucial information that helps the companies design the winning bid”[13].

The most common corruption scenarios that might occur in the public procurement procedures are the so-called "kickback" (i.e. payment of a bribe as a reward for the official who influenced the procurement process), manipulation of tender documents to favour a specific bidder, and the use of front/intermediary companies to cover the illegal activities of the corrupt official.

The main factor for the corruption practices in public procurement is the complexity of the public procurement process that makes it impossible for the end-users to award contracts directly. Thus the end users have to go through an agent - procuring entity[14] or contracting authority (contracting entity)[15] or awarding authorities[16]- over which they have limited control. Exactly the contracting authority, i.e. body in charge of establishing the contract specifications, selecting the bidders and choosing the winning bid, is the subject of the corrupt practices in public procurement process.
In summary:

- The subject of the corruption practices in public procurement is a **procuring entity** or **contracting authory;**
- Corruption practices in public procurement consist in preparing the contract, selecting the bidders and/or awarding the contract in such a way that the winning bidder will not necessarily be the one who maximises the social benefits but the bidder who will maximise their own welfare (by offering the largest bribe)."

There are two possible reasons for corruption on the part of members of the contracting authority:

- It is difficult for the end users to exercise control over the whole public procurement process;
- It is difficult to detect such a corrupt behavior on the part of members of the contracting authority.

4. Competition and the Bid-rigging Problem in Public Procurement

Usually, competition in public procurement results in lower prices and/or higher quality for a given price. Economic literature that deals specifically with bidding processes and procurement establishes a direct relationship between the extent of competition in procurement markets and the costs of the goods and services that are procured.

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[12] See, e.g. "How do you define corruption?" on the website of Transparency International, at http://www.transparency.org/news_room/faq/corruption_faq

[13] See “Collusion and Corruption in Public Procurement 2010”**,** The OECD Global Forum on Competition.

[14] The procuring entity acts as intermediary body between the beneficiaries and the potential providers and is usually composed of appointed or elected procurement officers

[15] “Contracting authorities” is a term used in “GREEN PAPER on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market”, Brussels, 27.1.2011, COM(2011) 15 final

[16] See Evaluation of Public Procurement Directives Markt/2004/10/D , Final Report, http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf

For example, the increased competition in procurement markets as a result of Public Procurement Directives of the European Communities lead to improved “value for money” achieved by purchasers probably by between 2.5 and 10 per cent of the overall procurement budget subject to the Directives or between about €6 and 24 billion a year by 2002[17].

The most commonly used method of public procurement is competitive tendering[18]. The public bodies (governments, municipalities and EU institutions) often rely upon a competitive tendering to achieve better value for public money[19]. However, the competitive tendering can achieve lower prices or better quality and innovation only when companies genuinely compete. When companies, that would otherwise be expected to compete in a bidding process, secretly conspire (collusive agreement) to rise prices or lower the quality of goods or services, collusive tendering (bid-rigging) takes a place[20]. Bid-rigging can occur both in public and private procurement process, but it is particularly harmful when it affects public procurement because it take resources from taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

Bid-rigging has a number of **common characteristics**. First of all, such practices are in no way limited either to developed or to developing countries. Second, collusive tendering for government contracts is international in scope; thus, they manifest a clear need for international co-operation in the enforcement of competition laws. Third, collusive tendering schemes take a variety of common forms[21]. All such schemes however, have at least one element in common, namely an agreement between some or all of the bidders that limits or eliminates competition between them and (normally) predetermines the winning bidder.

Common bid-rigging practices are:[22]

- **Bid Suppression**: In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted;
- **Cover Bidding**: Cover bidding (also known as "complementary" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to win but to give the appearance of genuinely competitive bidding[23];
- **Bid Rotation**: In bid rotation schemes, all conspirators submit bids but take turns being successful bidder with each conspirator designated to win certain contracts and thereby share out the market. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company. This is a form of market allocation;
- **Subcontracting as a compensating mechanism**: Subcontracting arrangements are often part of bid-rigging schemes, where competitors agree not to bid or to submit cover bids on the condition that some of the successful bidder’s contract will be subcontracted to them. In some schemes, a low bidder agrees to withdraw its bid in favour of the next

[17] See Evaluation of Public Procurement Directives Markt/2004/10/D , Final Report, http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf
[18] See Office of Fair Trading, “Evaluation of the impact of the OFT's investigation into bid-rigging in the construction industry”, a report by Europe Economics, June 2010, OFT 1240, pp. 7
[19] See Guidelines for fighting bid rigging in public procurement, OECD, http://www.oecd.org/dataoecd/27/19/42851044.pdf
[20] See Guidelines for fighting bid rigging in public procurement, OECD, http://www.oecd.org/dataoecd/27/19/42851044.pdf
[21] U.S. Department of Justice, “Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For,” (available on the internet at http://www.usdoj.gov/atr/public/guidelines/211578.htm).
[22] See Office of Fair Trading, “Evaluation of the impact of the OFT's investigation into bid rigging in the construction industry”, a report by Europe Economics, June 2010, OFT 1240, pp. 8
[23] According to the survey “Evaluation of the impact of the OFT's investigation into bid rigging in the construction industry”, a report by Europe Economics, June 2010, OFT 1240, cover bidding is the most frequently occurring form of bid rigging.

lowest bidder in exchange for a subcontract that divides the illegally-obtained higher price between them[24].

5. Relation between Corruption and Bid-rigging in Public Procurement

Corruption on the part of public officials and collusion among bidding firms are separate but interrelated problems that distort the effective functioning of public procurement markets.

There are some factors that make public procurement markets a risk area for corruption and bid-rigging. First, public procurement frequently involves large, high value projects (for example, infrastructure projects co-financed by EU funds), which present attractive opportunities for collusion and corruption. Next, EU and particularly national public procurement rules lead to procurement procedures creating opportunity for corruption and collusion. Third, frequently, subject of public procurement are economic sectors like construction industry that are vulnerable to anticompetitive or corrupt practices (possibility to use low quality materials, low quality of project execution, difficulties to examine). At last, close interaction between the public and the private sectors is also a factor that increases the risk of corruption and collusive practices in EU procurement markets.

Collusion involves a **horizontal relationship** between bidders in a public procurement, who conspire to remove the element of competition from the process[25]. Bid-rigging is the typical mechanism of collusion in public contracts intended to ensure that the designated bidder is selected by the apparently competitive process.

Corruption constitutes a **vertical relationship** between the public official concerned, acting as buyer in the transaction, and one or more bidders, acting as sellers in this instance. Corruption occurs where public officials use public powers for personal gain, for example, by accepting a bribe in exchange for granting a tender. While usually occurring during the procurement process, instances of post-award corruption also arise.

Both corruption on the part of public officials and bid-rigging are illegal activities that can appear during all stages of the public procurement process – from the definition of the subject-matter to the performance of the contract.

Most commonly, deliberate actions at the stages before the contract is awarded to the company include: possible favouritism of the particular company, individual expert (bribery etc.); fake reports of the evaluation of tenders. Most commonly, deliberate actions at the stage when the contract is once awarded, include*:* provision of fake documents, such as delivery notes, certificates of origin etc., extension of the duration of the contact, which does not comply with the rules; extension of the value of the contract – unauthorised etc;
Collusion and corruption are separate problems in public procurement, but in some cases they may occur together. Some forms of bid-rigging include corruption. In some practical cases, for example, where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion, there is a strong relation between bribery of public officials and bid-rigging.

Like corruption cases, bid-rigging agreements are very difficult to detect as both bribes and collusive agreements are typically negotiated in secret.

Additionally, these two separate problems have the same effect: a public contract is awarded on a basis other than fair competition and the merit of the successful contractor, so that maximum value for public money is not achieved. So, we can say that these two problems are inherently related by their end result – ineffective expenditure of the EU taxpayer's money in public procurement.

[24] However, that sub-contracting is not necessarily anti-competitive if it is not done in furtherance of efforts to limit competition in the award of the main contract.
[25] See "Collusion and Corruption in Public Procurement 2010", The OECD Global Forum on Competition.

Despite the above mentioned similarities between collusion and corruption in public procurement, there are very strong differences between them. First of all, the ways in which these two problems hinder the functioning of public procurement market are different. Corruption can distort the **integrity of the public procurement** process. Collusive tendering, on the other hand, particularly in the form of bid-rigging, can **suppress the competition among** potential bidders. Second, these too kinds of illegal activities strongly differentiate in their perpetrator. Corruption involves public officers that participate in the public procurement process. Collusion covers the unlawful acts of private entities (undertakings) involved in the tendering process. Exactly the existence of such a unique public-private relation makes public procurement so vulnerable to illegal activities like corruption and collusive practices.

Third, corruption and collusion in public procurement are usually regulated by different branches of law. Corruption is a criminal offence and is generally prohibited under the national criminal law. On the other hand, in most legal systems, bid-rigging is a hardcore cartel offence, and is accordingly prohibited by the competition law. However, in some countries bid-rigging is also a criminal offence.

At last, corruption and collusion in public procurement have received different deal of attention at both national and European Union (respectively, international) level.

6. Fight against Corruption and Bid-rigging in Public Procurement

6.1. Corruption in Public Procurement

Corruption has been a criminal offence under the national legislation of Member States long before the starting of the debate on the tackling of this phenomenon at European Union level. However, corruption (including corruption in public procurement) has rightly received a good deal of attention at European and international level in recent years. It is addressed by various European and international instruments, including:

- Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (23.10.1996);
- UN Convention Against Bribery and Corruption;
- Criminal Law Convention against Corruption of the Council of Europe;
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The abovementioned legal instruments give common definitions of “active corruption” and “passive corruption”, as well as of “community official”, “foreign public official”, etc. According to these instruments corruption of both national, foreign and community public officials is an offence[26] and must be sanctioned through criminal sanctions. Corruption is one of the offences that damage the financial interests of the EU and is addressed in the instruments for the criminal law protection of these interests[27]. All Member States have adopted anti-corruption legislation in compliance with the EU instruments.
Among other issues, the EU Public Procurement Directives also deal with the fight against corruption[28]. They contain a few specific rules for penalising favouritism and corruption in public procurement[29]. Public procurement as an area of special attention in the context of the fight against corruption is mentioned also in the Stockholm programme[30].

[26] Corruption offence belongs to the *acquis communautaire* and is one of the offences detrimental to the financial interests of the EU.
[27] See The First Protocol to the Convention on the Protection of the European Communities’ Financial Interests , *OJ C 313, 23.10.1996, p. 2–10.*
[28] Member States are obliged to adopt regulation that is in line with the rules of the Directives.
[29] These issues are more particularly addressed in national legislation.
[30] Council document 17024/09 adopted by the European Council on 10/11 December 2009, http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf

6.2. Bid-Rigging in Public Procurement

A pre-requisite for the deterrence of collusive tendering is an effective legal prohibition of such conduct, normally in a national competition or antitrust law[31]. Often, bid-rigging in public procurement processes is prohibited through general antitrust provisions against cartels or conspiracies in restraint of trade[32]. However, it can also be the subject of legal provisions that focus specifically on collusion in public procurement markets[33]. In some jurisdictions, bid-rigging can also trigger penalties under statutes aimed at the prevention of fraud.

At international level, in all OECD member countries bid-rigging as a kind of collusive tendering is an illegal practice and can be investigated and sanctioned under the national competition law and rules[34]. Additionally, in a number of OECD countries, bid-rigging is also a criminal offence.

There is no common criminal law framework adopted at EU level for fighting bid-rigging in public procurement. However, bid-rigging is prohibited under art. 101 of TFEU (previous art. 81 of EC Treaty).

Thus, at EU level the issue of bid-rigging in public procurement markets has not received similar high-level attention as corruption. This is despite the fact that competition is a core objective of national procurement systems as well as EU Public Procurement regulation[35].

Bid-rigging does not belong to the *acquis communautaire* like the other offences detrimental to the financial interests of the EU. But the drafters of the *Corpus Juris* found this to be a lacuna in the effective protection of the financial interests of the EC and therefore proposed its inclusion in the list of offences in the *Corpus Juris*[36]. As a result, an offence with the constitutive elements of bid-rigging, but with different name – market rigging - was defined in art. 2 of the *Corpus Juris 2000*.

According to art. 2 of *Corpus Juris 2000* "it is a criminal offence for a person, in the context of a adjudication process governed by Community law, to make a tender on the basis of an agreement calculated to restrict competition and intended to cause the relevant authority to accept a particular offer".

7. Experience in Different Jurisdictions

All EU Member States have applied government procurement regimes in compliance with EU Public Procurement Directives whose aim is to promote competition and to deter anti-competitive practices in procurement markets. These government procurement regimes strongly differentiate in sanctioning of bid-rigging. A great part of EU Member States do not have a bid-rigging offence in their national criminal legislation. In these Member States (Italy, Portugal, Sweden, Finland, Netherlands[37]) bid-rigging is prohibited and sanctioned but only under civil law[38]. In these Member States national competition law provisions relating to collusive tendering prohibit various forms of bid-rigging and propose administrative sanctions. This is the case of Bulgaria where an anticompetitive practices, cartel infringements and

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[31] More than one hundred countries now have such laws.
[32] This is the case, for example, in the United States and the European Community.
[33] This is the case, for example in Canada, where bid-rigging can, depending on the circumstances, be dealt with under either a specific provision of the *Competition Act* which addresses bid-rigging as such or under the more general provision on conspiracies in restraint of trade.
[34] OECD Guidelines for fighting bid rigging in public procurement (Helping governments to obtain best value for money), http://www.oecd.org/dataoecd/27/19/42851044.pdf
[35] The importance of the issue of competition in public procurement is proved from the resent fact that EU is holding a public consultation on how to achieve a more competitive public procurement market – and save more public money.
[36] See *Christine Van den Wyngaert, "*The Protection of the Financial Interests of the EU in the Candidate States. Perspectives on the Future of Judicial Integration in Europe", ERA - *Forum - 3 - 2001*
[37] See http://www.concurrences.com/rubrique.php3?id_rubrique=644&lang=en
[38] However infringements of the anticompetitive provisions committed by individuals may constitute certain types of crimes (e.g. forgery of documents, perjury, fraud, etc.) and thus can lead to criminal sanctions.

abuse of dominance are not criminalized but are prohibited by the *Protection of Competition Act (PCA).* The aim is to give the tenderers confidence that bids will be assessed objectively and that contracts will ultimately be awarded on the basis of product quality and competitive pricing, rather than patronage or cronyism.

In some Member States (UK, France) a dual public procurement regime is adopted that allows both administrative and criminal sanctions to be applied to such type of illegal market behavior. At last, some Member States as Hungary, Slovenia, Germany, Czech Republic, Estonia, Romania, Slovak Republic, Poland, have criminal law provisions on the subject even though they do not fully correspond to the formulation of art. 2 of *Corpus Juris 2000*.

In summary, bid-rigging is a prohibited behavior in all Member States, but criminal sanctions are applicable only in certain EU Member States[39].

The present article analyses the public procurement regimes of some EU Member States with a view to the provisions against bid-rigging. The selected countries include: the United Kingdom, Netherlands, Hungary, Italy, Estonia, Germany and France. The listed Member States are chosen because of their greater experience in the criminal law sanctioning of bid-rigging that might be very useful for Bulgaria.

7.1. The United Kingdom

As mentioned above, UK has a dual public procurement regime that allows both administrative and criminal sanctions to be applied to a broad range of collusive agreements, including bid-rigging.

The *Competition Act 1998 of the United Kingdom*[40] contains a provision about competition and the abuse of dominant position in the market. This provision[41] prohibits "agreements between undertakings, decisions by associations of undertakings or concerned practices" (section 2, subsection 1) which "(a) may effect trade within UK "and "(b) have as their object or effect the prevention, restriction or distortion of competition". The prohibition covers agreements which directly or indirectly fix purchase or selling prices, which limit or control markets or which share markets. The penalty applicable for infringing the prohibition is a fine imposed to an undertaking which is a party to the agreement. The *Competition Act* provides for a statutory maximum for the applicable fine in section 36 subsection 8 – the fine cannot exceed 10 percent of the turnover of the undertaking. According to the *Competition Act*, the Office of Fair Trading (OFT, established under the Enterprise Act 2002) has a power to investigate potential infringements (breaching) of the Chapter 1 prohibition if it establishes a breach of the law[42].

The adopted in the UK public procurement regime also provides for criminal sanctions for collusive practices through introducing a cartel offence into the Enterprise Act 2002[43]. The cartel offence operates alongside the *Competition Act 1998* regime. Section 188, subsection 1 of the *Enterprise Act* makes it a criminal offence for the individual to engage[44] dishonesty in

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[39] See Ili van Bael "Competition law of the European Community", Van Bael &Bellis, Kluwer Law International, 2005 http://books.google.bg/books?id=qJutEOtr39kC&dq=French+Competition+Authority,+possible+crominal+sanctions&source=gbs_navlinks_s

[40] See Competition Act 1998, which came into effect in 2000, http://www.legislation.gov.uk/ukpga/1998/41/contents

[41] See Chapter 1 Agreements, section 2, subsection (8) of the Competition Act.

[42] Since the prohibition on cartel activity, including bid-rigging, in Chapter 1 of the Competition Act 1998 entered into force in 2000 the OFT has completed six cases into bid-rigging in the construction sector between 2004 and 2006. Fines were imposed in all the cases and averaged from 0.3 to 1.3 per cent of turnover.

[43] See Enterprise Act 2002, http://www.legislation.gov.uk/ukpga/2002/40/contents.

[44] See section 188, subsection 1 of the Enterprise Act - "to make or implement, or to cause to be made or implement, arrangements of the specified kinds to at least two undertakings".

cartel agreements. Cartel agreements are broadly defined under the section 188, subsection 2 as agreements with competitors with intent to:

- directly or indirectly fix prices;
- limit or prevent supply or production;
- share a market; and
- **bid-rigging**.

Particularly the bid-rigging offence is broadly defined in section 188, subsection 5. A constitutive element of the offence is the existence of "the request for bids" in response of which one or more undertakings submit bids. The illegal action consists in participation in agreement according which one or more of the bidders (a) refrain from submitting a bid; or (b) submit a "cover bid".

Criminal sanctions that can be imposed for the so defined cartel offense (including bid-rigging) include imprisonment for a term not exceeding five years or a fine or both (section 190, subsection 1 (a)).

It must be underlined that the provisions of sections 189 and 190 of the *Enterprise Act 2002* concerning cartel offence are applicable only to natural persons. So, only individuals acting as bidders in public procurement process can be excluded from future bidding process on the base of the criminal conviction as required by the EU Public Procurement Directives (section 54 of 2004/18/EC). On the other hand, the administrative fines levied by the OFT under its statutory powers according to *Competition Act* are not result of criminal convictions[45]. So, it is not possible the fined companies to be excluded from future bidding for contracts under the Public Contracts Regulations.

7.2. Netherlands

In Netherlands the relevant substantive prohibitions for cartel agreements are provided for by the *Dutch Competition Act*[46].The cartel prohibition contained in the Dutch Competition Act is very similar to that of art. 101 of TFEU (previous Article 81 of the EC Treaty). According to Article 6 of the *Dutch Competition Act*, agreements between undertakings, decisions of trade associations and concerned practices are prohibited if they have as their object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market[47]. The prohibition is too broad and covers all types of behavior, irrespective of whether they are based on formal, oral or tacit agreements. The prohibition covers horizontal and vertical relations resulting in price fixing, market or customer sharing, **bid-rigging**. The penalties applicable under the *Dutch Competition Act* for infringements of cartel prohibition (as well as for infringement of article 101 of TFEU) are administrative fines for companies and individuals that have committed the offence. According to the *Dutch Competition Act* fines can be imposed on principals and *de facto* managers for breach of the cartel prohibition. The statutory maximum of the fine for individuals is €450,000. In addition to fines or penalties for bid-rigging per se, fines of up to €450,000 or 1 per cent of turnover can also be imposed for noncooperation in investigations[48].

Under the current *Dutch Competition Act* no criminal prosecution for bid-rigging is possible. However, the Ministers of Economic Affairs and Justice have announced the preparation of a bill according to which, a dual system of law enforcement similar to those in Germany, UK

[45] Dawsons LLP, "Public procurement newsletter", Autumn 2009

[46] The Dutch Competition Act came into force on 1 January 1998 and is based on European Community competition law. Text is available at http://www.nmanet.nl/engels/home/Legislation/10_Dutch_Competition_act/Index.asp

[47] The regulatory authority responsible for applying and enforcing the The Dutch Competition Act is the independent agency - Dutch Competition Authority (Nederlandse Mededingingsautoriteit, NMa)

[48] Dutch Competition Act is revised at 2007 (entered into force on 1 October 2007) and among other things are increased the fines applicable to non-cooperative actions in investigations.

and France may be introduced. The individuals who played a leading role in restricting competition would according to the proposal risk a personal criminal fine (imposed by the Dutch Competition Authority) or imprisonment (imposed by the criminal judge).

7.3. Hungary

According to the public procurement regime introduced in Hungary both administrative and criminal sanctions are applicable for collusive agreement. The *Competition Act*, which is currently in force, is *Act LVII of 1996* on the prohibition of unfair and restrictive market practices[49]. The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) was established by *Act LXXXVI of 1990 on the prohibition of unfair market practices*, and started its operation on 1 January 1991.

According to the Hungarian public procurement regime, agreements that restrain competition are also punishable under the *Hungarian Criminal Code*[50]. Since the amendments of 2005, the *Hungarian Criminal Code* provides for sanctions on bid-rigging in public procurement and concession tenders. Section 296/B (1) of *Hungarian Criminal Code* makes it a criminal offence for an individual to "enter into an agreement aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or an activity that is subject to a concession contract by fixing the prices (charges) or any other term of the contract, or for the division of the market, or takes part in any other concerted practices resulting in the restraint of trade".

The applicable penalty for an individual that participates in a cartel (i.e. price fixing, fixing of other contractual terms, other market sharing agreements and concerted practices), which results in a restriction of competition, is an imprisonment of up to five years. The same penalty applies for those who take part in a decision of an association of undertakings.

7.4. Italy

According to the adopted public procurement regime in Italy, collusive agreements restricting freedom of competition can be sanctioned under the *Competition and Fair Trading Act*[51]. There are no criminal sanctions for bid-rigging provided for in the Act; only civil or administrative sanctions can be applied for the infringements of the cartel agreements prohibition.

As stated in section 2, subsection 2 "agreements between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it" are prohibited. Particularly prohibited are agreements that:

- directly or indirectly fix prices;
- limit or restrict production, market access, investment, technical development or technological progress;
- share a market;
- **are bid-rigging agreements**.

In the most serious cases the Competition Authority[52] may decide, depending on the gravity and the duration of the infringement, to impose a fine of no less than one per cent and no

[49] See the Competition Act (Act LVII of 1996), http://www.gvh.hu/domain2/files/modules/module25/pdf/Competition_Act_2008_a.pdf. The Act entered into force on 1 January 1997.
[50] See the Hungarian Criminal Code (Act IV of 1978) Art. 296/B, http://www.legislationline.org/documents/section/criminal-codes
[51] Competition and Fair Trading Act Law No. 287 of 10th October 1990; amended by Act No. 57 of 4 March 2001 and by Act No. 248. http://www.wipo.int/wipolex/en/text.jsp?file_id=128226
[52] The Competition and Fair Trading Act establishes an independent national competition authority, the Antitrust Authority (the Authority - L'Autorità garante della concorrenza e del mercato), which is responsible for enforcing the Act, including controlling agreements that impede competition, abuses of dominant position, and mergers.

more than ten per cent of the turnover of each undertaking or entity for the previous financial year from the products forming the subject-matter of the agreement (section 15 subsection 1 of the *Competition and Fair Trading Act*).

In the case of non-compliance with restraining orders, the Authority may impose a fine of up to 10 per cent of the turnover (section 15 subsection 2 of the *Competition and Fair Trading Act*). In cases of repeated non-compliance, the Authority may decide to order the undertaking to suspend activities for up to 30 days.

7.5. France

Like the United Kingdom, France has a dual public procurement regime that allows both administrative and criminal sanctions to be applied for collusive agreements. The relevant legislation in France is the *Commercial Code*[53]. Article L420-1 of the French Commercial Code formulates a prohibition of agreements "that have the aim or may have the effect of preventing, restricting or distorting the free play of competition in a market". The prohibited agreements have to be intended to:

- Limit access to the market or the free exercise of competition by other undertakings;
- Artificially encouraging the increase or reduction of prices;
- Limit or control production, opportunities, investments or technical progress;
- Share a market.

Subsequently, Article L420-6 of the *Commercial Code* makes it a criminal offence for a natural person "to fraudulently take a personal or decisive part in the conception, organization or implementation of the practices referred to in Article L420-1". The penalty applicable to an individual for the same offence is a prison sentence of four years and a fine of 75,000 euro. Additionally, the court may order that its decision is published in full or in summary in the newspapers which it designates, at the expense of the offender.

The French Competition Authority (Conseil de la Concurrence)[54] may impose fines on companies which have taken part in antitrust infringements[55]. The law provides that such fines shall be proportionate to the gravity of the infringement, the damage caused to the economy and the individual situation of each company concerned, taking into consideration, where applicable, any repeating of the infringement. The statutory maximum for fines that can be imposed to companies is 10 per cent of the consolidated worldwide turnover.

7.6. Estonia

Collusive agreements prejudicing free competition can constitute a criminal offence in Estonia and are sanctioned under the *Estonian Penal Code*[56]. According to article 400 (1) of the *Estonian Penal Code* "agreements, decisions and concerted practices prejudicing free competition" are prohibited and each "member of the management board, of a body substituting for the management board or of the supervisory board of a legal person, who violates a prohibition" is guilty for a criminal offence. Estonia has already introduced criminal liability of legal persons in its national legislation. So, under par. 2 of article 400 the same illegal act, committed by a legal person is a criminal offence too. The applicable penalty for individuals for a violation of the prohibition against agreements prejudicing free competition is a fine (in the form of a pecuniary punishment) **or** imprisonment of up to three years. For the same offence the legal persons can be sanctioned by a fine (in the form of a pecuniary

[53] See Commercial Code Title II. Anti-competitive practices Articles L420-1 to L420-7 http://195.83.177.9/code/index.phtml?lang=uk

[54] The Conseil de la Concurrence acts as safeguard by ensuring the proper operation of markets and cracking down on anticompetitive practices by companies in all sectors of the economy

[55] http://www.mayerbrown.com/publications/article.asp?id=9857&nid=6

[56] See Estonian Penal Code, http://www.lexadin.nl/wlg/legis/nofr/oeur/lxweest.htm, Corresponding provision – article 400 - is introduced in Chapter 21. Economic offences; Division 7. Offences Relating to Competition of Estonian Penal Code.

punishment). The maximum level of fines for legal persons is 250 million kroons. For natural persons the maximum level of fines is 500 daily rates (calculated on the basis of income of the relevant person)[57].

7.7. Germany

Bid-rigging is a separate offence under the *German Criminal Code* (StGB) [58]. Moreover, the definition of the same offense in article 2 of *Corpus Juris 2000* is inspired by the text of the section 298 of the *German Criminal Code*.

The provision of section 298 of the *German Criminal Code*[59] is applicable only to natural persons that intentionally submit an offer (bid) based on an unlawful agreement whose purpose is to cause the organiser to accept a particular offer. Constituent element of the offence is the existence of "an invitation to tender in relation to goods or commercial services (section 298 (1)); or the private award of a contract after previous participation in a competition (section 298 (2))". This requirement narrows the application of the offence. The offence covers only participation in unlawful agreements that lead to submission of a winning bid upon an invitation to tender.

Still, the offence has a broader definition than the market-rigging offence provided for in art. 2 of the *Corpus Juris* where the requirements are non only the submission of the bid in response to an opened tendering procedure, but also the tendering procedure to be organized under the EU Public procurement rules.

The applicable penalty for natural persons convicted on bid-rigging under the Section 298 (1) of the *German Criminal Code* is an imprisonment of up to five years or a criminal fine.

8. Sanctions

Sanctions for collusion and/or corruption in public procurement range from fines and imprisonment to more specialised penalties like debarment from participation in future public procurement procedures. In many jurisdictions, a conviction for participation in collusion and/or corruption in public procurement leads to debarment from future procurement procedures for a certain period of time.

8.1. Sanctions for Corruption

The typical penalties imposed for corruption are fines and imprisonment, and dismissal within the employment context. In regard to public procurement a useful instrument to sanction unsound business behaviour is the exclusion of bidders convicted of corruption. The main contribution of the EU public procurement directives themselves to the fight against Corruption and collusion consists in providing for a special mandatory exclusion of tenderers convicted of corruption. Article 45 of the EU Public Procurement Directive 2004/18/EC[60], and article 39 of Directive 2009/81/EC (the EU Defence Procurement Directive) [61] provide the basis for debarring, or obligatory excluding, companies convicted of corruption, fraud, money laundering and participation in a criminal organization from public contracts.

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[57] The maximum levels of fines for misdemeanour offences are lower: 500,000 kroons for legal persons and 18,000 kroons for natural persons. Natural persons may also be subjected to detention of up to 30 days.
[58] See the German Criminal Code, http://www.iuscomp.org/gla/statutes/StGB.htm.
[59] See CHAPTER TWENTY-SIX. RESTRICTIVE PRACTICES OFFENCES. Section 298. Restricting competition through agreements in the context of public bids.
[60] Article 45 (1) of EU public procurement directive 2004/18/EC provides for an obligation to exclude candidates or tenderers who have been the subject of a conviction by a final judgement for certain crimes enumerated in the directive, amongs which is a corruption.
[61] See Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, *OJ L 216, 20.8.2009, p. 76–136*.

8.2. Sanctions for Bid-rigging

To be effective, legal prohibitions against collusive tendering should be backed up by appropriate sanctions including heavy fines and, in the view of many experts, prison sentences[62]. The EU public procurement rules do however not contain any specific rules dealing with the issue of collusion / bid-rigging.

Bid-rigging is generally subject to the same penalties as other hard core cartels, meaning fines and, depending on the jurisdiction, imprisonment. Fines are the most common penalty for bid-rigging imposed on both legal persons and individuals. In many jurisdictions, that recognize criminal liability for bid-rigging imprisonment sentences could also be imposed on individuals.

Antitrust violations involving bid-rigging can also result in a contractor's suspension or debarment. According to EU public procurement rules collusion between bidders can lead to an exclusion of the undertakings in question from the current and later procurement procedures. The already quoted Article 45 of Directive 2004/18/EC provides in its paragraph 2 that any economic operator may be excluded from participation in a contract where he has been convicted of an offence concerning his professional conduct or has been guilty of grave professional misconduct proven by any means.

However, the implementing conditions of this exclusion ground (which is, contrary to the exclusion grounds of Article 45 (1), not obligatory but optional) have to be determined by the EU Member States. Depending on Member States' definition of the notions "offence concerning his professional conduct" and "grave professional misconduct" in their implementation of Article 45 (2), collusion between bidders can thus constitute a reason for exclusion.

Debarment from future public procurement procedures however, particularly in smaller economies like Bulgarian economy, may have the paradoxical effect of reducing the number of qualified bidders to an uncompetitive level. As a result, instead of debarment from future works, some jurisdictions utilise the so called Certificates of Independent Bid Determination (CIBD) in public procurement. In such jurisdictions, prosecution for false statements in certification can provide a straightforward means of penalising collusion in tendering.

Penalties applicable for bid-rigging differ in their effect in deterring anti-competitive behaviour. For example, penalties applicable for bid-rigging that are perceived as the most important deterrents in UK are[63]:

- company fines[64];
- exclusion from bidding for further work (firms banned from undertaking certain activities; exclude firms from participating in future procurement projects (blacklisting) if found guilty of bid-rigging activities);
- criminal prosecution of individuals involved (possibly of prison sentences);
- negative publicity for firms caught (so called ‘naming and shaming’ approach);
- staff banned from undertaking certain activities (e.g. director disqualification);
- compensation claims/private damages action.

Strong penalties, including fines and exclusion from bidding for future contracts, were seen as the most important deterrents. Direct consequences for individuals through criminal

[62] See OECD, *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programme*, OECD, 2002; see also Richard Whish, "Control of Cartels and Other Anti-competitive Agreements," in Vinod Dhall, *Competition Law Today: Concepts, Issues and the Law in Practice* (New Delhi: Oxford University Press, 2007), chapter 1.
[63] Office of Fair Trading, “Evaluation of the impact of the OFT's investigation into bid rigging in the construction Industry”, a report by Europe Economics, June 2010
[64] Substantial fines of up to 5 per cent of turnover have been imposed in many of the OFT cases reviewed.

prosecutions and/or director disqualification were favoured too. Additional penalties on companies through blacklisting by procurers and other forms of 'naming and shaming' were also cited as possible options.

Some surveys retain that penalties alone are not serving as enough of deterrent and that other activities like the so called leniency programs[65] are needed. Many countries have competition leniency programmes[66] in place which grant immunity or reduced fines to firms that reveal the existence of cartels and participate in their subsequent investigation. European Commission adopted such a lenience programme (Leniency Notice) in 1996[67] that was replaced by a new Leniency Notice in 2002[68]. Subsequently, the European Commission and all EC Member States adopted a model leniency programme developed within the European Competition Network (a network linking all competition authorities in the Community)[69].

In all analyzed jurisdictions (Italy, sec. 2 (3) of Competition and Fair Trading Act; UK, section 2, subsection (4) of UK Competition Act 1998; France, Article 420-3 of Commercial Code, etc.) agreements that violate the collusive (cartel) agreements prohibition are illegal and null and void.

9. Conclusion

The legal prohibition of corruption and collusive practices in public procurement serves an important purpose by making clear that the government will not tolerate such illegal practices that have the potential to disturb the normal functioning of the public procurement markets.

Bid-rigging in public procurement markets accounts for a striking percentage of prosecutions by competition authorities in jurisdictions where such authorities are wellestablished.

In the UK, the OFT announced in September 2009 its decision to fine 103 construction companies a total of £129.2 million for infringing UK competition law by engaging in bid-rigging activities, largely in the form of cover pricing, on 199 tenders between 2000 and 2006[70].

In 2008, the European Commission imposed fines totalling € 32,755,500 on various large firms providing international removal and relocation services in Belgium for fixing prices, sharing the market and bid-rigging, in violation of the EC Treaty's ban on cartels (Article 101 of TFEU, previous Article 81 of EC Treaty)[71].

In France the *Council de la Concurrence* made 16 decisions concerning cartel activity in 2006; the maximum fine imposed in 2006 was €47.9 million (compared to €754.4 million in 2005). The fine was made to 34 companies found guilty of bid-rigging concerning a large number of public tenders in the Greater Paris area.

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[65] Leniency programs for co-operation in anti-cartel enforcement cases were introduced in the US in the 1980s and progressively strengthened through the 1990s.
[66] UK, Hungary, Italy, France
[67] Commission Notice on the non-imposition or reduction of fines in cartel cases, *Official Journal C 207*, 18 July 1996 pp. 4 – 6.
[68] Commission notice on immunity from fines and reduction of fines in cartel cases, *Official Journal C 45*, 19 February 2002, pp. 3-5. (The main change was that, once a firm was admitted to the programme, immunity became automatic).
[69] See http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html, and http://ec.europa.eu/competition/ecn/model_leniency_en.pdf
[70] OFT press release 114/09, September 2009, http://www.oft.gov.uk/news-andupdates/press/2009/114-09
[71] "Antitrust: Commission fines providers of international removal services in Belgium over €32.7 million for complex cartel" (EC Commission, Press Release, IP/08/415, 11 March 2008).

Enactment of an appropriate competition law provision prohibiting bid-rigging and other collusive agreements is only the beginning. Recent efforts to deter such arrangements through effective enforcement of relevant statutory provisions have taken two main forms. First, sanctions for culpable parties have been substantially increased[72]. Convictions in bid-rigging cases can now result in significant penalties. In broad terms, the trend to impose heavy penalties on defendants in cases of bid-rigging and collusive tendering has been progressively replicated in a number of jurisdictions in EU. Second, more and more Member States make a criminal offence the participation in collusive agreements in the context of public procurement by introducing a separate provision in their criminal codes.

The financial crisis makes the fight against corruption and bid-rigging a more significant question both at national and EU level. We retain that the moment is appropriate to propose some amendments of the public procurement regime in Bulgaria. These amendments have two aspects. First, the introduction of a bid-rigging offence (like in Germany and Hungary) in the Bulgarian Criminal Code. Second, the introduction of criminal law liability for legal persons for offences like corruption and bid-rigging in order to create grounds for debarment of such legal persons from future public procurement procedures.[73]

[72] See Wouter P.J. Wils, "Is Criminalization of EU Competition Law the Answer?", *World Competition: Law and* Economics Review, 2005.

[73]

THE LEGAL IMPACT OF THE EUROPEAN 'DEBT' CRISIS

The influence of the crisis in the field of constitutional law and human rights

Professor Bill Bowring

- President, European Lawyers for Democracy and Human Rights (ELDH)
- International Secretary, Haldane Society of Socialist Lawyers, England
- Birkbeck College, University of London;
- Barrister at Field Court Chambers, Gray's Inn - I represent applicants against Azerbaijan, Estonia, Georgia, Latvia, Russia
- Executive Committee and founding member, Bar Human Rights Committee of England and Wales;
- founder and Chair of European Human Rights Advocacy Centre (EHRAC); we have several hundred cases against Georgia and Russia – staff lawyers in Chechnya, Moscow and Russian regions

The influence of the crisis in the field of constitutional law and human rights

Capital is behaving normally: the contradictions of the EU and Council of Europe are ever sharper

Above you see the Birkbeck College logo.

- We provide evening higher education for 19,000 working-class adults.
- We were founded in the 19th century by George Birkbeck as the Mechanics Institute. Our President is the Marxist historian Eric Hobsbawm.
- Now government funding for non-science subjects is cut by 80%
- We are forced to charge from next year £9,000 per year. Students will graduate with debts of more than £30,000.
- Our Union, UCU (University and College Union) has called us out on strike twice this year – pensions, dismissals

Crisis of the Strasbourg system 1

- As of today, there are 151,000 cases pending before the Strasbourg court
- There are 43,000 cases pending against Russia
- Of these, 38,000 do not have priority
- The Protocol 14 reforms are a "finger in the dyke" = perhaps reduce number of pending cases by 25%, when applications increase by 25% a year
- As of March 2011, the Court hears cases based on the urgency of a violation, as opposed to the chronological order of receipt.
- Urgent claims will not be lost, but lesser claims may never be heard.

Crisis of the Strasbourg system 2

- The UK is defying Strasbourg
  - refusal to implement the judgment on DNA testing by police
  - refusal to implement the judgment on prisoners voting (*Hirst v UK*)
  - judgments soon on UK war crimes in Iraq – *Al-Skeini v UK*, *Al-Jedda v UK*
- Russia is preparing to defy Strasbourg
  - anger at *Kononov v Latvia* (red partisan convicted of war crimes)
  - anger at *Markin v Russia* (discrimination, criticism of Constitutional Court)
  - anger at *Republican Party v Russia*, *United Opposition v Russia*

Crisis of the Strasbourg system 3

- The crisis of the Strasbourg system is the direct result of the overall onslaught of capital in Europe
- More and more CoE states have right-wing and authoritarian governments (Russia, Hungary, UK, Italy)
- The flood of new applications to the ECtHR is made up of desperate individuals who cannot find justice in their own legal system
- But the ECtHR cannot deal with social rights, and its existing Art II case-law does not favour trade unions: it is a court of individual rights

Crisis of the ECJ system 1

- The EU, post-Lisbon, seeks to present itself as the bastion of rights and fundamental freedoms, even "solidarity rights".
- Soon the EU will accede to the ECHR, with an EU judge at Strasbourg.
- In reality the EU is a set of disciplines for pursuing a neo-liberal policy in which it is obligatory to privatise, and to commodify in all spheres of life.
- Neo-liberal monetary policy was at the heart of the creation of the Euro. Clear with Maastricht at the start of the 1990s.
- Thus talk of a constitution for the EU was meaningless
- At the same time, the "social constitution" – based in Germany on the *sozialstaatsprinzip* – characteristic of much of post-war Europe including Greece - is now under extreme threat.

Crisis of the ECJ system 2

- **ECJ anti-labour judgments**
  - *Viking* (C-438/05, 11 December 2007),
  - *Laval* (C-341/05, 23 February 2008),
  - *Rüffert* (C-346/06, 3 April 2008),
  - *COM v Lux* (C-319/06, 19 June 2008)

• These cases show clearly that Community law, with its "four freedoms" for economic integration, trumps labour rights.

•The Institute of Employment Rights (2010, http://www.ier.org.uk/node/371) said:

"These cases are symbolic of the extent to which business consolidated its power in the neo-liberal global economy, securing control of the European legal system and condemning any idea of "social Europe" to a distant memory."

•They recommend strategic litigation at the ILO and the ECtHR - **but**
  - The ILO is totally ignored by the UK
  - The ECtHR is in melt-down .

What is going on? 1

- **Don't talk about "neo-liberalism", "capitalism" or even "finance capital"**

• Today's crisis of capital system is nothing new. This is

• The raging hunger of **capital** for new opportunities to valorise itself

• Karl Marx wrote:

"Hitherto, capital has been regarded from its material side as a *simple production process*. But, from the side of its formal specificity, this process is a *process of self-valorisation*. Self-valorisation includes preservation of the prior value, as well as its multiplication." (*Grundrisse*, Penguin edition, p.310-311)

• This is capital as an abstract form which feeds on people: a **vampire.**

• Capital cannot be hoarded. It cannot be satisfied simply with ever-expanding production of goods, services or intellectual outputs. It must constantly seek out new areas of human life and human existence to colonise,

• This process cannot stop, on the contrary it must constantly accelerate.

• Not just privatisation: wholesale commodification of all spheres, especially the provisions of services, education, health-care and all aspects of leisure and cultural activity.

• Everything must have a monetary price, and be put up for sale.

What is going on? 2

•The so-called debt crisis is nothing of the kind. Nothing to do with the individual wickedness or greed of individual capitalists.

• In reality, the banking sector experienced an absolutely typical bubble phenomenon, in which "bundled financial products" or services were created and sold, even though the only real monetary core was composed of the mortgages paid by very poor people. Their value was completely fictitious.

• Enormous individual fortunes were made by charging fees and commissions on every transaction. In the UK, the scandal of payments to individual bankers - £ millions.

• In the end the bubble burst, and instead of letting the market do its job by killing off the financial institutions responsible, states felt themselves obliged to re-finance the institutions. It is not hard to guess why.

What is going on? 3

• What is at stake in Greece and all other EU states is not reducing a debt, but radically reducing the public sector share of the economy, around 40% in Greece and other EU states.

• In Britain we are the opposite of Germany: since Thatcher, we have no industry.

• A very high proportion of employment is in the public sector – more than in Greece.

• We now have a government which is far more extreme in its policies than anything proposed much less implemented by Thatcher.

• Higher education and the health service are now being prepared for privatisation.

• The system of Legal Aid, once the best in the world, is now to be destroyed.

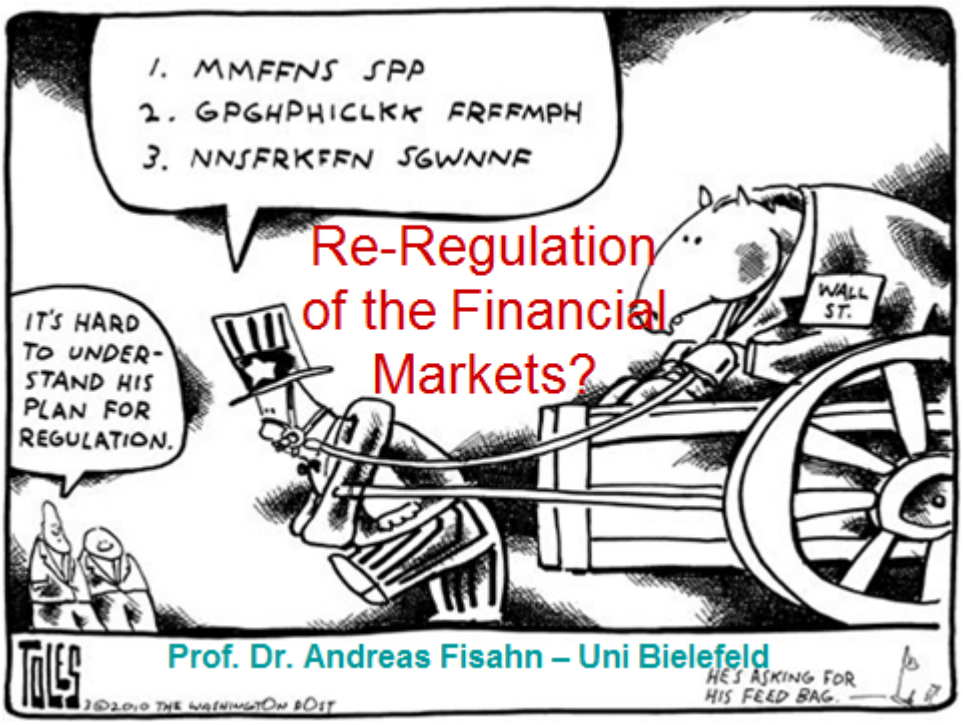
• It is already very difficult to go on strike in Britain: there are now calls for strikes to be prohibited.

• The right to protest is under threat – "kettling", serious criminal charges for those almost killed by police

What is to be done?

- Serious resistance to this monetarist onslaught can only come from organised labour.
- Half a million protestors on the streets of London on 26 March were organised by the trade unions. The Haldane Society of Socialist Lawyers was there with its banner.
- On the other hand, the feudal monarchy organised one million people mainly from southern England, to applaud the royal wedding, which was a blatantly political event.
- Socialist and democratic lawyers will be fully engaged defending the right to protest and the right to strike.

www.bbk.ac.uk



Re-Regulation of the Financial Markets?

Prof. Dr. Andreas Fisahn – Uni Bielefeld

Political Reaction after the crisis

- September 2008 Lehman Brothers crash
- Attac Proposals in 2009:
  - Capital Transactions control and Credit Contraction
  - Tobin Tax and stock exchange transfer tax
  - Closing of Offshore Places
  - ban of High Risk Fond
  - Ban of high risk financial instruments like: deriavtes, securitization (Verbriefung) and ban of trading credits – licensing of useful Derivates
  - New System of monetary Management (like Bretton Woods) basing on an artificial currency
  - Reform of World Bank and IMF

Political Reaction after the crisis

Wind of change - G20 Decisions in April and September 2009 :

- Large and complex financial institutions require particularly careful **oversight** given their systemic importance,
- **hedge funds** or their managers will be **registered** and will be required to disclose appropriate information including on their leverage, necessary for assessment of the systemic risks
- to protect public finances and international standards against the risks posed by non-cooperative jurisdictions (**tax heavens**),
- **Credit Rating Agencies** should be subject to a regulatory **oversight** regime that includes registration.

Political Reaction after the crisis

- **regulation of** over-the-counter (**OTC**) derivatives, securitization markets,
- improve both the **quantity and quality of bank capital** and to discourage excessive leverage. …
- *Improving over-the-counter derivatives markets:*
- Crisis management groups for the major cross-border firms and a **legal framework for crisis intervention** as well as improve information sharing in times of **stress.**
- *Reforming **compensation practices** to support financial stability:* including by (i) avoiding multi-year guaranteed **bonuses**; …

Political Reaction after the crisis

Back on the usual way: G20 meeting 2010: "We

- -committed to reach agreement expeditiously on **stronger capital and liquidity standards** as the core of our reform agenda
- agreed the financial sector should make a **fair** and substantial **contribution** toward paying for any burdens associated with government interventions, where they occur, to repair the banking system or fund resolution.
- Those countries with serious fiscal challenges need to accelerate the **pace of consolidation**."

Political Reaction after the crisis

Welt: "Die G-20-Staaten konnten sich nicht auf eine globale Bankenabgabe einigen. Die Finanzminister und Notenbankchefs konnten sich außerdem nicht auf neue Regeln für die Finanzmärkte einigen. Auch die Fristen für die Umsetzung früherer Beschlüsse blieben unverändert. Trotz starker Bedenken aus einigen Ländern hielten die Minister daran fest, die strikteren Kapitalvorschriften für Banken (Basel III) Ende 2012 einzuführen."

Basel III

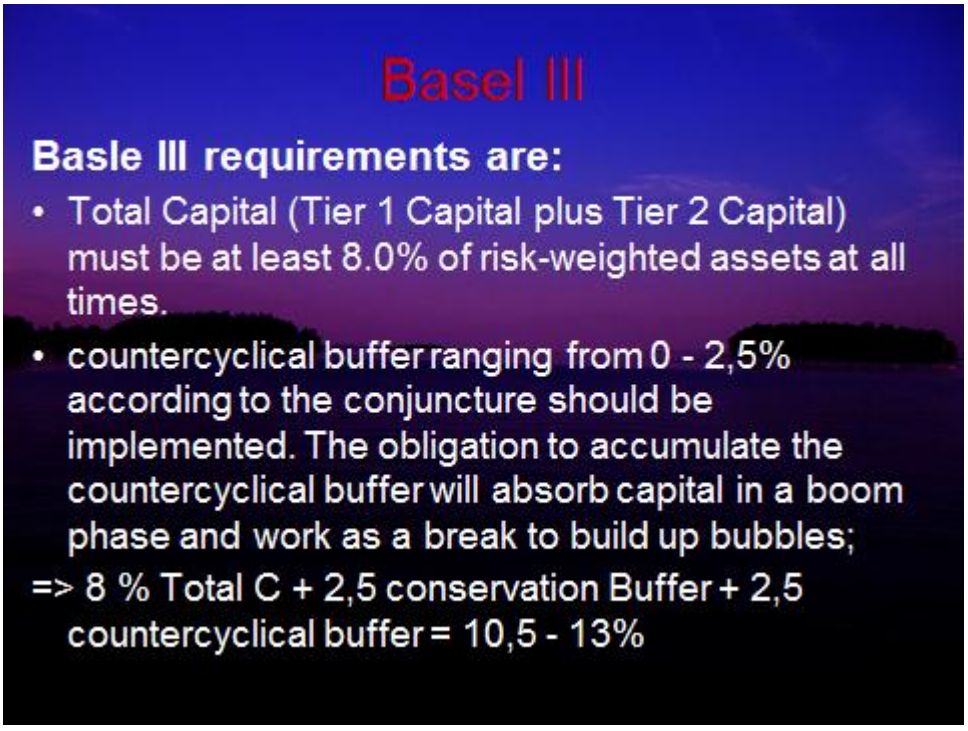
BASEL III – December 2010

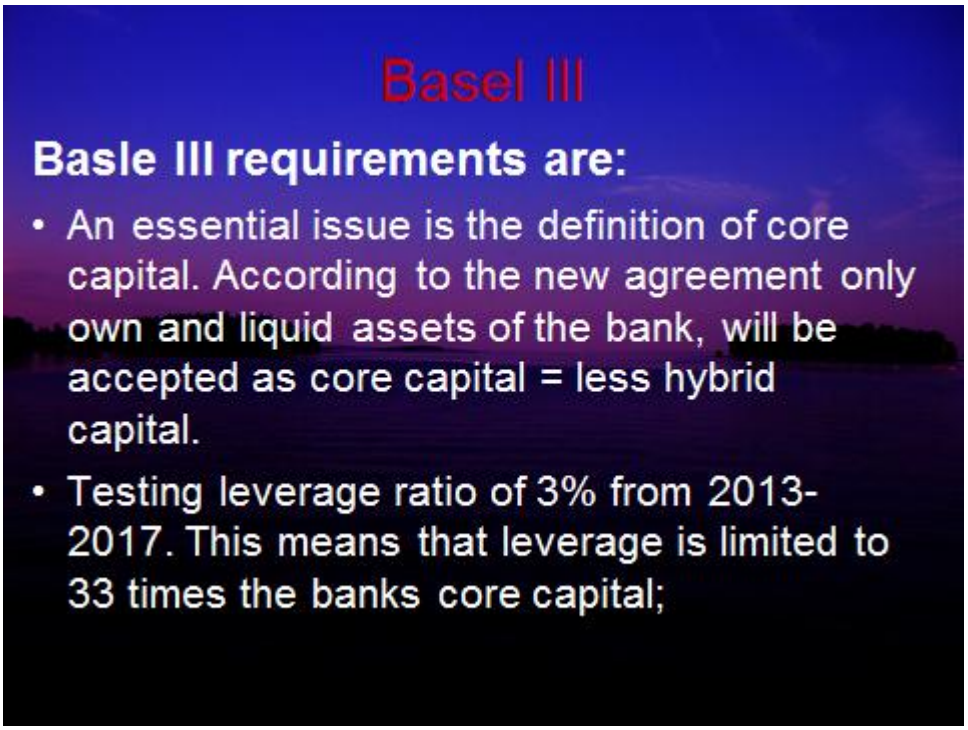
- a new global regulatory, not binding standard on bank capital adequacy and liquidity
- agreed by the members of the Basel Committee on Banking Supervision
- Committee was founded 1974 by the central reserve banks and the bank supervision agencies of G10
- Seat is Basel, Bank for International Settlements (BIS)

Basel III

- Capital regulations under Basel I came into effect in December 1992
  - A minimum ratio of 4% for Tier 1 capital and 8% for Tier 1 and Tier 2 capital
- Basel II was released in June 2004
  - defines minimum capital to buffer unexpected losses.
  - based on a complex system of risk weighting that applies to 'credit', 'market' (MR) and 'operational' risk (OR),
  - Definition of (risk) capital was to difficult to work (383 pages)
  - If Buffers depending on the risk the system has pro-cyclical effects
  - Risks under underestimates in good and overestimated in bad times


Basel III
Basle III requirements are:
• Common Equity Capital (Core Capital Tier 1) must be at least 4.5% of risk-weighted assets at all times.
• Additional Tier 1 Capital must be at least 6.0% of risk-weighted assets at all times.
• A capital conservation buffer of 2,5% (Core Capital Tier 1) will be introduced. 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;
=> 8,5 Tier 1 Capital, 7% Core Tier 1 Capital


Basel III
Basle III requirements are:
• Total Capital (Tier 1 Capital plus Tier 2 Capital) must be at least 8.0% of risk-weighted assets at all times.
• countercyclical buffer ranging from 0 - 2,5% according to the conjuncture should be implemented. The obligation to accumulate the countercyclical buffer will absorb capital in a boom phase and work as a break to build up bubbles;
=> 8 % Total C + 2,5 conservation Buffer + 2,5 countercyclical buffer = 10,5 - 13%


Basel III
Basle III requirements are:
• An essential issue is the definition of core capital. According to the new agreement only own and liquid assets of the bank, will be accepted as core capital = less hybrid capital.
• Testing leverage ratio of 3% from 2013-2017. This means that leverage is limited to 33 times the banks core capital;


Basel III
Basel Committee estimated:
• The capital requirement of 4,5% and 2,5 Buffer leads to a shortfall of € 577 billion (for group1 banks),
• sum of profits after tax and prior to distributions in 2009 was € 209 billion

Basel III

Problems:

- Shadow Banks (Hedge Fonds) are not included
- Doubt, if control by authorities will work, especially the border crossing supervision
- Doubt, if financial bubbles will be avoided by this measures (Advantage: 2,5% Buffer Core Capital, and 2,5% countercyclical Buffer)
- Unclear, if Basle III will be implemented by all states (USA)
- Basle III should be implemented from 2013 to 2018
- Legitimacy of the Basle Committee (Group of Central Bank and Bank Supervisors)

Tax Heaven

May 2009: Peer Steinbrück, the German Finance Minister, stirred up sentiment in the Alps by saying that the Swiss were behaving like Red Indians — the old-fashioned word for Native Americans — in flight from the US Cavalry, a reference to the way that bankers have been resisting the opening of accounts. A Swiss deputy then compared Mr Steinbrück to a Nazi.

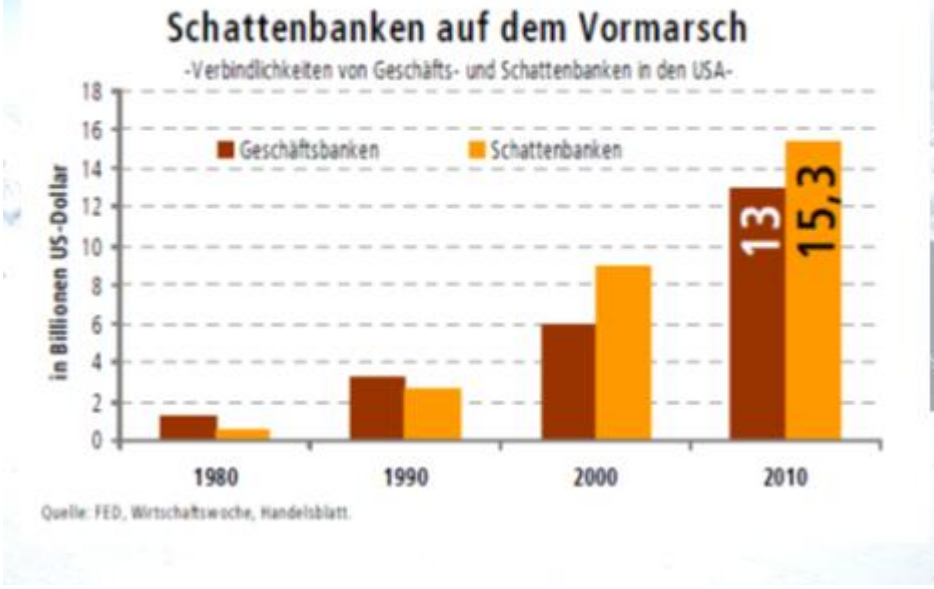
This month Mr Steinbrück lumped Switzerland and other tax havens together with Ougadougou, the capital of Burkina Faso.

Tax Heaven

- Shadow Banks are settled in Tax heavens = non-cooperative jurisdictions
- To avoid regulatory standards of banks
- Shadow Banks = Hedge, private equity Fonds, special purpose entities

- Exampel: German HRE bought Depfa Bank and settled it in Irland
- Depfa is not a shadow banks
- Started business in less regulated Countries
- Depfa crashed and HRE failed too
- FRG payed 100 Bio. Euro

Tax Heaven



Tax Heaven

OECD informed:

- In a report issued in **2000**, the OECD **identified** a number of jurisdictions as **tax havens** according to criteria it had established. Between 2000 and April 2002, **31 jurisdictions made formal commitments** to implement the OECD's standards of transparency and exchange of information.
- In **May 2009**, the Committee on Fiscal Affairs **decided to remove all three remaining jurisdictions (Andorra, the Principality of Liechtenstein and the Principality of Monaco) from the list of uncooperative tax havens** in the light of their commitments to implement the OECD standards of transparency and effective exchange of information and the timetable they set for the implementation

Tax Heaven

OECD: Model agreement on exchange of information on tax matters, developed by the OECD Global Forum Working Group on Effective Exchange of Information.

Art. 5: The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a **request**:
5 (d) grounds for believing that the information requested is **held in the requested Party** or is in the possession or control of a person within the jurisdiction of the requested Party;

FRG Agreement with Liechtenstein = identical

Financial Supervising

European System of Financial Supervisors (ESFS) (Art. 2 (2) RI 1095/2010)

- European Systemic Risk Board
- the Joint Committee of the European Supervisory Authorities (ESA)
- European Banking Authority (EBA);
- *European Insurance and Occupational Pensions Authority Eiopa)* - established by Commission Decision 2004/9/EC of 5 November 2003 and directive 2005/1/EC of 9. März 2005
- Committee of the European Supervisory and Market Authorities (ESMA), REGULATION (EU) No 1095/2010 of 24 November 2010 (before CESR)

Financial Supervising

European Systemic Risk Board: Regulation (EU) No 1092/2010 of 24. Nov. 2010 on European Union macro-prudential oversight of the financial system

Members of the General Board:

- the President and the Vice-President of the European Central Bank (ECB)
- the Governors of the national central banks of the Member States
- one member of the European Commission
- the Chairperson of the European Banking Authority (EBA)
- the Chairperson of the European Insurance and Occupational Pensions Authority (EIOPA)
- the Chairperson of the European Securities and Markets Authority (ESMA)
- the Chair and the two Vice-Chairs of the Advisory Scientific Committee (ASC)
- the Chair of the Advisory Technical Committee (ATC)

Financial Supervising

ESRB shall carry out the following tasks:

- determining and/or collecting and analysing all the relevant and necessary information;
- identifying and prioritising systemic risks;
- **issuing warnings** where such systemic risks are deemed to be significant and, where appropriate, make those warnings public;
- issuing **recommendations** (Art. 16) for remedial action in response to the risks identified including legislative initiatives
- Need for adequate **justification**, if recommendations are not followed.
- coordinating its actions with those of international financial organisations, particularly the International Monetary Fund (IMF) and the Financial Stability Board (FSB)

= Advisory Service and non binding warnings

Financial Supervising

European Banking Authority Regulation (EC) No. 1093/2010 of 24 November 2010 replaced CEBS Commission Decision 2009/78/EC

Tasks and powers of the Authority (Art. 8 ff)

- establishment of high-quality common regulatory and supervisory standards and practices
- to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture
- to stimulate and facilitate the delegation of tasks and responsibilities among competent authorities
- to organise and conduct peer review analyses of competent authorities,

=> Coordination and binding technical standards

Financial Supervising

Binding Decisions

- Art. 18 (3): In **emergency situations** the Authority may adopt individual decisions requiring **competent authorities** to take the necessary action

  (4) where a competent authority does not comply with the decision of the Authority, the Authority may, where the relevant requirements laid down in legislative acts including in regulatory technical standards, adopt an **individual decision** addressed to a **financial institution** requiring the necessary action to comply with its obligations under that legislation, including the **cessation of any practice**.

Financial Supervising

- Art. 21 (2) b): initiate and coordinate Union-wide **stress tests** in accordance with Article 32 to assess the resilience of financial institutions
- *Art. 60* Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority
- Against decisions of the "board of appeal", the way to the ECJ is open

Rating Agencies

EU Regulation No. 1060/2009 of 16.9.2009 on credit rating agencies:

- **Art. 14:** A credit rating agency shall apply for **registration** for the purposes of Article 2(1) provided that it is a legal person established in the Community

=> Private Rating Agencies

Rating Agencies

Condition for Registration:

- **Art. 6 (1):** A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating is not affected by any existing or potential **conflict of interest**
- **Art. 7 (1):** A credit rating agency shall ensure that rating analysts, its employees and any other natural person whose services are placed at its disposal or under its control and who are directly involved in credit rating activities have **appropriate knowledge and experience** for the duties assigned.

Rating Agencies

Transparency

- **Art. 8 (1):** A credit rating agency shall disclose to the public the **methodologies, models and key rating assumptions** it uses in its credit rating activities.
- **Art.10 (3):** When a credit rating agency issues credit ratings for **structured finance instruments**, it shall ensure that rating categories that are attributed to structured finance instruments are clearly differentiated using an **additional symbol**.

Alternative Investment Fond

Proposal for a Directive on Alternative Investment Fund Managers
- KOM(2009) 207

- **The AIFM Directive in October 2010 was accepted by the council. In December 2011 the EP agreed.**

Alternative Investment Fond

- *Art.4: Requirement for authorisation*
- *Art. 9:* The AIF-Manager shall:
  (a) **act honestly**, with **due skill**, care and diligence and fairly in conducting its activities;
  (b) act in the **best interests of the AIF** it manages,
- Art. 14: Member States shall require AIFM to take all reasonable steps to identify **conflicts of interest** between the AIFM, including their managers, employees

Alternative Investment Fond

- *Art. 15 + 16:* Risk Management and *Liquidity management System is needed*
- *Art.9:* internally managed AIF should have an initial capital of EUR 300 000. Extern managed of 125 000 (= 0,2%)
- The AIFM shall provide an additional amount of own funds of 0.02 %, if the value of the portfolios of the AIFM exceeds EUR 250 million.
- Not more than EUR 10 million.

Alternative Investment Fond

- Art. 27: AIF notifies the competent authorities of its home Member State of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%

Alternative Investment Fond

- Problems:
  - Initial Capital or own Fund is a joke (Basle III Minimum = 7 %)
  - Business Model itself is not questioned
  - Typical Activities, which are not necessary, are not prohibited (in FRG before 2004 and again 2010) like short sales
  - No effective limit of the **leverage ratio**

Short Sales and CDS

15. September 2010: proposal on *Short Selling and certain aspects of Credit Default Swaps*

- "credit default swap" means a derivative contract in which one party pays a fee to another party in return for compensation or a payment in the event of a default by a reference entity, (Art. 2 (1) c)
- "short sale" in relation to a share or debt means any sale of the share or debt which the seller does not own at the time of entering into the agreement (p)

Short Sales and CDS

- Art. 5ff: Transparency rules i.e. Notification, if short positions reaches 0.2% of the value of the issued share capital
- Art. 12: Short sale is allowed, if
  - the person borrowed the share or
  - have an agreement to borrow or
  - Has a reservation for lending the share

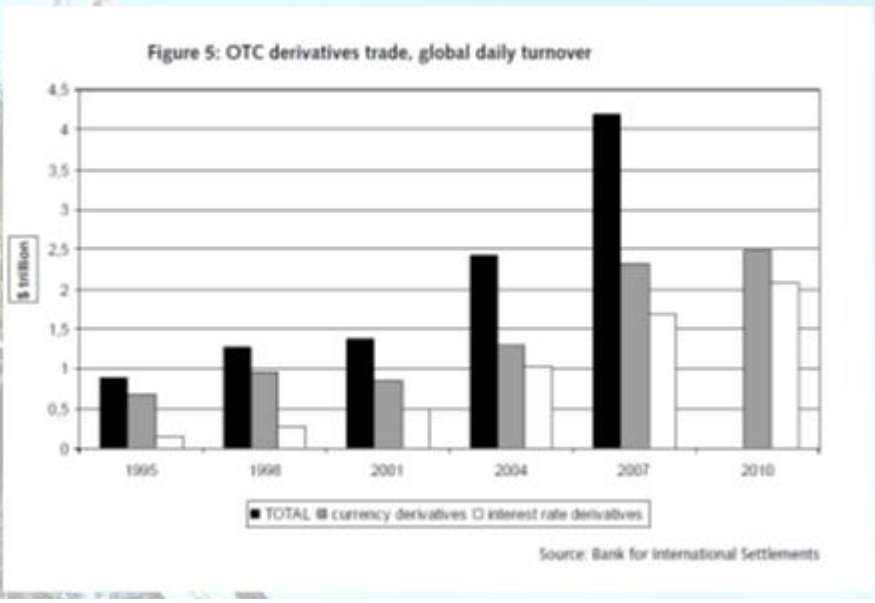
Short Sales and CDS

- Art. 13: If a person is not able to deliver the shares,
  - The counterparty should buy in the shares or
  - cash compensation is payed to the other part of the contract and
  - The person who fails, should pay all amounts paid pursuant to points before.
- Exceptions (art 14 ff): Short sales outside the Union

Short Sales and CDS

- In case of adverse events or developments which constitute a serious threat to financial stability
  - The national authorities (Art. 17 + 18) and ESMA (Art. 24)
  - may prohibit or impose conditions relating to persons entering into short sales
  - may limit persons from entering into credit default swap transactions

Over the Counter Derivates



Over the Counter Derivates

15. September 2010 proposal for *a Regulation on OTC derivatives, central counterparties and trade repositories*

- *Art.3:* A financial counterparty shall clear special OTC derivative contracts
- Art. 4: ESMA decides whether that class of derivatives is eligible for the clearing obligation

Over the Counter Derivates

- Art. 3: 'central counterparty (CCP)' means an entity that legally interposes itself between the counterparties to the contracts traded within one or more financial markets, becoming the buyer to every seller and the seller to every buyer and which is responsible for the operation of a clearing system;
- clearing' means the process of checking that financial instruments, cash or both are available to secure the exposures arising from a transaction;

Over the Counter Derivates

- = Contract between CCP and each partner, CCP checks the risks and must be liquid
- Art. 12: A CCP shall have a permanent, available and separate initial capital of at least EUR 5 million to be authorised pursuant to Article 10

Over the Counter Derivates

Problems:

- Short sales should be prohibited – not necessary
- CDS should stay at the owner of the shares, trading is not useful
- Clearing of derivates is insufficient – derivates should be checked, if useful or not

Towards a new Crash ?

- April 2008: German Stock Index (DAX) at ≈ 6500 points
- 2009: German GDP fall 4.7 %
- 2009 Dax fall to ≈ 3.600
- April 2011: German GDP on the level before the crisis
- April 2011: Dax at 7100
- Mai 2011: Hedge Fonds administrate 2000 Bio. Dollar; the GDP of Germany is at 2500 Bio Euro

- July 2008: Barrel oil (Brent) at 147 Dollar
- 2009: lowest price 32 Dollar
- April 2011: 122 Dollar


Towards a new Crash ?
• April 2008: Price for wheat ≈ 9 Dollar bushel
• September 2009: wheat ≈ 4,3 Dollar
• April 2011: wheat ≈ 8 Dollar
• => Still too much money in the circle
• => To much opportunities to make money by betting
• => The Casino is still working
• => An other Crash is probable this year

Case-law of the Latvian Constitutional Court: bailout and the principle of legitimate expectations

Aleksandrs Kuzmins, LL.M., Latvian Human Rights Committee
Submission for the conference „The legal impact of the European 'debt' crisis" in Athens, May 21, 2011

Good afternoon; first I want to thank the organisers for the opportunity to speak. To give a context, why could the Latvian experience be of interest not only to Latvians? Latvia has suffered one of the greatest losses of gross domestic product in 2009 among the European Union member states: 18 %. Unsurprisingly, crisis-connected cases before the Constitutional Court are numerous. Up to now, most of the cases are in some way connected with three themes relevant to many countries, which I'll touch:

- cuts in the social sphere (demand for its support is high – unemployment rate is still stable over 13 %[1])
- regulation of lending and banking sphere, which did enlarge the real estate bubble in the first years of this century, when Latvia was called a „Baltic Tiger", and in 2008, deprived the budget of stability, when the second-largest bank has received bailout and was nationalized to prevent bankrupcy.
- negotiations with EU and IMF on the loans to cover the deficit.

Turning to specific case-law, most judgments I'll speak about are already translated in English and published on the Court's website www.satv.tiesa.gov.lv, where one can find the Constitution[2] of Latvia, too. Most of the cases discussed were brought before the court by individuals affected.

The earlier approach of the Constitutional Court was, that, in order to respect the legitimate expectations, the amendments decreasing entitlements of people had to have a transition period foreseen, or to provide for a compensation[3]. One should note that Latvian Constitution, while proclaiming right to social insurance, does not expressly foresee a principle of social state, but the earlier practice of the Constitutional Court has derived from the Constitution a principle of a „socially responsible state"[4].

The changes began with pensions: originally not even cut. There was a provision in the law „On State Funded Pensions", foreseeing recalculating age and disability pensions according to inflation once a year (by-laws set April, 1, as the date of recalculation). In March, 2009, the parliament has decided not to apply the provision in 2009. The Court has decided that the legitimate expectations have existed, bet were less weighty, since the recalculation of 2009 has not taken place until March, and the necessity to keep the social security system stable was held superior to legitimate expectations. It has stressed the difference between expectation of benefits already given or eventual, as well as the necessity to evaluate the proportionality of interference with expectations and the need to protect public interests: the public interests could justify cutting entitlements even without transition period or compensation[5].

The most significant, both financially and legally, case connected with the current economical downturn before the Constitutional Court of Latvia was that of cutting the age

[1] Statistics available at http://www.nva.gov.lv/index.php?cid=6&new_lang=lv#bezdarbs (Latvian)
[2] Constitution of the Republic of Latvia http://www.satv.tiesa.gov.lv/?lang=2&mid=8
[3] CC Judgment in the case No. 2002-12-01 http://www.satv.tiesa.gov.lv/upload/2002-12-01E.rtf Para. 2 of the concluding part
[4] CC Judgment in the case No. 2006-07-01 http://www.satv.tiesa.gov.lv/upload/judg_%202006-07-01.htm Para. 18
[5] CC Judgment in the case No. 2009-08-01 http://www.satv.tiesa.gov.lv/upload/judg_2009-08-01.htm (case brought before the court by the parliamentary opposition. In Latvia, one fifth of MPs can lodge a constitutional complaint) Para. 25

pensions by 10 %, and pensions for those retired people who remain employed by 70 % through the so-called Disbursement law of June, 2009, (coming into force only two weeks after its adoption, without a transition period). The government justified the cuts, *inter alia*, with the terms of its agreement with the EU and International Monetary Fund.

The Court has found[6] the contested provisions to be prescribed by law and having a legitimate aim, but not necessary for its achievement (the single most convincing argument seems to be that the Parliament has not, in fact, debated and did not provide reasons to reject other ways of reaching the same amount of limiting state's expenses), and thus unconstitutional.

Regarding the reference to the agreement with the EU and IMF, the Court has decided that

- the specific cuts were not demanded by the EU and IMF, albeit pledged by the government in its unilateral documents, and (while the first seems to be sufficient),
- „the international commitments assumed by the Cabinet of Ministers cannot by themselves serve as an argument for the restriction of the fundamental rights", as the conceptual decision on a loan „significantly affecting the budget" had to be adopted by the Parliament (*Constitution: „68. All international agreements, which settle matters that may be decided by the legislative process, shall require ratification by the Saeima"*), referring to the practice established before 1940 as well as to some cases of laws adopted on specific loans from modern history of Latvia (without discussing the fact that in the contemporary Latvia there were considerable loans taken by the government, too).

This approach seems to ignore the supremacy of the international law; possibly a better (and well-founded) way would be to consider the agreement to be a political obligation instead of a legal one.[7]

Several judgments were adopted consequently concerning the deductions from other pensions (long service pensions for military persons[8], prosecutors[9] and policemen[10]) similar to those from age pensions and introduced in the same wave of amendments in June, 2009, and also finding them unconstitutional. The Court did also define time-limits for the unlawful deductions to be reimbursed. The fact that new proceedings were needed confirms the reluctance of the government to correct its wrong approach already pointed to by the Court.

To end with the pensions, one should note two more cases, both decided in February, 2011. One of them concerns the possibility to retire two years earlier if having period of insurance of at least 30 years (normal age of retirement in Latvia is 62 and is planned to reach 65 in some ten years). Before the downturn, this meant that one initially received 80 % of the pension. The amendments of June, 2009, provided for this share to fall until 50 % for those retiring starting from July, 2009. The Court has decided[11] that the amount of pension in case of early retirement, unlike the possibility of obtaining it, was not in the scope of legitimate expectations, and the amendments were thus held to be constitutional.

The last pensions case to mention concerns rights of Latvian 'non-citizens' (approximately 14 % of the population now, down from some 30 % at the beginning of independence). These

[6] CC Judgment in the case No. 2009-43-01 http://www.satv.tiesa.gov.lv/upload/judg__2009_43_01.htm (the case was brought before court both by parliamentary opposition and several affected individuals) See especially Para. 30-31. Several relevant documents are available at http://www.fm.gov.lv/?eng
[7] Paparinskis M. Satversmes tiesas attīstītās „būtiskuma teorijas" analīze. *Jurista vārds* No. 5 (600). February 2, 2010
[8] CC Judgment in the case No. 2009-88-01 http://www.satv.tiesa.gov.lv/upload/judg_2009_88_01.htm
[9] CC Judgment in the case No. 2009-86-01 http://www.satv.tiesa.gov.lv/upload/judg_2009-86-01.htm
[10] CC Judgment in the case No. 2009-76-01 http://www.satv.tiesa.gov.lv/upload/judg_2009-76.htm
[11] CC Judgment in the case No. 2010-29-01 http://www.satv.tiesa.gov.lv/upload/Spriedums_2010_29_01.htm (not yet translated) Para. 23

are former citizens of Latvian SSR ,who came to Latvia from the other republics of the former USSR, and their descendants, who were not recognized as citizens of any country after 1991. Unlike the citizens of Latvia, they do not receive pensions for the time worked in the former USSR outside Latvia, unless provided by a special bilateral treaty. This differing approach was found to be discriminatory by the European Court of Human Rights in a Grand Chamber case led by our committee since 2000, *Andrejeva v. Latvia,* in 2009.[12] However, the pensions law was not (and still is not) amended, so we were forced to go to the Constitutional Court with other applicants (Ms. Andrejeva has died in 2010[13], having received just satisfaction as ordered by ECtHR, but her pension was not recalculated, and she submitted an application to administrative court to recalculate it[14]).

The new applicants had worked not only in Russia, whose treaty with Latvia, foreseeing mutual non-retroactive taking into account of insurance periods, came into force during the trial before the Constitutional Court, but also in the Soviet republics of South Caucasus and Central Asia. The Court has not found the relevant provisions of the law „On State Funded Pensions" to be discriminatory, distinguishing the case from *Andrejeva* by stressing the coming into force of the treaty with Russia (?!) and the special circumstances of Andrejeva, who did not receive pension for the time actually worked in the territory of Latvia, but considered to be worked in Ukraine and Russia due to subordination of a then-federal enterprise (although ECtHR did not refer to these circumstances in its reasoning). Besides, the Court has referred to the only dissenter in ECtHR case, the judge from Latvia[15]. So, now we'll have to go to ECtHR again, with some hope to faster process thanks to *Andrejeva*.

Other cases where cuts were found to comply with the Constitution include a case on a provision of the earlier-mentioned Disbursement law, cutting the parental benefit for the employed parents,[16] where cuts were an expression of the transition period to abolishing the benefit for the employed parents at all; besides, unemployed parents in an even worse situation. Still, one of the six judges sitting (the President of the Court) has dissented, putting more accent on the rights of a child.[17]

In two more cases another cuts, which the Court has accepted without dissents, were made to other social insurance benefits: child maintenance disbursement and accidents and occupational diseases insurance. Conclusion that „In certain cases, when balancing the amount of the restriction of legal security and the necessity and urgency of amendments to legal regulation, deviation from the rights guaranteed to a person is permissible without providing a transitional period" from the earlier judgment on pensions had served as a ground for this, together with the fact that the benefits were not fully abolished. In the first case, the pimary responsibility of parents and the fact that disbursement wasn't given from people's own contributions but from the general budget, were of significance, too[18]. In the second case, a transition period and low standards of other countries were relied on to justify the cuts[19].

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[12] Andrejeva v. Latvia [GC]. Judgment of February 18, 2009. Application no. 55707/00

[13] Ушла из жизни Наталья Александровна Андреева
http://www.pctvl.lv/index.php?lang=ru&mode=archive&submode=year2009&page_id=10216

[14] Бузаев В. Суд поздравил Наталью Андрееву с днем освобождения Риги
http://www.pctvl.lv/index.php?lang=ru&mode=archive&submode=year2009&page_id=9521

[15] CC Judgment in the case No. 2010-20-0106 http://www.satv.tiesa.gov.lv/upload/judg_2010_20_0106.htm Para. 9, 13, 14. *NB* In this judgment, the law's title is translated as „On State Pensions", but this is the same law as mentioned before

[16] CC Judgment in the case No. 2009-44-01 http://www.satv.tiesa.gov.lv/upload/judg_2009-44.htm (the case was brought before court both by parliamentary opposition and several affected individuals) See especially Paras. 10, 23

[17] Dissenting opinion of Justice G. Kutris in the case No. 2009-44-01
http://www.satv.tiesa.gov.lv/upload/opinion_2009-44-01.htm

[18] CC Judgment in the case No. 2010-18-01 http://www.satv.tiesa.gov.lv/upload/judg_2010-18-01.htm Para. 11-13

[19] CC Judgment in the case No. 2010-17-01 http://www.satv.tiesa.gov.lv/upload/judg_2010-17-01.htm (the case was brought before court both by parliamentary opposition and several affected individuals). Para. 10-14

Notably, in all three benefits cases mentioned the Court has taken a position contrary to that of the Ombudsman (who was summoned by the Court to give his evaluation; Ombudsman has right to bring constitutional complaint before the court, too, but he rarely uses it).

There is reason to argue that the principle of legitimate expectations (also called 'legitimate trust' in translations of the case-law) seems to be much more convincing for the Constitutional Court when combined with some reasoning on the separation of powers, like in the judgment on the Disbursement law mentioned above and in cases, where the independence of the judiciary was involved, as were two cases connected with the salaries of judges[20] [21] and one – with that of land registry offices judges[22]. The Court has invoked legitimate expectations, but the essence of its conclusion was the violation of separation of powers by disproportionate decreasing the remuneration of judges.

Finally, there is a recent case[23] on the Law on Lending Institutions. The parliamentary opposition has questioned the constituonality of several provisions regarding the possibility to forcefully divide a bank or to merge it into another bank in case of latter's insolvency or a significant threat to Latvia's economy.

The Court upheld all the relevant provisions, including:

- impossibility to annul a merger in certain cases (paras. 20-23; the Court has stressed, that one can demand compensation through administrative courts),
- lack of a transition period (since no bank was merged in the first months after the amendment – para. 12.4)
- references to transfer of property of the merged bank abroad (para. 14).
- lack of state's responsibility for possible losses of shareholders and creditors (para. 17 – deemed to be consequences of bank's hardships, not state actions)
- lack of criteria for choosing a model for handling with a bank in danger (para. 16 – possibility of discrimination was evaluated as lying in applying the law, not in the law itself; a dangerous logics allowing for laws foreseeing arbitrary actions).

P.S. To make more specific the international law framework: Latvia is a member state of ICESCR, European Social Charter (1961 version) and the Protocol No. 1 to ECHR, but not of Protocol No. 12 to ECHR or European Code of Social Security.

[24]

[20] CC Judgment in the case No. 2009-11-01http://www.satv.tiesa.gov.lv/upload/judg_2009_11.htm
[21] CC Judgment in the case No. 2009-111-01 http://www.satv.tiesa.gov.lv/upload/judg_2009-111-01.htm
[22] CC Judgment in the case No. 2010-39-01 http://www.satv.tiesa.gov.lv/upload/judg_2010-39-01.htm
[23] CC Judgment in the case No. 2010-60-01 http://www.satv.tiesa.gov.lv/upload/spriedums_2010-60-01.htm (not yet translated)
[24]