

THE UNIVERSITY OF HULL

EU Public Procurement, the Social Dimension and its Building Capacity

being a Thesis submitted for the Degree of PhD Management

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by

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To Jennifer, my very dear sister

You're so sorely missed.....
A pulsating void now lingers on
It heeds your place instead
And innocent memories tread upon
Your gentle paths
That whisper serene from your heart.

Abstract

This thesis attempts to prove how the flexible application of public procurement has the potential to realise a social model of integration in the European Union wherein the European citizen is the key actor in the integration process.

The integration dynamics of the European Union have been promoted by recourse to neo-liberal economic theories where market integration features as a crucial imperative. In this respect the regulation of public procurement plays a vital role in the programme of the Single European Market. Preferential procurement alongside state aid reflects on market intervention on the part of the public sector commensurate with neo-liberal principles and less on the distributive objectives of societal welfare. However, this thesis presents a fundamental departure from such logic for it argues on the basis of a social just alternative that takes into account the distributive objectives of societal welfare albeit in a limited manner in so far public procurement contracts are concerned.

The question of poverty across the EU is put into context as its persistent levels are perceived as indicative system-failures of market regulation that are too heavily based on neo-liberal economics. On a plane of practical reasonableness the thesis argues for optimal use of public procurement as a dynamic policy instrument by institutionalising a balance both domestically and EU-wide. Such balance needs to be guided by a public interest function where the key umbrella concept that corresponds to embracing the fight against poverty namely, respect for human dignity, equality and freedom for participatory action is incorporated. As a powerful socio-economic lever public procurement should not be regarded as a barrier to EU economic growth but as a crucial safety valve at the disposal of Member States for the benefit of the EU citizen and not in the least EU integration aims.

Declaration

I hereby declare that I have carried out this thesis and that it is entirely my own work.

A handwritten signature in black ink, appearing to read 'A. Calleja'.

Antoinette Calleja

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I owe my gratitude to all those who have in their various ways encouraged and supported me in its completion and not in the least my family. My family's constant support and encouragement have been crucial in particular at times when the writing of this thesis has been met with various challenges but which nonetheless had to be overcome.

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Abbreviations

BRIC	Brazil, Russia, India and China
CAN	Contract Award Notice
CN	Contract Notice
DG	Director General
EC	European Community
ECJ	European Court of Justice
ECU	European Currency Unit
ECSC	European Coal and Steel Community
EDC	European Defence Community
EEC	European Economic Community
EPC	European Political Cooperation
EU	European Union
EURATOM	European Atomic Energy Community
GATT	General Agreement on Tariff and Trade Rules
GDP	Gross Domestic Product
GPA	Government Procurement Agreement
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OMC	Open Method of Co-ordination
PPP	Power Purchasing Parity
PPPs	Public-Private Partnerships
PIN	Prior Information Notice
PSO	Public Service Obligation
SEM	Single European Market
SGI	Services of General Interest
SGEI	Services of General Economic Interest
SMEs	Small and Medium Sized Enterprises
SSGI	Social Services of General Interest
TED	Tenders Electronic Daily
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
US	United States
USO	Universal Service Obligation
VFM	Value For Money

Contents

Abstract	iii
Declaration	iv
Acknowledgments	v
Abbreviations	vi
PART 1: THE STATUS QUO	1
1.0 Introduction	2
1.1 Background to the thesis	2
1.2 The Liberalisation of the Network Industries as an illustration on the European Union's overriding and unconditional attitude towards the single market project	15
1.3 Research Hypothesis and Research Questions	24
1.4 Design and Method	24
1.5 Themes and Organisation of thesis	26
1.6 Concluding Remarks	28
2.0 Free Trade: What about it – Myths or Realities?	30
Chapter Summary	30
2.1 Introduction	31
2.2 The Beginnings to the Development of EU Public Procurement Regulation and its role in European Integration – An Overview	36
2.3 On Framing Economic Theories	43
2.4 The Theory of Comparative Advantage – A General Idea	45
2.5 The Case For or Against Free Trade	48
2.6 Beyond Economical Theoretical Assumptions	51
2.7 And Further Beyond.....	55
2.8 The impact of EU Public Procurement legislation vis-à-vis the EU's Free Trade Agenda	57
2.8.1 A foreword note on EU public procurement spend	58
2.8.2 Impact on Transparency	60
2.8.3 Impact on Cross-border procurement	69
2.8.4 Impact on Small and Medium Enterprises	74
2.8.5 Impact on the International Public Procurement Market	75
2.9 Concluding Remarks	77

3.0 Poverty and Justice within Context	80
Chapter Summary	80
3.1 Introduction	81
3.2 Poverty Across the EU – A Snapshot	84
3.3 The Nature of Poverty: Definitions Abound	87
3.4 Freedom For Human Flourishing as Conceived Through Natural Law Theory	92
3.4.1 Morality in Natural Law Theory	93
3.4.2 Practical Reasonableness: distinguishing sound from unsound practical thinking	94
3.4.3 Dignity as the basic moral premise	96
3.5 Respect for Human Dignity – A legally enforceable fundamental right	99
3.6 On Theories of Social Justice	101
3.6.1 Utilitarianism	104
3.6.2 Egalitarian Liberal Perspectives	108
3.7 On Europe’s Social Model	113
3.7.1 Ordoliberalism	114
3.7.2 The EU’s social dimension and its implementing instruments: an overview	116
3.7.3 Social Europe on the move	119
3.8 The Quest for Justice in Poverty Reduction: Putting EU Public Procurement into Perspective	123
3.9 Concluding Remarks	129
PART 2: CLOSING THE GAP	131
4.0 On the Mission of Serving the Public: Services of General Interest and Community Law	132
Chapter Summary	132
4.1 Introduction	133
4.2 The European Commission and its plethora of soft law	135
4.3 Services of General Economic Interest: Forging a bond between European economic efficiency and social cohesion?	137
4.3.1 On internal market tensions and concerns	142
4.4 Services of General Interest: an endeavour in untangling chaos in the free thinking zone	144

4.4.1	On economic versus non-economic services	145
4.4.1.1	Gaining marketing insights on the nature of services	147
4.4.1.2	Gaining marketing insights on the characteristics of services	151
4.4.1.3	Cross cultural behaviour and attitudes on service quality	156
4.4.2	The public interest: fiction or fact?	159
4.4.2.1	Public interest – some theoretical reflections	164
4.4.2.2	On the requirement of the common good- expressing the natural law method	170
4.5	Concluding Remarks	172
5.0	Public Procurement as the EU's Safety Valve	177
	Chapter Summary	177
5.1	Introduction	178
5.2	The EU as a de-centred State	180
5.3	Marchés Publics as sui generis markets	186
5.4	To what extent is the EU public procurement regime serving the public interest?	189
5.5	To what extent should the EU harness Member States' potential of utilising public purchasing as a tool capable of promoting social policies?	199
5.6	Concluding Remarks	202
PART 3:	THE SOLUTION	204
6.0	On Public-Private Partnerships: For a European Theory of a Social Just Alternative	205
	Chapter Summary	205
6.1	Introduction	206
6.2	On Public-Private Partnerships	207
6.3	UK-London: Thameslink rolling stock procurement programme – the case in a nut shell	209
6.3.2	Best value for money.....long term best value?	211
6.3.3	On the meaning and content to the fundamental right to equality	214
6.4	Arguing for a European Theory of Social Justice	219
6.4.1	Advancing a European theory of a social just alternative	223
6.5	Concluding Remarks	230

7.0	Conclusions	232
7.1	The validity of our actions needs to be limited by time and concrete results	233
7.2	On a plane of practical reasonableness	237

TABLES

Table 1-	Summary description of the basic requirements of practical reasonableness as postulated by Finnis	95
Table 2 -	Summary description of the basic goods as postulated by Finnis	98

FIGURES

Figure 1 -	Conceptual forces underpinning the EU legal order: A binary distinction on the conduct of the State	184
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Bibliography	250
Table of Cases before the Court of Justice of the European Union	275
Official Documents	279

Part 1

The Status Quo

1.0 Introduction

1.1 Background to the thesis

This thesis attempts to prove how the development of European integration could be further advanced through a social model of integration in the European Union achieved through the flexible application of public procurement wherein the European citizen is the key actor in the integration process.

The motive behind public procurement regulation in the European Union goes beyond the eradication of discriminatory practices and protectionist behaviour but forms part and parcel of Europe's drive in creating an integrated political and economic union.¹ In this respect history enlightens us further. The Treaty of Rome which led to the creation of the European Economic Community (EEC) signed on 25 March 1957 although politically motivated has primarily an economic focus with anticipated spill-over effects. Its rationale draws from neofunctionalist theory which sees initial cooperation on non-controversial technical sectors as bringing about a gradual spill-over effect to other sectors. This in due course is expected to lead towards greater political cooperation that calls for a gradual reduction in the power of national governments whilst concurrently increasing centralisation of powers for dealing with sensitive and politically charged issues.² Neofunctionalist arguments were eventually challenged most prominently by Liberal Intergovernmental theory. This theory held that States rather than supranational institutions were the key actors in the integration process.³ Such rationale guided the actions that were taken in reinforcing the Single European Market and which led to the signing of the Single

¹ See, Cox, A. 1993, *The Single Market Rules and the Enforcement Regime After 1992*, Earlsgate Press, Great Britain, pg.9.

² See, Craig, P. and De Búrca, G. 2011, *EU Law – Text, cases and materials*, Fifth edition, Oxford University Press, Oxford. Worth noting that the term *Economic* was deleted from the treaty's name by the Maastricht Treaty which was put into force in 1993 and renamed the *Treaty establishing the European Community* (TEC) The treaty of Lisbon which was brought into force in 2009 brought further amendments and was renamed , the *Treaty on the functioning of the European Union*.

³ Ibid.

European Act (SEA) in 1986 and which came into force in 1987.⁴ The Single European Act (SEA) which embodied the White Paper represented Member State's willingness in accepting Treaty reform and the political commitment to removing before the deadline of 1992 the long list of identified barriers to the single European market. The adoption of the SEA also reflected a shift in intellectual, political and economic thinking in favour of neo-liberalism.⁵

At the time, the liberalisation of public procurement was said to play a key role in European integration via the single market initiative even though it comprised only one of the 282 legislative proposals for reform. According to the European Commission the "...continued partitioning of individual national markets is one of the most evident barriers to the achievement of a real internal market."⁶ It was argued that as long as Member States maintained preferential national public procurement patterns in order to protect their domestic industries from competition there would always be vested interests for resisting an integrated political and economic union eradicating any hope that Europe could ever become properly integrated, that is both politically and economically.⁷ In addition, in view of the fragmented European market it was argued that European firms were operating in relatively small domestic markets which lacked the necessary economies of scale and that this prevented them from competing successfully in world markets.⁸

The legislative reforms proposed by the 1985 White Paper presented the European Commission with the long awaited for opportunity to conduct studies that gave further impetus in sharpening their resolve for liberalising public procurement thus enabling the proper functioning of the European Single Market.⁹ In effect, the Atkins Report on *The Costs of Non-Europe in Public*

⁴ Ibid.

⁵ See, Cox, A. 1993, *The Single Market Rules and the Enforcement Regime After 1992*, Earlsgate Press, Great Britain.

⁶ See, COM 85 (310) final 1985, Completing the Internal Market. White Paper from the Commission to the European Council, Commission of the European Communities, Milan. pg. 23.

⁷ See, Cox, A. 1993, *The Single Market Rules and the Enforcement Regime After 1992*, Earlsgate Press, Great Britain. pg. 11.

⁸ Ibid.

⁹ See, op.cit. (n. 5) pg. 58.

*Sector Procurement*¹⁰ and the Cecchini report on *The European Challenge 1992*¹¹ provided much of the rationale for the public procurement recommendations found in the Single market initiative.¹² The reform extended the scope of the public procurement rules to previously excluded areas to include public services procurement and public utilities procurement (the utilities sector included entities operating in the water, energy, transport and telecommunication sectors).¹³ Whilst building on the framework of the previous Directives¹⁴ the new Directives aimed at coordinating the effective establishment of a competitive public procurement regime. Additional safeguards designed to introduce transparency and to monitor compliance were introduced. Worth noting that the first Community directives that were enacted in 1971 and in 1977 which essentially sought to institutionalise the liberalisation of public procurement practices failed in their scope. According to the Atkins report¹⁵ only 2-5% of public purchasing could be attributed to cross border trade. Member States did not comply with the public procurement rules and the lack of an effective enforcement and remedy regime did not prove to be helpful either.¹⁶

Key arguments emerging from both the Atkins Report and the Cecchini Report were that significant economic gains could be achieved were more aggressive liberalisation policies

¹⁰ See, Atkins, W.S.M.C. *The Costs of Non-Europe in Public Sector Procurement. Basic Findings Vol 5, Part A and B*. 1988, Office for Official Publications of the EC, Luxembourg.

¹¹ See, Cecchini, P. 1988, *The European Challenge, 1992: The benefits of a Single Market*. Wildwood House Limited, Aldershot, Hants.

¹² See, Cox. A. op.cit. (n. 5) pg. 13.

¹³ Chapter 2, section 2.2, "*The Beginnings to the Development of EU Public Procurement Regulation and its Role in European Integration*" provides a more detailed account of the Directives that were issued at the time.

¹⁴ See, Council 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.

Council Directive 77/62/EEC of 21 December 1976. *Coordinating procedures for the award of public supply contracts*, OJ No L 13, 15. 1. 1977, p. 1.

¹⁵ See, Atkins, W.S.M.C. *The Costs of Non-Europe in Public Sector Procurement. Basic Findings Vol 5, Part A and B*. 1988, Office for Official Publications of the EC, Luxembourg.

¹⁶ See, COM 85 (310) final. *Completing the Internal Market. White Paper from the Commission to the European Council*, 1985, Commission of the European Communities, Milan.; Van Hamme, A. 1990, "EC Public Procurement Rules in the Wake of the Single European Market: A Survey of Recent Changes", *Studia Diplomatica*, 43, 3, 6. in Cox, A. Op.cit. (n. 5).

instituted on the part of the Community.¹⁷ According to the Atkins Report failures on the demand side created sub-optimal supply side outcomes and thereby reducing intra Community trade integration.¹⁸ The Cecchini Report, described as ‘a solid body of scientifically-assembled evidence...’¹⁹ projected efficiency gains amounting to 0.5% of 1986 Community GDP (circa ECU 17.5 billion or ECU 21.5 billion if defence procurement were included).²⁰ Other projections with the removal of all formal and informal barriers to intra-European Union (EU) trade included major reductions in chronic European unemployment, opportunities for growth, stable prices and consumer choice. In his opening statement to the Cecchini report Lord Cockfield then vice president of the European Commission, stated that the completion of the Internal Market “...will give a permanent boost to the prosperity of the people of Europe and indeed of the world as a whole”.²¹ This study guided the EU’s agenda then and continues to inspire it today.

In line with the main objectives for the creation of an integral public market the integration dynamics of the European Union have maintained recourse to neo-liberal economic theories wherein the creation of the Single European market has served as a major focus with the aim that this would ultimately lead towards an integrated European economic and political union. In this respect EU directives 2004/18/EC and 2004/17/EC and the respective implementing national public procurement regulations currently in force need to be examined in the light of the rules and principles resulting from the European Treaties, particularly as regards the freedom of establishment and freedom to provide services (Article 49 TFEU and Article 56 TFEU respectively) which encompass in particular the principles of transparency, equality of treatment, proportionality and mutual recognition. In essence, the regulation of public procurement exposes an economic and a legal approach to the integration of public markets in the EU with the aim of enhancing competition and unobstructed market access. In its recent proposal for a directive of the European Parliament and the Council on public procurement the European Commission claimed that public authorities in Europe spend circa 18% of GDP on supplies, works and

¹⁷ See, Cox, A. Op.cit. (n. 5) pg. 13.

¹⁸ See, Cox, A. Op.cit. (n. 5) pg. 17.

¹⁹ See, Cecchini, P. Op. cit. (n. 11) pg. xvii.

²⁰ Ibid. pg. 17.

²¹ Ibid. pg. xiii

services.²² In 2004 public procurement spend was estimated at 16% of the EU's gross domestic product.²³

It could be argued that public procurement as a vital public policy tool that operates within sui generis markets is concerned with the delivery of public services and the ultimate scope of awarding Government contracts is to add value and better the communities they serve. The provision of public services plays a highly valid and crucial societal role that cannot be left solely to the whims of market forces. Indeed, one cannot negate the fact that European Jurisprudence has also recognised their relevance. Hence, In the Corbeau judgment (1993)²⁴ it was acknowledged that the granting of exclusive rights may hinder the application of the rules of the Treaty on competition and that Article 106(2) TFEU permitted Member States to confer on undertakings the granting of such rights in so far as the restriction on competition, or even the exclusion of all competition was necessary in order to ensure the performance of the services of general economic interest tasks.²⁵ In the BFI case (1998) the court held that bodies that are governed by public law and established for the specific purpose of meeting needs in the general interest “may choose to be guided by other than economic considerations.”²⁶ In which case “such a body might consider it appropriate to incur financial losses....”²⁷ “The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations.....”²⁸ For, “the needs in question are ones which, for

²² See, COM(2011) 896 final. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20.12.2011, European Commission, Brussels.

²³ See, European Commission. February, 2004, *A report on the Functioning of Public Procurement Markets in the EU: Benefits from Application of EU Directives and challenges for the future* Brussels.

²⁴ See, Case C-320/91. Paul Corbeau, [1993]ECR I-02533.

²⁵ See, Case C-320/91. Paul Corbeau, [1993]ECR I-02533, paragraph 14.

²⁶ See, Case C-360/96. Gemeente Arnhem and Gemeente Rheden v BFI Holding BV, [1998]ECR I-06821 paragraph 43.

²⁷ Ibid.

²⁸ Ibid.

reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence.”²⁹

Public purchasing is indissolubly linked with national policies and in particular social policy.³⁰ It has proven to be a dedicated follower of political fashion. Historically, there have been consistent attempts to link public procurement with the government policy of the day as EU public procurement did not always have the economic and open market access objectives. In 1989 the European Commission published a communication on the regional and social aspects of public procurement.³¹ It claimed that the opportunities deriving from the liberalisation of public procurement could not be captured in so far as Member States maintained protectionist behaviour and refrained from adopting appropriate re-structuring measures. For instance, in the case of the UK and Germany the Commission held as follows:

In neither the British nor the German case is there reliable evidence of the preference schemes having made a significant contribution to the development of the regions concerned. At the same time, there is no evidence either of them giving rise to significant distortions to trade whether within those countries or between them and other Member States.³²

Although, the European Commission contended that preference schemes may have contributed, “.....to a more balanced functioning of the economy, by helping to limit the widening of regional disparities through guaranteeing certain markets”³³ and despite the “absence of evidence, one way or the other, concerning the effect of these schemes”³⁴ nonetheless, the Commission arrived to the conclusion that regional preference schemes were problematic as they privileged certain enterprises at the expense of others thus, impinging on fundamental Community

²⁹ Ibid. paragraph 51.

³⁰ See, Bovis, C. 2006, "Public Procurement in the Common Market Context" in *EC Public Procurement Case Law and Regulation*, University Press, Oxford.

³¹ See, COM(1989) 400 final. 24 July, 1989, *Public Procurement Regional and Social Aspects (Communication from the Commission)*, Brussels.

³² See, COM(1989) 400 final. 24 July, 1989, *Public Procurement Regional and Social Aspects (Communication from the Commission)*, Brussels. Paragraph 35, pg. 9.

³³ Ibid, paragraph 40, pg. 10.

³⁴ Ibid.

procurement policy and the Treaty itself for they “do not operate in a way which ensures that similarly situated enterprises are treated equally.”³⁵ According to the European Commission,

It is implicit in the programme for the establishment of the single market in public procurement that removal of internal barriers will give rise to changes in the distribution of contracts and therefore to more efficient procurement.³⁶

At the time, in year 1989 the Commission also asserted that “....while the overall consequences for economic demand and employment will be positive, the distribution of the pain and the gain between firms, groups and regions will only become apparent with time.”³⁷

Indeed, the validity of our actions needs to be limited by time and concrete results. Twenty years following the anniversary of the Single Market the distribution of the pain and gain across the EU in the public procurement market has now become highly apparent. In this respect the following are some of the salient issues that are worth highlighting:

- i. When it comes to the participation of Small and Medium sized enterprises (SMEs) in above EU threshold public procurement SMEs have remained persistently under represented. In the period 2006-2008 an estimated 60% of above EU threshold contracts were awarded to SMEs. This accounted for 33% of the market share in terms of value.³⁸
- ii. Over the past 20 years cross-border public procurement remained relatively low - over 98% of contracts awarded according to EU rules are won by national bidders.³⁹

³⁵ Ibid, paragraph 41, pg. 10.

³⁶ Ibid, paragraph 16, pg. 5.

³⁷ Ibid. paragraph 17, pg. 6.

³⁸ See, GHK. *Evaluation of SMES' Access To Public Procurement Markets In The EU*, 2010, DG Enterprise and Industry, Brussels. For a more detailed account see chapter 2, section 2.8.4, “*Impact on Small and Medium Enterprises*”.

³⁹ See, SEC(2011) 1586 final. *Commission staff working paper executive summary of the impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors*, 20.12.2011, European Commission, Brussels.

For a more detailed account see chapter 2, section 2.8.3, “*Impact on Cross-border procurement*”.

- iii. When it comes to the international scenario EU suppliers in the Utilities public procurement market are facing discriminatory practices that in effect close off their exporting opportunities.⁴⁰ The current economic crisis has increased such practices.⁴¹
- iv. The Court of Auditors of the European Union in their audits concerning projects co-financed by Regional Development Funds and Cohesion Funds has on various occasions identified irregularities relating to public procurement contracts. For instance, for the years 2006-2009⁴² such irregularities have accounted for 41% of the cumulative quantifiable errors.⁴³ In its declaration of assurance by Director General (DG) Regional Policy concerning the regularity and legality of the applicable EU budget in 2011, DG Regional Policy made various reservations one of which was in respect of, “serious deficiencies in the management and control systems with regard to the compliance of the operations with the public procurement rules.....”⁴⁴
- v. Member States are obliged to forward to the Commission yearly statistical reports of the preceding year by end of 31 October of each year in order to permit assessment of the results of applying the EU Directives on public procurement.⁴⁵ However, to date the European Commission has consistently presented estimates in lieu of actual data reports in view of the fact that a large proportion of public procurement data is unavailable.⁴⁶

⁴⁰ See, COM(2009) 592 final. *Report from the Commission concerning negotiations regarding access of Community undertakings to the markets of third countries in fields covered by the Directive 2004/17/EC*, 28.10.2009.

⁴¹ *ibid.* pg. 18. For a more detailed account see chapter 2, section 2.8.5, “*Impact on the International public procurement market*”.

⁴² See, SEC(2011) 1179 final. *Commission Staff Working Paper - Analysis of errors in cohesion policy for years 2006-2009_Actions taken by the Commission and the way forward*, 5.10.2011, European Commission, Brussels.

⁴³ The calculation of error rates is based on representative statistical samples with a 95 % confidence level. See, for example, Court of Auditors. *Annual report concerning the financial year 2009*, (2010/C 303/01), 9.11.2010, Official Journal of the European Union.

⁴⁴ See, European Commission. *2011 Annual Activity Report - Directorate General Regional Policy*, 2012, Brussels. pg. 6.

For a more detailed account see chapter 2, section 2.8.2, “*Impact on Transparency*”.

⁴⁵ See for example Article 67 of Directive 2004/17/EC and Article 75 of Directive 2004/18/EC.

For a more detailed account see chapter 2, section 2.8.1, “*A foreword note on EU public procurement spend*”.

⁴⁶ See, for example European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels. pg. 3.

- vi. Transparency has been regarded as a mandatory element for the elimination of preferential and discriminatory purchasing behaviour. Points ii, iv and v (above) can be viewed as important considerations that shed light upon the extent of transparency albeit lack of it when it comes to the implementation of EU public procurement.
- vii. In year 2011 the Commission claimed that the EU public procurement Directives have helped at generating,
 - savings and improvements in the quality of procurement outcomes. Open and competitive public procurement has driven down costs by around 4%, generating savings of approximately €20 billion. This far exceeds the costs generated by the regulatory framework, which are estimated to be €5 billion.⁴⁷

It is argued that such claimed savings are highly unreliable estimates for they rely on data that captures nothing other than the award price as published in the Contract Award Notices in the Official Journal of the European Union through the Tenders Electronic Daily database (TED). This is not sufficient and can be highly misleading. What counts is the actual final price that the public purchaser pays up for by the end of the contractual period. This is highly relevant especially for works and service contracts where cost overruns can flow during the contractual period. In the case of large construction projects cost overruns are a common feature due to various unforeseen reasons such as inflation of construction costs (wages and materials) and unforeseen additional works. As the Commission notes, “[T]he ultimate test of the effectiveness of public procurement legislation is the impact on prices actually paid for goods and services by public procurement authorities.”⁴⁸ However, measuring the actual prices that incorporate the variations that arise during the contractual period would appear to be a mammoth task.⁴⁹

The above points are some of the salient issues that reflect upon the ineffectiveness of the public procurement regulations and hence their consequent failure in creating an integrated and efficient EU public procurement market. Notwithstanding such, this thesis takes the matter a step further

⁴⁷ See, European Commission. "Press Release, Single Market Act: EU public procurement framework has saved around 20 billions euros, IP/11/785".

⁴⁸ See, European Commission. *A report on the Functioning of Public Procurement Markets in the EU: Benefits from Application of EU Directives and challenges for the future* February, 2004, Brussels. pg. 14.

⁴⁹ For a more detailed account see chapter 2, section 2.8.2, “Impact on Transparency”.

as it endeavours to capture a more integrated and explanatory map. In this respect, in order to understand better the discourses on EU public procurement one cannot rely solely on its own terms because public procurement is the product of various exogenous forces and thus it is important that insights from other sources are drawn. Mono disciplinary perspectives frame too narrow a social inquiry and leave too much significance out of the picture.⁵⁰ Authoritative claims influencing policy making bear an impact on society. Thus, such claims need to inform research on how that life is lived.⁵¹

This thesis hence enquires from a general viewpoint whether communities are getting any better especially in the light when one considers that nearly one in seven people in the EU are at risk of poverty, meaning below the poverty threshold.⁵² In years 2011, 2010 and 2009 the percentage of people-at-risk-of poverty (17% ; 16%; 16 % respectively) was not so different from the former Member States over the previous decade (17% - 1995; 16%-1997; 15% - 2001) or for the EU as a whole (15% -2002).⁵³ The concept of poverty raises important political questions because it is fundamentally linked with how society distributes and re-distributes its resources and opportunities. It reflects upon the failure of the State in its system of welfare.

Poverty exposes the depth to the gap limiting European integration aims. The persistent levels of poverty across the EU and current social injustices are indicative system-failures of market regulation that are too heavily based on neo-liberal economics. European economic efficiency logic has its limits. The **European citizen** is the fulcrum that stands at the heart of reaching

⁵⁰See, Peterson, V.S. 1998, "Shifting Ground(s): Epistemological and Territorial Remapping in the Context of Globalisation(s)" in *Globalization Theory and Practice*, Pinter, London. According to Peterson, "Conventional accounts in international relations separate political activities associated with states from economic activities associated with markets." pg. 19.

⁵¹ See, Giddens, A. 1976, *New Rules of the Sociological Method*, Hutchinson, London.

⁵² According to Eurostat *People-at-risk-of poverty* is defined as follows: "This indicator reflects the percentage of people with an equivalised disposable income below the 'at-risk-of-poverty threshold'. The at-risk-of poverty threshold is set for each country at 60% of the national median equivalised disposable income." See, Antuofermo, A. and Di Meglio, E. 2012, *Eurostat statistics in focus 9/2012 - Population and social conditions*, Eurostat, Luxembourg.; Frazer, H. 2009, *Poverty and Inequality in the EU*, Brussels. pg. 7.

⁵³ See, Antuofermo, A. and Di Meglio, E. 2012, *Eurostat statistics in focus 9/2012 - Population and social conditions*, Eurostat, Luxembourg.; Frazer, H. 2009, *Poverty and Inequality in the EU*, Brussels.; Eurostat newsrelease. 171/2012, *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.

European integration aims. The single market route is not the only market route that is capable of leading Europe towards full integration, that is, political and economic integration. There are various market routes available and all are for the taking. Such routes need not necessarily be bound by economic liberal theories that essentially underpin the single market dogma, for what in effect is economic integration about? According to Myrdal economic integration refers to economic life within the existing Nation States.⁵⁴ This is not to be interpreted as a call for nationalism but simply that European citizens are the protagonists on how that life is lived and thus the social dimension cannot be neglected. Enabling European citizens to attain for themselves reasonable objectives constitutes the common good.⁵⁵ And the conditions that need to be obtained if each citizen were to attain her or his objectives relate to the common good of the political community⁵⁶ – a matter that needs to be addressed by both the EU and Member States.

It is within this context that this thesis argues for the flexible application of public procurement. A flexibility that entails an EU public procurement regime, that on one hand seeks open market access opportunities by way of reinforcing transparency, objectivity and non-discrimination between competing participants in tenders at EU-wide level whilst on the other seeks to take into account domestic distributive objectives of societal welfare albeit in a limited manner in so far public procurement contracts are concerned.

Indeed, preferential procurement, alongside state aid, reflects on market intervention on the part of the public sector commensurate with neo-liberal principals and less on the distributive objectives of societal welfare. However, this thesis presents a fundamental departure from such logic. For it culminates by advancing a European theory of a social just alternative that draws heavily from Rawls in a property-owning democracy. According to Rawls a property-owning democracy is necessary in order to realise the principles of justice as fairness. This he distinguishes from welfare state capitalism. It is argued that whilst welfare state capitalism secures a social baseline through ex post redistributive taxation a property-owning democracy

⁵⁴ Myrdal, G. 1956, *An International Economy: Problems and Prospects*, Routledge & Kegan Paul, London.

⁵⁵ This draws on natural law theory, see, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford. pg. 155. For a more detailed discussion on the *common good* see also Chapter 3 in particular, section 3.4 et seq. “*Freedom for Human Flourishing as Conceived through Natural Law Theory*”.

⁵⁶ Ibid.

sets limits to the accumulation of wealth across a concentrated narrow band of citizens by dispersing capital holdings across the population therefore making use of ex ante redistribution of capital. “The intent is not simply to assist those who lose out through accident or misfortune (although that must be done), but rather to put all citizens in a position to manage their own affairs **on a footing of a suitable degree of social and economic equality.**”⁵⁷ Whereas, Rawls grounds his arguments in favour of a property-owning democracy regime over that of welfare state capitalism there have been others who believe that both regimes can complement each other and that property-owning democracy be regarded as, “useful extensions of, rather than replacements for, the welfare state.”⁵⁸ This view is congruent with that adopted in this thesis which also aims to demonstrate how Rawls’ principles of justice as fairness through the regime of a property-owning democracy could be institutionalised through public procurement. Hence, the intellectual rational underpinning the logic of a public procurement contract as adopted by this thesis takes into consideration the distributive objectives of societal welfare albeit in a limited manner in so far public procurement is concerned. This is made possible by way of:

- i. broadening the concept of equality wherein the concept is not confined solely to ensuring *equal access to opportunities* as is interpreted by the European Commission but adopts a more holistic interpretation which recognises the human being as an end in oneself and not as a means to an end as is the case when single market integration aims pose as the ultimate objective⁵⁹;
- ii. broadening the concept of the *value for money* principle by incorporating objectives that go beyond the whole-of-life costs and the quality of the good or service being

⁵⁷ See, Rawls, J. 2001, *Justice as Fairness: A Restatement*, Harvard University, Cambridge, MA. pg 138 in, O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. emphasis added.

⁵⁸ See, O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. pg. 390. The author also notes that this is very much in line with James Meade's opinion about policies concerning a property-owning democracy and quotes his view in this respect, “These measures are needed, for the most part, to supplement rather than to replace the existing Welfare-State policies” See, Meade, J. 1964, *Efficiency, Equality and the Ownership of Property*, George Allen and Unwin, London., pg. 75.

⁵⁹ This is consistent with the enactment of type (i) policies as referred to in a Property-Owning Democracy. For a more detailed discussion refer to chapter 6, section 6.4.1, “*Advancing a European Theory of a social just alternative*”.

purchased by seeking the most efficient mix of costs that leads to cost cutting with simultaneous increases in social welfare gains;⁶⁰

- iii. Instituting systems that safeguard against conflict of interest, favouritism and corruption in public procurement.⁶¹

Such logic engages in a social justice model that seeks to define and meet the ends of its citizens, that capitalises on Member States' diversity and operates on the basis of principles and conditions that enable the flourishing of its citizens by incorporating key umbrella values as discussed and understood in this thesis, that is, the respect for human dignity,⁶² equality⁶³ and freedom for participatory action.⁶⁴ These key umbrella values also referred to by the author as a key umbrella concept corresponds to embracing the fight against poverty, social exclusion whilst enabling the participatory engagement of citizens.

Further, public procurement contracts need to be viewed as a special category of contracts wherein one of the parties represents the *public interest*. It incorporates complex social exchanges

⁶⁰ This is consistent with the enactment of type (ii) policies as referred to in a Property-Owning Democracy. For a more detailed discussion refer to chapter 6, section 6.4.1, "*Advancing a European Theory of a social just alternative*".

⁶¹ This is consistent with the enactment of type (iii) policies as referred to in a Property-Owning Democracy. For a more detailed discussion refer to chapter 6, section 6.4.1, "*Advancing a European Theory of a social just alternative*".

⁶² On the value of respect for Human Dignity - Each and every person as a rational human being has a dignity. Human Dignity is inviolable. It is "superior to human rights and fundamental freedoms who owe their origin and existence to the dignity of the human person." Aquilina, K. *Respect for Human Dignity and the Law* <http://www.statecareandmore.eu/index.php/blogs/respect-for-human-dignity-and-the-law-by-prof-kevin-aquilina-.html> [23 November 2010]. See also, discussion in chapter 3 in particular section 3.4.3 "*Dignity as the basic moral premise*" and section 3.5 "*Respect for Human Dignity – A legally enforceable fundamental right.*"

⁶³ On the value of Equality – what we are herein concerned with is an equality vis-à-vis the person in its totality. A totality that recognizes the individual not just as a physical being but also as a social being where at its very core lies its human dignity. It calls for the recognition of the human being as an end in oneself and not as a means to an end. More specifically, we need to refer to an equality that takes into account the *capability to function*. *Capabilities to function* assert freedom. The notion of *capability to function* refers to that conceived by Professor Amartya Sen as discussed in chapter 3, section 3.3, "*The Nature of Poverty: Definitions Abound*".

⁶⁴ On the value of Freedom for participatory action – What we are herein concerned with is a freedom that enables the full participation of the individual into society. A freedom that defines and serves the ends of its citizens, liberates the individual and provides space for initiative and action. Such space for initiative and action unleashes the individuals' capability to function which in itself asserts freedom. This is the freedom that finds its epitome when expressed through the flourishing of the individual.

which go far beyond the simple *quid pro quo* notion which involves the reciprocal economic exchange between two parties.⁶⁵ As such, this thesis defines public procurement contracts as a special category of contracts wherein one of the parties represents the *public interest* and is manifest through complex exchanges that occur in social relationships and which in the process are separated in part by the passage of time.

The notion encompassing the *public interest* necessitates that we instil content in order to derive with workable meanings for otherwise we remain confronted with a term that remains highly vague and devoid of true meaning. The public interest function that this thesis is interested in marks a fundamental departure from that which is currently put into motion when it comes to EU public procurement as it draws from neo-liberalism which takes into consideration aggregative conceptions of the *common good*. The *public interest* function that this thesis endorses and puts forth is one that seeks to achieve a *common good* wherein, the interdependent and harmonious flourishing or fulfilment of each individual in the community can only be made possible through cooperation and coordination in communities. It calls for the incorporation of the key umbrella concept as identified by this thesis to underpin and thus guide such public *interest* functions.

1.2 The Liberalisation of the Network Industries as an illustration of the European Union's overriding and unconditional attitude towards the single market project

During the past two decades growth in Europe according to the European Commission is attributed to the creation of the single market and the opening of borders.⁶⁶ Accordingly, the combined effect of these two forces, that is, “internal market integration, in particular through the liberalisation of network industries, and enlargement has been to create 2.75 million additional jobs and growth of 1.85% in the period 1992-2009.”⁶⁷ The 70% drop in mobile phone call

⁶⁵ On the notion of *Exchange* see discussion in Chapter 4, section 4.4.1.1, “*Gaining marketing insights on the nature of services.*”

⁶⁶ See, COM (2010) 608 final. *Towards a Single Market Act for a highly competitive social market economy*, 27.10.2010, European Commission, Brussels.

⁶⁷ Ibid. pg. 2.

charges and 40% reduction in airfares have been described as “concrete examples” of the single market creating advantages for both businesses and European citizens.⁶⁸

However, it is argued that one cannot attribute the drop in mobile phone call charges or the reduction in air fares solely to the creation of the single market in view of the fact that other additional factors have also contributed significantly to such outcomes. For instance, technological advancements with consequent leaner organisational restructuring have also had a crucial impact in the reduction of prices. As it transpires in the case of air transport the major hurdles limiting competition do not relate to trade barriers but to shortages of available slots in major airports and air space congestion. Indeed, the “concrete examples”⁶⁹ that have been presented us stop short of others where the impact of the single market on the performance of the network industries remains very much hazy. For one would expect that over a span of more than two decades since the gradual opening of the network industries much more tangible indicators that reaffirm the effectiveness of the liberalisation programme and its positive impact on businesses and the European citizen are presented. In year 2007 the European Commission published a staff working document on the evaluation of the performance of network industries providing services of general economic interest and noted as follows:

Network industries are generally still characterised by high levels of market concentration and a slowly developing state of competition. While competition has picked up most in the telecommunications sector, the electricity and gas sectors are still largely dominated by incumbents, who often benefit from an insufficient level of separation of their supply activities on the one hand and their transmission activities on the other. This simultaneous control tends to discourage new entrants and consequently hampers the development of competitive markets.⁷⁰

⁶⁸ Ibid. pg. 2.

⁶⁹ Ibid.

⁷⁰ See, SEC(2007) 1024 final. 12.07.2007, *Commission Staff Working Document - Evaluation of the Performance of Network Industries Providing Services of General Economic Interest 2006 Report*, Brussels. pg. 6.

What follows is a brief overview of the performance of the network industries since the implementation of the EU's gradual liberalisation programme given that according to the Commission, **“there can be no denying the contribution made by the single market”**⁷¹ and that **“internal market integration, in particular through the liberalization of network industries.....”**⁷² is one of the major forces behind growth in Europe.

In the **telecommunications sector** reforms were introduced in the 1990s. On the basis of a market opening index developed by Copenhagen Economics for work commissioned by the European Commission reflecting the level of implementation at national and EU level, it was revealed that market opening in the telecommunications sector remained below 50% until year 2000. This has been explained as being partly due to the time lag between legislation and implementation.⁷³ Prices in this sector have fallen significantly over time. As a result of market opening price convergence between EU countries appears to have been attained.⁷⁴ Productivity levels (per employee and per hour) have also been on the increase. By year 1996 the reported productivity levels exceeded those of the total industry level. Yet, it has been argued that it would be difficult to attribute such productivity gains to the liberalisation process given that market opening in the Telecommunications sector remained below 50% till year 2000. On the other hand the increase in productivity gains as a result of technological developments that started way before the liberalisation process⁷⁵ and the gradual fall in employment levels⁷⁶ have been considered as possible influences. Despite such reforms, according to a European Central Bank

⁷¹ See, COM (2010) 608 final. *Towards a Single Market Act for a highly competitive social market economy*, 27.10.2010, European Commission, Brussels. Pg. 2 [emphasis is that of the European Commission].

⁷² Ibid. [emphasis added].

⁷³ See, Mehmet, U. *Liberalisation in a World of second best: evidence on European network industries*, 2009, MPRA Paper No. 17873, Munich. Table 1, pg. 8.

⁷⁴ See, ibid. Tables 2 & 3, pgs. 10-11.

⁷⁵ See, Mehmet, U. *Liberalisation in a World of second best: evidence on European network industries*, 2009, MPRA Paper No. 17873, Munich.

⁷⁶ Ibid. table 5, pg. 13. According to Copenhagen Economics, 2005 market opening reforms have led to 500,000 jobs. See, Copenhagen Economics. *Market Opening in Network Industries: Parts I and II. (Report no. 6201 for DG Internal Market)*, <http://www.copenhageneconomics.com/Publications/Trade---Internal-Market.aspx> [6 May, 2011].

report⁷⁷ effective competition remains restrained in this sector as incumbent operators remain dominant especially for local calls. This position has also been reaffirmed by the Commission however they appear to remain optimistic as it is argued that market players continued to increase between 2004 and 2005 with competition being stronger in the mobile markets than in fixed telecommunications.⁷⁸

EU reforms in the **postal sector** started in 1992⁷⁹ with the postal directive setting out the Community framework.⁸⁰ Germany, the Netherlands and Sweden have been described as the front runners in the postal liberalisation process and do not appear to have experienced problems.⁸¹ The organisational and ownership restructuring initiatives by Member States from state owned to limited or joint stock company has been described as almost complete by 2010.⁸² Nevertheless, Member States appear to maintain a controlling stake in such firms with the exception of Germany, Malta and the Netherlands.⁸³ Where restructuring has not brought about a separation of network and operation, access by new entrants, distortion of competition and protectionism remain problematic. Driven by fierce competition from the electronic sector new entrants operating the postal sector have been instigated to adopt low-cost business strategies relying on a younger, less educated workforce and short term contracts.⁸⁴ As a consequence fears

⁷⁷ See, Martin, R., Roma, M. and Vansteenkiste, I. 2005, *Regulatory Reforms in Selected EU Network Industries, Occasional Paper Series, no. 28*, Germany.

⁷⁸ See, SEC(2007) 1024 final. 12.07.2007, *Commission Staff Working Document - Evaluation of the Performance of Network Industries Providing Services of General Economic Interest 2006 Report*, Brussels.

⁷⁹ See, COM(2008) 884 final. 22.12.2008, *Report from the Commission to the Council and the European Parliament on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC)*, Brussels.

⁸⁰ See, Postal Directive 2008/06/EC is the third postal directive amending the first Postal Directive (97/67/EC) as amended by Directive 2002/39/EC indicating year 2010 and in the case of some other Member States year 2012 as the final step in the process of gradual market opening. See, European Commission. *The EU Single Market - EU Postal legislation*, http://ec.europa.eu/internal_market/post/legislation_en.htm#proposal, [9 May, 2011].

⁸¹ See, Martin, R., Roma, M. and Vansteenkiste, I. 2005, *Regulatory Reforms in Selected EU Network Industries, Occasional Paper Series, no. 28*, Germany.

⁸² See, Okholm, H.B., Winiarczyk, M., Möller, A. and Nielsen, K.C. 2010, *Main developments in the postal sector (2008-2010)*, Copenhagen.

⁸³ *ibid.*

⁸⁴ According to the research findings by Copenhagen economics this scenario has been observed in Sweden, Germany, Austria and Belgium. See, Okholm, H.B., Winiarczyk, M., Möller, A. and Nielsen, K.C. 2010, *Main developments in the postal sector (2008-2010)*, Copenhagen. pg. 151.

of declining working conditions and wage dumping in the postal sector have been expressed.⁸⁵ When it comes to consumer prices these have been found to differ greatly across Member States.⁸⁶ But on the whole prices have been found to be on the increase in most postal markets⁸⁷ whilst competition in this sector appears to be progressing slower than expected.⁸⁸

Prior to 1987 the European **air transport services** could be described as a fragmented market enjoying a high degree of government protection. Between 1987 and 1997 gradual liberalisation took place in three successive packages of liberalisation measures.⁸⁹ Since 1997 the EU regulatory framework provided unrestricted market access to Community air carriers holding a Community licence including the freedom to set fares. Nevertheless, despite the adoption of a cautious regulatory reform process the European Commission found that in 1997 more than 90% of EU air routes were still monopolistic or duopolistic.⁹⁰ This finding was further confirmed by an OECD 2000 report.⁹¹ The shortages of available slots in major airports and air space congestion have been identified as the major bottlenecks limiting competition.⁹² In the meantime

⁸⁵ *ibid.*

⁸⁶ Prices for 20g tariff letters ranged between €0.23 and €0.81 and for 1kg parcels ranged between €0.9 and €15.1 (Prices are for 2009 after purchasing power standard adjustment). See, Okholm, H.B., Winiarczyk, M., Möller, A. and Nielsen, K.C. 2010, *Main developments in the postal sector (2008-2010)*, Copenhagen. pg. 36.

⁸⁷ See, Okholm, H.B., Winiarczyk, M., Möller, A. and Nielsen, K.C. 2010, *Main developments in the postal sector (2008-2010)*, Copenhagen.

⁸⁸ See, COM(2008) 884 final. 22.12.2008, *Report from the Commission to the Council and the European Parliament on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC)*, Brussels. pg. 7.

⁸⁹ Regulatory measures in connection with the first package of 1987 laying down the procedure for the application of competition rules included the following regulatory instruments, Regulation 3975/87, OJ L374/1 1987; Regulation 3976/87, OJ L374/9 1987; 87/601, OJ L374/12 1987; Decision 87/602, OJ L374/19 1987.

The second package of 1990 adopting measures for further relaxation included the following regulatory instruments, Regulation 2342/90, OJ L217/1 1990; Regulation 2343/90, OJ L217/8 1990.

The 1992 third package on the liberalisation of the internal aviation market included the following regulatory instruments, Regulation 2407/92, OJ L; Regulation 2408/92, OJ L Regulation 2409/92, OJ L.

⁹⁰ See, Martin, R., Roma, M. and Vansteenkiste, I. 2005, *Regulatory Reforms in Selected EU Network Industries, Occasional Paper Series, no. 28*, Germany. pg. 24.

⁹¹ *ibid.*

⁹² *ibid.*

the development of low cost carriers slashing down air fares, offering alternative routes and the introduction of electronic air tickets appear to be changing substantially the competing structure of the air transport industry.

Railway sector; July 1996 the Commission issued a white paper laying out, "A strategy for revitalising the Community's railways."⁹³ At the time the railway sector was described as on the decline with falling market shares and hence the need to respond to market changes and customer needs. Further reforms were proposed by way of the so called *rail infrastructure package*. The first package⁹⁴ that aimed at making legislation more effective was adopted in 2001. In 2002 the Commission issued the *second railway package*⁹⁵ aiming at improving safety and interoperability

⁹³ See, COM(96) 421 final. 30.07.1996, *A strategy for revitalising the Community's railways*, Brussels. (not published in the Official Journal).

See, Europa. *White Paper: A strategy for revitalising the Community's railways*, http://europa.eu/legislation_summaries/environment/tackling_climate_change/124014_en.htm [11 May, 2011].

⁹⁴ The first *rail infrastructure package* included the following regulatory instruments, Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, Official Journal L 75 of 15.03.2001.
Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/CE on the licensing of railway undertakings, Official Journal L 75 of 15.03.2001.
Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, Official Journal L 75 of 15.03.2001.

See, Europa. *Summaries of EU legislation - White paper: A strategy for revitalising the Community's railways*, http://europa.eu/legislation_summaries/environment/tackling_climate_change/124014_en.htm [11 May, 2011].

⁹⁵ The proposals presented in the second railway package were based on the White Paper presented by the Commission on 12 September 2001: "European transport policy for 2010: time to decide" [COM (2001) 370 final - not published in the Official Journal]. The following regulatory instruments comprised this package:

Directive 2004/49/EC of the European Parliament and of the Council on 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/CE on the licensing of railway undertakings and Directive 2001/14/CE on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, Official Journal L 164 of 30.04.2004.
Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system, Official Journal L 164 of 30.04.2004.
Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways, Official Journal L 164 of 30.04.2004.
Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency, Official Journal L 164 of 30.04.2004.

See, Europa. *Summaries of EU legislation - White paper: A strategy for revitalising the Community's railways*, http://europa.eu/legislation_summaries/environment/tackling_climate_change/124014_en.htm [11 May, 2011].

including the establishment of a European Railway agency in order to support such. In 2004 the *third railway package* was adopted with a view to completing the European regulatory framework.⁹⁶ In 2006, the Commission, more specifically DG Energy and Transport commissioned a report in, “response to perceived failings of railways such as falling market shares in both passenger and freight markets and especially poor performance in international freight traffic where rail should naturally have a competitive advantage over road.”⁹⁷ From amongst the findings it was observed that, “both the path and speed of the reforms differs from country to country and that there may be several ways to undertake reforms...”⁹⁸

Reforms calling for liberalisation in the **electricity** market began progressively through the adoption of the 1996 Electricity Market Directive⁹⁹ that called for the initial liberalisation of at least 25% of the national electricity markets by 1999 and to the subsequent increase to one third by 2003. In the **gas market** sector partial liberalisation was foreseen by 20% by year 2000 and subsequently to one third by 2008.¹⁰⁰ However, in 2003 an agreement to speed up the liberalisation process in the energy market was reached with the adoption of new directives that

⁹⁶ See, COM(2004) 140 final. 3.3.2004, *Communication from the Commission - Further integration of the European rail system: third railway package*, Brussels. Directive 2004/51/EC. *Directive of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways*, Official Journal L 164 of 30.04.2004, Directive 2004/50/EC, *Directive of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system*, Official Journal L 164 of 30.04.2004.

See, Europa. *Summaries of EU legislation - White paper: A strategy for revitalising the Community's railways*, http://europa.eu/legislation_summaries/environment/tackling_climate_change/124014_en.htm [11 May, 2011].

⁹⁷ See, European Commission. 2006, *Policy effectiveness of rail - EU policy and its impact on the rail system*, Belgium. pg. 1.

⁹⁸ *ibid.*

⁹⁹ See, Directive 96/92/EC. *Directive of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity*, OJ L 27, 30.1.1997, p. 20.

¹⁰⁰ See, Directive 98/30/EC. *Directive of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas*, OJ L 204, 21.7.1998, pg. 1.

repealed the former.¹⁰¹ The new target deadlines were 1 July 2004 for non-household users and 1 July 2007 for household users.

Despite the reforms, “the electricity and gas sectors are still largely dominated by incumbents....”¹⁰² as three major companies tend to control between 100% and 75% of the market except in the case of Germany and the UK where the share ranges between 39% and 68%.¹⁰³ The relationship between productivity gains and market opening in the electricity and gas sectors is not clear cut as an upward trend in productivity levels was already in existence before the EU reforms took effect.¹⁰⁴ In addition, the gradual fall in employment levels could possibly be regarded as another contributory factor responsible for the productivity gains.¹⁰⁵ As to the evolution of prices in the electricity and gas sectors, it is worth noting that a downward trend was already in existence across the EU-15 before the Community reforms commenced.¹⁰⁶ According to reported empirical research across the EU-15 the overall effect of the reforms in the electricity and gas sector on prices was never found to be statistically significant for electricity whilst negative correlations were found with gas prices.¹⁰⁷ In addition, prices were found to show strong and different dynamics across countries. Further, the researchers found strong evidence of higher consumer satisfaction with prices when under public ownership.¹⁰⁸ In another

¹⁰¹ See, Directive 96/92/EC which was repealed and replaced by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, OJ L 176, 15.7.2003, p. 37.

Directive 98/30/EC concerning common rules for the internal market in natural gas was repealed and replaced by Directive 2003/55/EC.

¹⁰² See, SEC(2007) 1024 final. 12.07.2007, *Commission Staff Working Document - Evaluation of the Performance of Network Industries Providing Services of General Economic Interest 2006 Report*, Brussels. pg. 6.

¹⁰³ See, Mehmet, U. *Liberalisation in a World of second best: evidence on European network industries*, 2009, MPRA Paper No. 17873, Munich. pg. 18.

¹⁰⁴ See, *ibid.* Table 4, pg. 12.

¹⁰⁵ *ibid.* Table 5, pg. 13.

¹⁰⁶ See, Fiorio, C.V. and Florio, M. 2010, *A Fair Price for Energy? Ownership versus Market Opening in the EU15*, Section I. Introduction.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

study based on findings across the EU-15 it was noted that, “Irrespective of what the cause is, it is clear that the relationship between price convergence and competition is not as straightforward as the proponents of liberalisation would expect.”¹⁰⁹ It is argued that in line with the *theory of second best*,¹¹⁰ partial removal of market distortions will not necessarily lead to Pareto-optimality or welfare improvement.¹¹¹

Indeed, whilst on one hand the Commission appears to acknowledge that substantial barriers continue to hamper market integration in the network industries including the protectionist behaviour of governments vis-à-vis their domestic incumbents¹¹² on the other hand it remains adamant that the creation of the single market constitutes one of Europe’s main driving forces behind its growth for the period 1992-2009.¹¹³ Worth recalling the aim of progressively establishing the internal market expired on 31 December 1992.¹¹⁴ Nevertheless, two decades later “the aim of **establishing** or ensuring the functioning of the internal market in accordance with the relevant provisions of the Treaties”¹¹⁵ remains envisaged by the EU.

¹⁰⁹ See, Mehmet, U. *Liberalisation in a World of second best: evidence on European network industries*, 2009, MPRA Paper No. 17873, Munich. pg. 11.

¹¹⁰ OECD defines the *theory of second best* as follows, “The theory of the second best suggests that when two or more markets are not perfectly competitive, then efforts to correct only one of the distortions may in fact drive the economy further away from Pareto efficiency.” See, OECD. *Glossary of statistical terms*, <http://stats.oecd.org/glossary/detail.asp?ID=3306> [18 May, 2011].

¹¹¹ See, Mehmet, U. *Liberalisation in a World of second best: evidence on European network industries*, 2009, MPRA Paper No. 17873, Munich.

¹¹² See, SEC(2007) 1024 final. 12.07.2007, *Commission Staff Working Document - Evaluation of the Performance of Network Industries Providing Services of General Economic Interest 2006 Report*, Brussels. pg. 8.

¹¹³ See, COM (2010) 608 final. *Towards a Single Market Act for a highly competitive social market economy*, 27.10.2010, European Commission, Brussels.

¹¹⁴ Article 14 (1) EEC held that, “The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992.....”

¹¹⁵ Article 26(1) TFEU refers, emphasis added.

1.3 Research Hypothesis and Research Questions

This study explores the impact economic policies and related legislation bear on Europe's social dimension. It argues that the intertwined social threads constitute the very fabric of Europe's economic dimension and that Europe's building capacity is located therein potentially weaving the way towards European integration.

The hypothesis of the thesis is that the flexible application of public procurement has the potential of realising a social model of integration in the European Union wherein the European citizen is the key actor in the integration process.

As such this thesis is concerned with the following research questions:

1. To what extent is the EU public procurement regime serving the public interest?
2. To what extent should the EU harness Member States' potential of utilising public purchasing as a tool capable of promoting social policies?

1.4 Design and Method

EU public procurement is the product of various exogenous forces and therefore one cannot rely solely on its own terms but needs to incorporate the substance provided by other disciplines in order to better grasp how the EU public procurement regime is affecting the European citizen and Europe at large. Thus, in order to capture a broad and in as much an explanatory map this research study adopts a multidisciplinary approach. The literature review permeates the entire thesis and is the main thrust to this research investigation whilst being constantly guided by its underpinning research questions. It draws from economics, legal, social, historical, marketing, management and philosophical perspectives. Through the analysis and synthesis of source materials the author attempts to provide fair and holistic understandings. It is on the basis of this novel critical approach that cuts through various disciplines whilst seeking and maintaining linkages with the EU public procurement regime that validates the legitimacy of this thesis.

Fundamental differences in the ontological and epistemological positions inevitably imply different techniques and research procedures. This is more a matter of pragmatics that is, making sense and seeking best fit of the methods for the purpose of the research under question.¹¹⁶ When it comes to social inquiries, reliability can be seen as a useful concept that safeguards against subjectivity. For others, validity is of greater significance. It is argued that in view of the complexities engrained within social phenomena and its continuous state of flux one cannot simply have it ‘pinned down’ for the sake of reliability. When it comes to validity it has been noted that the basis for assessing validity does not reside with the impossible task of representing the ‘truth’ but with the notion of ‘trustworthiness’.¹¹⁷

The method as to how one chooses to examine the social world interconnects with epistemological and ontological considerations, the researcher’s values and practical considerations that bound the research itself. Methods are not neutral tools because they have the potential link to the world that reflects the researcher’s standpoint.¹¹⁸ Nor as is argued are methods suffused with intellectual inclinations and therefore, one needs to question how best the research method and practice be put to its best use. Indeed, a variety of methods are available.....but this is more a matter that resembles a bespoke application, that is, it needs to be tailored for the needs of the social inquiry, more specifically be capable of answering the hypothesis and research questions at hand.

The method adopted in this thesis is that of ‘Verstehen’ – that is, the rational comprehension of the motivations underlying behaviour. Objectivity is provided by the Weberian concept of the *ideal type* which in effect refers to recurring human behaviours that depict and hence put into perspective a coherent picture that is free from contradiction.¹¹⁹

¹¹⁶ See, Knight, P. 2002, *Small-Scale Research* Sage Publications, London.

¹¹⁷ See, Reissman, C.K. 1993, *Narrative Analysis* Sage Publications, London.

¹¹⁸ See, Bryman, A. 2004, *Social Research Methods*, Oxford, University Press.

¹¹⁹ See, Weber, M. 1904, *Über die 'Objectivität' sozial wissenschaftlicher und sozialpolitisher Erkenntnis*, and Weber, M. 1922, *Wirtschaft und Gesellschaft*, Tübingen, Mohr.

For a discussion on the social paradigms of social research see chapter 1 of, Corbetta, P. 2003, *Social Research Theory, Methods and Techniques*, Sage Publications, London.

1.5 Themes and Organisation of thesis

This thesis is organised into three main themes.

Part 1: “The Status Quo” revisits the premises that provide the justifications for the regulation of EU public procurement. EU public procurement plays a vital role in the EU plan to integrate Member States through the single market imperative. The move towards the single market is based on neo-liberal economics where at its heart rests the theory of comparative advantage. When one delves into this theory and the way it evolved over the years starting from the very early logic as postulated by Adam Smith during mid 18th century, to the Ricardian model, early nineteenth century and other modifications as were incorporated during the twentieth century one finds that there yet remains various assumptions that do not fit in with today’s realities and thus much remains unsaid. The author in turn questions the rationale and justifications of the European Union in devoting so much attention, energy and resources on policies that directly promote an abstract concept and which come at the expense of promulgating social policies that tap at the very heart of EU’s social dimension. The question of poverty is henceforth put into context. Poverty across Europe features as a real problem and a major obstacle to social cohesion, harmonious development, the attainment of acceptable standards of living and not in the least EU integration objectives. Poverty is fundamentally linked with how society distributes and re-distributes its resources and opportunities and therefore, by and large exposes the inadequacy of our current systems. Indeed, poverty exposes the depth to the gap that has emerged in the pursuit of European Integration objectives. Further to the discussion that has been presented in this chapter, the themes under discussion in part one will be tackled through chapters, 2 and 3.

Part 2: “Closing the Gap” sets off to closely examine the attempts of the European Union in closing the gap in its drive towards the attainment of European integration. It does so by examining the provision of public services and how these have become captured at the European level by way of services of general economic interest. The ever increasing commercialisation of the EU citizen’s everyday life which presses for the subordination of public policies to market

forces is seen by the author as a major obstacle when it comes to reaching European integration aims. The author reveals how concepts that embrace utilitarianism are incompatible with claims maintaining that at the heart of Community policies lies the interest of its citizens. For utilitarianism is concerned with the achievement of aggregate utility. Individual freedom, autonomy, rights and quality of life are only valuable in so far as they increase aggregate utility. Hence, it is argued that a European social model can only emerge if we distance ourselves from utility based concepts. The themes under discussion in part 2 will be taken up in chapters 4 and 5.

Part 3: “The Solution” presents the author’s vision for a European social model that bridges the gap between economic liberal theories and poverty. It identifies with a flexible EU public procurement regime as the most compatible bridge capable of preserving the ideal market economy which the author defines as the ‘one that exploits the potential and provides the greatest opportunities for all those wanting to engage in it in a sustained manner’. Public procurement’s compatibility in bridging the gap manifests itself through its flexibility as an instrument of public policy, serving both domestically and EU-wide public interest needs. The formulation of an umbrella concept that captures key fundamental values and which correspond to embracing the fight against poverty, social exclusion and enabling the participatory engagement of citizens underpins the author’s vision for a European theory of a social just alternative. The respect for human dignity, equality and freedom for participatory action emerge as the key fundamental values that are captured within this umbrella concept explicating Europe’s social model. These three values are tightly enmeshed and cannot be disentangled. Any attempt to treat separately means to deprive the very essence of their integrity. A European social model that incorporates sizeable enhancements of these values will create a telling case that emerges and pronounces even stronger the value on the respect for Human Dignity. The themes under discussion in part 3 will be dealt with in greater detail in Chapters 6 and 7.

1.6 Concluding Remarks

The basic thesis of this research investigation is that the flexible application of public procurement has the potential of realising a social model of integration in the European Union wherein the European citizen is the key actor in the integration process. Such flexibility entails an EU public procurement regime, that on one hand seeks open market access opportunities by way of reinforcing transparency, objectivity and non-discrimination between competing participants in tenders at EU-wide level, whilst on the other takes into account domestic distributive objectives of societal welfare albeit in a limited manner in so far public procurement contracts are concerned.

European challenges need not rely solely upon European economic efficiency logic. “Europe” Schuman proposed “will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”¹²⁰ What Schuman proposed more than sixty years ago remains highly relevant today.

The ratification of the Treaty of Lisbon which came into force in 2009 has been looked upon by some as shifting towards a more social market stance.¹²¹ It bears noting that the new Articles 2 and 3 in the Treaty of the European Union (TEU) appear to be more inclined towards social values and aims than purely economic objectives.¹²² Article 2 (TEU) states:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States as a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

¹²⁰ See, European Commission. *Robert Schuman: the architect of the European integration project*, http://europa.eu/about-eu/eu-history/founding-fathers/pdf/robert_schuman_en.pdf [20 November, 2012].

¹²¹ See, Spiegel Online. *A Less ‘Anglo-Saxon’ EU: Sarkozy Scraps Competition Clause from New Treaty*, <http://www.spiegel.de/international/europe/0,1518,490136,00.html>; Ross, M. 2009, "A healthy approach to services of general economic interest? The BUPA judgement of the Court of First Instance (2009) 34 E.L. Rev. 134", *European Law Review*, 34, 134, in Barton, R. 2012, "Social services of general interest: the case for greater harmonisation of the competition and public procurement rules", *European Law Review*, 584.

¹²² See, Jones, A. and Sufrin, B. 2010, *EU Competition Law: Text, Cases & Materials*, Fourth, Oxford University Press, Oxford. pg. 41.

Article 3(3) TEU describes the internal market as working for “.....the sustainable development of Europe based on balanced economic growth..... a highly competitive social market economy, aiming at full employment and social progress.....” In addition, this article describes the internal market as combating, “.....social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.” Article 9 TFEU stipulates that the Union shall “take into account requirements linked tothe guarantee of adequate social protection” and “the fight against social exclusion.....” Pursuant to article 1 of the Charter of Fundamental Rights, human dignity is inviolable; it must be respected and protected. Article 6(1) of the Treaty confers on the Charter of Fundamental Rights the same legal value as the Treaties. Indeed, the dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.

Further, social policies rest with Member States’ sovereignty and are immune from supranational intervention.

Therefore, all in all the Treaty of Lisbon is perfectly balanced in allowing the flexible application of public procurement in order to realise a social model of integration in the European Union wherein the European citizen features as the key actor in the integration process.

2.0 Free Trade: What about it – Myths or Realities?

Chapter Summary

The regulation of public procurement at the EU level has sought to bring about a gradual reform of public procurement practices amongst Member States. Its motives go beyond the eradication of discriminatory practices and protectionist behaviour and finds its roots conceived in the Treaty of Rome. An analysis of the EU plan to integrate Member States through the notion of free trade and ensuing competition is presented. As it transpires on one hand, the theory of comparative advantage on which the doctrine of free trade is based reveals that various facets to the theory remain unanswered as it verges into abstractness. On the other, an examination of the extent to which the EU public procurement regime is living up to the 1992 single market programme exposes a plethora of biased claims that attempt to find further justifications for its continued regulation. This poses as an accountability problem for others this may be described as a democratic deficit. Notwithstanding such, the main argument put forth is that when it comes to EU public procurement too much energy and resources are being used to directly promote an abstract concept as is the market economy. And as we drift into abstractness the presence of a gap is formalised. This reflects the gap between what the market economy embraces today from the ideal or wished for level of performance. It is argued that when the EU adopts such an overriding and unconditional attitude wherein the EU public procurement regime is constantly viewed from the single market perspective Europe overlooks alternative opportunities for achieving its desired objectives.

2.1 Introduction

The intellectual rationale behind the opening up of public procurement forms part and parcel of Europe's drive in creating an integrated political and economic union. It has been held that "political and economic integration are inextricably inter-related."¹ Thus, as the reasoning follows as long as Member States maintain preferential national public procurement patterns in order to protect their domestic industries from competition there will always be vested interests for resisting an integrated political and economic union and thus eradicating any hope that Europe can ever become properly integrated, that is both politically and economically. Further, in such a situation as is argued, in the light of global competition the consequence of such market fragmentation is that European firms would not be able to compete successfully in world markets as they lack the necessary economies of scale given that they operate in relatively small domestic markets.²

The liberalisation of public procurement was said to play a key role in European integration via the single market initiative.³ Once public procurement was removed from within the clutches of the Member States it was assumed that one could get away with local parochialism and trigger into motion the industry's competitive market forces. This would be made possible through a reformulation of the public procurement rules. In other words, through a reformulation of the public procurement rules a domino effect on the single market initiative was to be expected. Thus it was assumed that, uncompetitive suppliers would be forced to restructure themselves if they were to survive in a competitive environment, mergers and acquisitions would be encouraged and greater opportunities would open up for small and medium sized enterprises to participate in public contracts. And, as a consequence efficiency gains amounting to 0.5 % (circa ECU 17.5 billion or ECU 21.5 billion if defence procurement was included) of 1986 Community GDP was expected to result.⁴ Such efficiency gains were

¹ See, Cox, A. 1993, *The Single Market Rules and the Enforcement Regime After 1992*, Earlsgate Press, Great Britain. pg. 11.

² Such argumentations are based on those put forth by Cox, A. 1993 (ibid.)

³ See, Cecchini, P. 1988, *The European Challenge, 1992: The benefits of a Single Market*. Wildwood House Limited, Aldershot, Hants. and Atkins, W.S.M.C. *The Costs of Non-Europe in Public Sector Procurement. Basic Findings Vol 5, Part A and B*. 1988, Office for Official Publications of the EC, Luxembourg.

⁴ See, Cecchini, P. 1988, *The European Challenge, 1992: The benefits of a Single Market*. Wildwood House Limited, Aldershot, Hants. pg. 17.

to emanate from three major supply side effects.⁵ First, the *static trade effect* brought about through liberalised procurement making it possible for the public purchaser to buy from the cheapest suppliers. Second, the *competition effect* would cause prices to fall in the face of real competition. Third, the *restructuring effect* would lead to long term savings through economies of scale and international competition.

The economic rationale behind EU public procurement regulation is based on neo-liberal economics. Various community documents as well as famous studies such as the Cecchini and the Atkins report reflect this.⁶ In essence, it is assumed that once rules to eradicate market barriers are put into place the efficient operation of the market when left to its own device would ensure that the public sector is served by the most efficient suppliers. This in turn would lead to significant savings in public expenditure. It has also been assumed that most of the gains would flow into higher levels of employment and increases in economic growth. But, there appears to have been various criticisms to this line of thought for it assumes that market inefficiencies are located on the demand side of the economic equation that is through inefficient public purchasing and it is through the correction of public purchasing behaviour such as the eradication of protectionism and defence of national champion firms that would naturally generate positive supply side ripple effects on the economy.⁷ However, such argumentation fails to take into account the purchasing behaviour on the supply side which has been held to be of equal importance and regulation in this respect is not included in public procurement legislation.⁸

⁵ Ibid.

⁶ See, Cecchini, P. 1988, *The European Challenge, 1992: The benefits of a Single Market*. Wildwood House Limited, Aldershot, Hants.; Atkins, W.S.M.C. *The Costs of Non-Europe in Public Sector Procurement. Basic Findings Vol 5, Part A and B*. 1988, Office for Official Publications of the EC, Luxembourg; Office for Official Publications of the EC. July 1988, *Public Procurement and Construction: Towards an Integrated Market*, 2nd edition, Luxembourg.; European File. February, 1989, *Opening Up Public Procurement in the European Community* Office of Official Publications of the EC, Luxembourg; Bovis, C. 1998, "The Regulation of Public Procurement as a Key Element of European Economic Law", *European Law Journal*, 4, 2, 220.

⁷ See, Siebert, H. *The Completion of the Internal Market*, 1989, The Institut fur Weltwirtschaft an Der U Kiel, Symposium, Tubingen: JCB Mohr.; Cutler, T. and et al. 1989, *1992-The Struggle for Europe* Berg Publishers, Oxford. in Cox, A. 1993, *The Single Market Rules and the Enforcement Regime After 1992*, Earlsgate Press, Great Britain.

⁸ See, Bovis, C. 1998, "The Regulation of Public Procurement as a Key Element of European Economic Law", *European Law Journal*, 4, 2, 220.

Other researchers appear not all convinced that the trade barriers as identified in the Cecchini report are the main reasons for market fragmentation across the EU. Geroski⁹ attributed market fragmentation to the diversity in national and regional tastes and that the 1992 Programme would do little to reduce this type of fragmentation. Head and Mayer¹⁰ appear to lend further support to Geroski's conjecture on the basis of their empirical research which was mainly concerned with the examination of the border effect vis-à-vis non-tariff barriers and the consumption of foreign goods relative to the consumption of domestic goods. Head and Mayer make use of a trade model derived from monopolistic competition. The researchers found no relation between market fragmentation and the barriers that were identified and removed by Europe's Single Market Programme prior to the implementation of the Single European Act that is for the periods 1984-1986. In effect, the industries relating to the personal consumption of goods and not those as identified by the Commission appeared as the ones where the border effects (defined by the researchers as the, "...extent that domestic subunits trade more with each other than with foreign units of identical size and distance")¹¹ were higher. Hence, Head and Mayer argued that border effects appear to be more linked with variety in tastes than to formal barriers to trade. Other research¹² also examining the impact of non-tariff barriers on the share of EU imports in four major EC countries for the years 1975-1985 found no relationship to their impediment on trade. Moreover, the results suggested that the Single Market Programme may generate more benefits to firms outside the EU.¹³ Further, Head and Mayer also conducted empirical research on the impact of non-tariff barriers and the border effect post implementation of the Single Market Programme. They noted a declining trend with respect to the impact of borders. However, this downward trend could be traced from at least a decade before the Single Market Programme was implemented.¹⁴

⁹ See, Geroski, P. 1991, "1992 and European Industrial Structure" in *The Economics of the Single European Act*, Macmillan, London.

¹⁰ See, Head, K. and Mayer, T. 2000, "Non-Europe: The Magnitude and Causes of Market Fragmentation in the EU", *Review of World Economics*, 136, 2, 284-314.

¹¹ *ibid.* pg. 286.

¹² See, Neven, D.J. and Rollers, L.H. 1991, "European Integration and Trade Flows", *European Economic Review*, 35, 6, 1295-1309.

¹³ It has been noted by the Commission that within the WTO even when procurement opportunities are not offered in the final negotiated deal, other trading parties are well aware that procurement opportunities across the EU are not, "sheltered with a wall, which would be impossible to penetrate." See, COM(2009) 592 final. *Report from the Commission concerning negotiations regarding access of Community undertakings to the markets of third countries in fields covered by the Directive 2004/17/EC*, 28.10.2009, pg. 19.

¹⁴ This finding is consistent with other empirical reports from the power supply industry that have also presented evidence that long term restructuring in the market commenced well before the implementation of the single

Moreover, the researchers noted that none of the different measures for the removal of non-tariff barriers for the industries earmarked by the Commission could explain the changes in the border effect and thus their removal did not provide the greatest benefits to the targeted industries. In other words the expected rise in the ratio of trade over the consumption of domestic products for those industries labelled by the Commission as high barriers to trade did not materialise. On the other hand, according to Head and Mayer their results suggest that whereas differences in taste could be invoked prior to the implementation of the Single Market Programme, following 1986 the fall in border effects did not seem to be larger in industries comprising mainly final goods and as such they attribute consumer bias as an explanation for the border effects.

In another study¹⁵ funded by the Commission more specifically prepared by Directorate-General for Economic and Financial Affairs (although Commission inserted a disclaimer noting that the views expressed represent solely those of the authors) aimed at analysing the effects of the implementation of the Internal Market Programme. In this study, Ilzkovitz et al. put together a comprehensive body of empirical evidence in order to take stock of what has been achieved in terms of European Economic Integration. They claim that the internal market has been the source of large macro-economic benefits. However, they also contend that “the initial expectations that the Internal Market would serve as a catalyst for creating a more dynamic, innovative and competitive economy at the world level have not been met”.¹⁶ The researchers identify various reasons for this and which all appear to point towards various inefficiencies – slow and at times incomplete implementation of directives, inadequacy of some instruments, persistence of barriers to cross border trade and investment and a slow development of an Internal Market for knowledge. And therefore, it is argued thatif only the removal of most of the remaining cross-border barriers was achieved Europe could have attained substantially much larger gains.

market programme, See, McGowan, F. and Stephen, T. 1989, "Restructuring in the Power-Plant Equipment Industry and 1992", *World Economy*, 12, 4, 539-556. Stephen, T. and McGowan, F. 1991, "Procurement in European Power Plant", *Utilities Policy*, 124-133. Ninni, A. 1990, "Recent Changes in the Power Equipment Industry and the Opening Up of Public Procurement", *Energy Policy*, 18, 4, 320-330.

¹⁵ See, Ilzkovitz, F., Dierx, A., Kovacs, V. and Sousa, N. *Steps towards a deeper economic integration: the Internal Market in the 21st century - A contribution to the Single Market Review*, 2007, Directorate-General for Economic and Financial Affairs, Brussels.

¹⁶ *ibid.* See pgs. 1 and 18.

The reasoning grounding the liberalisation of the European public procurement market as afore noted draws on neo-liberal economics that is based on a strong support for the market economy where at its heart rests the theory of comparative advantage. When one delves into this theory one finds that there are various assumptions that do not fit in with today's realities and that much remains unsaid. We are hence left with nothing but an abstract concept. Therefore, when the European Community utilises public purchasing¹⁷ as a tool to directly promote an abstract concept as is the market economy this comes at the expense of its potential use by Member States in directly promoting their domestic social policies.

This chapter will continue its discussion in section 2.2 by presenting a brief overview of the development of EU public procurement regulation and its anticipated vital role in European Integration, "The beginnings to the development of EU public procurement regulation and its role in European Integration – An overview". Having given due regard to the direct and vital contribution the EU public procurement regime is expected to bear upon European integration by way of adding further impetus towards the notion of free trade this chapter's attention will then focus on the economic theories that relate to free trade. The discussion in this respect first starts off by exposing the difficulties that economists face when framing economic theories - section 2.3, "On framing Economic Theories" and their conflicting claims as experienced over the years. Such facts are important for the reader to be aware of and need to be factored in our understandings and ultimately when drawing up conclusions given the overriding importance that Europe attributes to neo-liberal economics. We then move on to section 2.4, "The Theory of Comparative Advantage – A General Idea" to introduce very briefly a general idea of the theories that relate to free trade with a view to enabling the reader who may not be well versed with such theories understand better the arguments that emanate in this respect. This thus makes it possible to proceed further with the discussion and present, "The Case for or Against Free Trade" - section 2.5. Section 2.6, goes, "Beyond Economical Theoretical Assumptions" for what good does it do to maintain solely theoretical knowledge whilst failing to put into context real life applications? Section 2.7, "And Further Beyond....." takes the discussion further through real life scenarios where it attempts to portray the crucial role politics play in driving world trade even though politics per se does not appear to feature in the theories formulating the market economy. The discussion in section 2.8, "The impact of EU Public Procurement vis-à-vis the EU's Free Trade Agenda" moves on to examine the extent to which the EU public procurement regime is living up to

¹⁷ The term public purchasing and public procurement are used interchangeably in this thesis.

the 1992 single market claims. From the understandings derived in this section the claim that EU public procurement contributes to the European single market is highly questionable.

2.2 The Beginnings to the Development of EU Public Procurement Regulation and its Role in European Integration – An Overview

The Treaty of Rome which led to the creation of the European Economic Community (EEC) was signed on 25 March 1957 by its founding member states namely, Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. Its creation comes after a major setback following the lack of progress in ratifying the treaty concerning the European Defence Community (EDC) which was signed in 1952 by the six European Coal and Steel Community (ECSC) states and following the shelving of plans for a European Political Cooperation (EPC) treaty. Replacing earlier moves towards integration that sought to bring about explicit political cooperation, the treaty of Rome although politically motivated has primarily an economic focus with anticipated spill-over effects. In this respect, neofunctionalist theory attempts to explain the intellectual rationale behind the development of the European integration process. Accordingly, neofunctional integration sees initial cooperation on non-controversial technical sectors as bringing about a gradual spill-over effect to other sectors with possible greater political cooperation that necessitates a gradual reduction in the power of national government with concurrent centralisation of powers for dealing with sensitive and politically charged issues.¹⁸

Therefore, having as its primary focus economic objectives with anticipated spill over effects the treaty of Rome provided for the creation and functioning of a common market¹⁹ which saw to the approximation of economic policies and their harmonious development over successive stages within the EEC's member states. Obstacles to the free movement of goods, workers, services and capital were to be eliminated. Tariff barriers were to be abolished and a common external customs tariff set up. Undistorted competition was to be ensured. The

¹⁸ See, Craig, P. and De Búrca, G. 2011, *EU Law – Text, cases and materials*, Fifth edition, Oxford University Press, Oxford. Worth noting that the term *Economic* was deleted from the treaty's name by the Maastricht Treaty which was put into force in 1993 and renamed the *Treaty establishing the European Community* (TEC) The treaty of Lisbon which was brought into force in 2009 brought further amendments and was renamed , the *Treaty on the functioning of the European Union*.

¹⁹ See Articles 2 and 3 of the Treaty of Rome, 1957.

creation of a single currency and the adoption of a common economic and monetary policy were to be progressively coordinated. The treaty also provided for the creation of common transport and agriculture policies and a European social fund and an investment bank to give loans and guarantees and to help less developed regions or sectors.

Although the treaty of Rome does not provide for a general community regime on public procurement²⁰ several of its provisions have been nonetheless applied and remain applicable to date, that is, the rules and principles instituting and guaranteeing the proper operation of the Single Market, namely,

- i. The rules prohibiting any discrimination on grounds of nationality (Article 18 TFEU) the rules on the free movement of goods (Articles 34 TFEU et seq), freedom of establishment (Article 49 TFEU et seq), and freedom to provide services (Articles 56 TFEU et seq) and the exceptions to those rules provided for in Articles 36, 51 and 52 TFEU, Article 106 TFEU concerning public undertakings and undertakings to which Member States grant special or exclusive rights and state monopolies providing services of general economic interest may help to determine if the granting of such rights are legitimate.
- ii. The principles emerging from the Court's case law namely the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality.

However, as it transpires the Treaty provisions were considered to be too general and imprecise to be easily applied to public procurement practices. The reasons for such poor performance were related to economic and political issues.²¹ From the economic aspect at the time, that is during the period from 1950 till early 1970s economic growth was described as exceptional in historic terms.²² Therefore, given such a healthy economic climate Member

²⁰ To date the amending treaties do not provide for a general regime on public procurement. Article 132(4) EC, now repealed was the only provision which explicitly referred to public procurement. And, article 45 (1)(b) TEU is the only instance where procurement is explicitly referred to and states that the European Defence Agency is tasked to, "promote harmonisation of operational needs and adoption of effective, compatible procurement methods."

See also, Fernández Martin, J.M. 1996, *The EC Public Procurement Rules: A Critical Analysis*, Clarendon Press, Oxford. chapter 1.

²¹ See, Cox, A. 1993, *The Single Market Rules and the Enforcement Regime After 1992*, Earlsgate Press, Great Britain. Chapter 2 "The History of EC Rules: from the treaty of Rome to the Single European Act (1957-1987).

²² Ibid. pg. 30. During the period 1950-1973 the annual average economic growth was more than twice that for the period 1973-1987.

States did not feel the need to address public sector preferential purchasing - the liberalisation of public procurement was not an issue.²³ From the political aspect, by the end of the 1960s trade was essentially free from tariffs and quotas and only non-tariff barriers remained.²⁴ So it was only then by the end of the decade that the Community's attention focused on the eradication of non-tariff barriers with national product and technical standards and protectionism in public procurement being identified as the most common and blatant examples.²⁵

In 1971 and later in 1977 the first Community Directives providing a more specific framework enshrining the basic treaty rules applicable to public procurement procedures were enacted.²⁶ The Directives aimed at seeking the liberalisation of public procurement practices thus instituting and guaranteeing the proper operation of the Single Market. This could be considered as a first step in the direction towards eliminating some of the means by which governments avoided open competition through the use of hidden non-tariff barriers. Thus, in the case of public works contracts the directives were applicable to all contracts above ECU 1 million and for public supplies all contracts over ECU 200,000. The introduction of measures seeking equal conditions for tendering in public procurement contracts aimed at encouraging a more transparent, open, competitive and efficient public procurement market. However, the directives failed to have the desired impact. According to the Atkins²⁷ report only 2-5% of public purchasing could be attributed to cross border trade. Member States did not comply

²³ See, op.cit. (n.1) pg. 30. See also EC Commission. *Memorandum on Technological and Industrial Policy Programme*, 1973, Bruxelles. wherein public procurement started to be considered within the framework of a common industrial policy in the 1970s.

²⁴ See, Cox, A. 1993, *The Single Market Rules and the Enforcement Regime After 1992*, Earlsgate Press, Great Britain. pg 34.

²⁵ Ibid.

²⁶ See, Council 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.

Council Directive 77/62/EEC of 21 December 1976. *Coordinating procedures for the award of public supply contracts*, OJ No L 13, 15. 1. 1977, p. 1.

²⁷ See, Atkins, W.S.M.C. *The Costs of Non-Europe in Public Sector Procurement. Basic Findings Vol 5, Part A and B*. 1988, Office for Official Publications of the EC, Luxembourg.

with the public procurement rules and the lack of an effective enforcement and remedy regime did not prove to be helpful either.²⁸

The period around the time when the Directives were introduced that is the years following 1973, coincided with the start of the technical revolution and the setting in of the recession. Faced with difficult choices governments were more inclined to protect their domestic industry. The 1970s have been referred to as the period of political stagnation or malaise in the Community.²⁹ The European Commission found great difficulties in securing Council agreements to its proposals and as a result there were significant delays in the attainment of Treaty objectives.³⁰

In the light of the economic threat posed by the US and Japanese in high technology and in assembly industries by newly industrialising countries the protected European firms operating in close markets were no match to compete with the highly efficient and competitive firms. Despite this, as above noted governments remained unwilling to open up their markets for to do so was to see their national firms collapse. Such firms could only survive if remained protected by their own Governments. The General Agreement on Tariffs and Trade rules (GATT) and European Community (EC) trade rules were only a matter where governments paid lip service to. The 1970s and the early part of the 1980s were not conducive years for the Commission to embark on measures for the eradication of national protectionism in public procurement. But soon all this were to change.

The failure of state led industrial policy to deal with major competition coming from highly efficient American and Japanese firms contrasted sharply with the apparent success of the economic policies enacted in the 1980s by the Reagan and the Thatcher administration. Such administrations embarked on policies which favoured market based ideologies such as deregulation, supply-side tax cuts, privatisation and limiting social spending. At the time such actions gave the necessary impetus for stimulating economic growth whilst neo-liberal

²⁸ See, COM 85 (310) final. *Completing the Internal Market. White Paper from the Commission to the European Council*, 1985, Commission of the European Communities, Milan.; Van Hamme, A. 1990, "EC Public Procurement Rules in the Wake of the Single European Market: A Survey of Recent Changes", *Studia Diplomatica*, 43, 3, 6. in Op.cit. Cox, A. (n. 1).

²⁹ See, Craig, P. and De Búrca, G. 2011, *EU Law – Text, cases and materials*, Fifth edition, Oxford University Press, Oxford.

³⁰ Ibid.

intellectual ideas rose to prominence.³¹ The shift to intellectual, political and economic thinking favouring neo-liberalism, deregulation and market integration was starting to see light in Europe. If European firms were to survive in the face of harsh competition the restructuring of inefficient and overmanned public sector industries was inevitable. And the internal European market seemed to offer the right opportunities.³²

In 1985 the EC summit endorsed the European's Commission white paper, "Completing the Internal Market"³³ which argued for the elimination by 1992 of a whole series of non-tariff barriers via 282 legislative measures that sought to free the costs of Europe's fragmented market in order for it to be able to enjoy what was referred to as a real European home market. At the time liberal intergovernmental theory successfully challenged neofunctionalist arguments and provided the underpinning rationale for the actions that were taken in reinforcing the Single European Market which led to the signing of the Single European Act (SEA) in 1986 and that came into force in 1987.³⁴ Liberal intergovernmental theory held that States rather than supranational institutions were the key actors in the integration process.³⁵ The White Paper acknowledged the apparent failures of the public procurement reforms by way of the 1971 public works directive and the 1977 directive on the government procurement of supplies of goods and equipment and that there had been minimal adherence to the legislation as contained within these directives by Member States. The Single European Act (SEA) which embodied the White Paper represented Member State's willingness in accepting Treaty reform and their political commitment to removing before the deadline of 1992 the long list of identified barriers to the single European market. It also reflects the shift in intellectual, political and economic thinking in favour of neo-liberalism.

³¹ Op.cit. Cox, A. (n. 1).

³² Ibid.

³³ See, COM 85 (310) final. *Completing the Internal Market. White Paper from the Commission to the European Council*, 1985, Commission of the European Communities, Milan.

³⁴ See, Craig, P. and De Búrca, G. 2011, *EU Law – Text, cases and materials*, Fifth edition, Oxford University Press, Oxford. Worth noting that the term *Economic* was deleted from the treaty's name by the Maastricht Treaty which was put into force in 1993 and renamed the *Treaty establishing the European Community* (TEC) The treaty of Lisbon which was brought into force in 2009 brought further amendments and was renamed , the *Treaty on the functioning of the European Union*.

³⁵ Ibid.

Although, public procurement comprised only one of the 282 legislative reforms proposed by the 1985 White Paper, this was enough for the European Commission to take its goals forward. It gave them the opportunity to undertake studies in order to sharpen further policy formulation. Towards this end, in 1986, Lord Cockfield vice president of the European Commission launched a study (herein referred to as the Cecchini report) where it was revealed that by 1988 only a third to the journey for accomplishing the 1992 programme was over.³⁶ What remained was described as a daunting and uphill task. The basic findings of the Cecchini report further reinforced the white paper in that a whole series of barriers had to be eliminated and failure to do so resulted in Europe's costly fragmented market – 'the costs of non-Europe'.³⁷

The barriers identified were categorised under three main headings:

- Physical Barriers - characterised mainly by frontier controls, delays and administrative burdens;
- Fiscal Barriers – characterised mainly by differing rates of VAT and excise duties;
- Technical Barriers – characterised mainly by differing technical standards and technical regulations, conflicting business laws and accessing nationally protecting public procurement markets.³⁸

Government protectionism in public procurement markets across the EU was identified as a significant non-tariff barrier and described as a, "shot in the foot".³⁹ The reform in public procurement led to the introduction of new legislation that built on the structure of the previous directives adopted in 1971⁴⁰ and 1977.⁴¹ The reform aimed at assisting the process of creating the Single European Market. This was clearly expressed in the Directives'

³⁶ See, Cecchini, P. 1988, *The European Challenge, 1992: The benefits of a Single Market*. Wildwood House Limited, Aldershot, Hants.

³⁷ Ibid. pg.4

³⁸ Ibid.

³⁹ Ibid. pg 16.

⁴⁰ See, Council 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. ; Council Directive 89/440/EEC. *Public works contracts, amending Directive 71/305/CEE* (OJ No L 210 of 21st July 1989).

⁴¹ See, Council Directive 77/62/EEC of 21 December 1976. *Coordinating procedures for the award of public supply contracts*, OJ No L 13, 15. 1. 1977, p. 1. ; Council Directive 80/767/EEC. *On public supply contracts, amending Directive 77/62/EEC* (OJ No L 215 of 18th August 1980), and Council Directive 88/295/EEC. *On public supply contracts, amending Directive 77/62/EEC* (OJ No L 127 of 20th May 1988).

preamble and that additional safeguards designed to introduce transparency and to monitor compliance were introduced. The new Directives extended the scope of the rules to public services procurement and to the previously excluded public utilities procurement (the utilities sector included entities operating in the water, energy, transport and telecommunication sectors).⁴² They aimed at coordinating the effective establishment of a competitive public procurement regime by instituting and guaranteeing the proper operation of the single market. As previously noted the new set of European Directives built on the structure of the two previous directives which were amended several times and consolidated into two Directives:

-Directive 93/37/EEC coordinating the procedures for the award of public works contracts and consolidating Directives 71/305/EEC and 89/440/EEC (OJ No. L 199 of 9th August 1993);

-Directive 93/36/EEC coordinating procedures for the award of public supply contracts and consolidating Directives 80/767/EEC and 88/295/EEC (OJ No L 199 of 9th August 1993);

For public service contracts, a specific Directive, the Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts (OJ No L 209 of 24 July 1992), entered into force on 1st July 1993.

Directive 89/665/EEC harmonizes review procedures for public supply, public works and public service contracts (OJ No L 395 of 30th December 1989).

With respect to the utilities a specific Directive was adopted, Directive 90/531/EEC (OJ No L 297 of 29th October 1990). This Directive was consolidated by Directive 93/38/EEC (OJ No L 199 of 9th August 1993). A specific Directive on review procedures for contracts in the water, energy, transport and telecommunications sectors was adopted, Directive 92/13/CEE (OJ No L 76 of 23rd March 1992).

EU public procurement Directives are based on three underlying fundamental principles: Community-wide advertising of public contracts above certain thresholds in order to ensure transparency; prohibition of technical specifications capable of discriminating against

⁴² Worth noting that in the case of the utilities sector, as has been the case with defence procurement such sectors are regarded as key industrial sectors and thus highly sensitive areas when it comes to open competition.

potential bidders; and application of objective criteria of participation in tendering and award procedures.⁴³

In essence, it could be argued that whilst the legislation on public procurement has sought to bring about a gradual reform of public procurement practices amongst Member States its motives go beyond the eradication of discriminatory practices and protectionist behaviour. The White paper on completing the internal market, the Single European Act, the Cecchini report and the Atkins report can all be said to have made crucial inroads to a path that was conceived with the Treaty of Rome. They have played a vital role at the opportune time that builds on intellectual foundations supporting neo-liberal economics.⁴⁴

2.3 On Framing Economic Theories

Differences in economic analysis should not come as a surprise.⁴⁵ One needs only to look at the history of economics which is replete with examples of economic theories that were later drastically revised. Burt⁴⁶ explains that when economists differ in their analysis this is not because their methods have been employed incorrectly or in an unscientific manner. For Burt these differences stem from other phenomena that are more deeply ingrained within the nature of economics itself. Burt lists three factors that contribute to such differences. First, there is the difficulty of *verifying economic hypotheses*. The conduct of controlled experiments in economics is generally not possible. History cannot be rerun to see for example whether a different monetary policy could have produced greater economic stability. Thus, the ability of economic hypotheses to explain the real world is seriously questioned. The procedures economists employ are almost always indirect and their judgments almost always conditional. Second, there is the difficulty of *open-endedness of economic behaviour*. According to Burt economic action is usually concerned with the choice of scarce economic resources in order to achieve specified goals and which in turn produce income. However, he argues that the

⁴³ See, Bovis, C. 1998, "The Regulation of Public Procurement as a Key Element of European Economic Law", *European Law Journal*, 4, 2, 220.

⁴⁴ See, Cox, A. op.cit. (n.1)

⁴⁵ "There are any number of models that make contradictory stipulations in the hope of justifying, by different routes, the program of free trade conducted on the basis of comparative advantage." Mangabeira Unger, R. 2007, *Free Trade Reimagined: The World Division of Labour and the Method of Economics*, Princeton University Press, New Jersey. Pg 32.

⁴⁶ See, Burt, E.J.J. 1972, *Social Perspectives in the History of Economic Theory*, St. Martin's Press, New York.

dividing line between economic and non-economic goals and motives is drawn differently amongst economists. The achievement of non-economic goals such as, prestige, status, security or alternatively the achievement of economic goals falls largely within the discretion of the economist. Different decisions on such preliminary questions and motives lead to different predictions. The third factor and for Burt the most fundamental to economic controversy amongst economists revolves around the *need for an element of valuation in all economic judgments*. In view of the fact that economic valuations are not amenable to measurement or ranking, what may appear for one economist as a significant bit of analysis the same can be dismissed and hence regarded by another as insignificant. Burt argues that, “each age writes its own history books and stamps upon the contents the value judgments of that age.”⁴⁷ Burt presents a multitude of examples. For instance, he explains how Malthus’ theory of effective demand was demolished by Ricardo. But a century later John Maynard Keynes revived Malthus’ theory and claimed that he was after all in the right track and Ricardo in the wrong one. François Quesnay the first to develop an input output analysis, a tool that is today recognised as of great importance, was dismissed for generations by economists only to be valued a hundred and fifty years later. Anti-mainstream writers such as Sismondi and Karl Marx were rejected outright at the time. However, some of their insights such as techniques of dynamic analysis were acknowledged in the 20th century.

Burt notes three approaches in the attitudes of economists to the place of value judgements in scientific analysis. First approach – During the 17th century economists assumed that their value judgments based on scientific conclusions were desirable for society and therefore necessary to support certain government policies. Second approach - attitudes reversed by the end of the 19th century. The separation of positive analysis from normative judgments was recognised as essential for the growth of pure scientific economics. John Stuart Mill and John E. Cairnes advanced the idea that the economist as an economist should not and cannot draw political conclusions. Third approach – By the middle of the 20th century it was recognised that no matter how positivist the economist is, the valuation process is implied in all forms of analysis. Myrdal is quoted as stating the following, “This implicit belief in the existence of a body of scientific knowledge acquired independently of all valuations is, as I now see it, naive empiricism.”⁴⁸ For Myrdal, economic theories require a priori social judgments because

⁴⁷ *ibid.* pg. 3.

⁴⁸ See, Myrdal, G. 1969, *The Political Element in the Development of Economic Theory*, Simon and Schuster,

otherwise, “there are no scientific facts but only chaos.” And for Burt, “The social relevance of the valuation systems of the men who frame theories and draw inferences becomes, then, a fundamental issue in economic theory.”⁴⁹ Indeed, such argumentation taps precisely on the research problem that this thesis has set out to explore in that the EU fails to give due weight to its social dimension when economic policies and related legislation are drawn. It also gives further credence to this thesis’ claim and to the methodology that it adopts because we cannot rely and be guided solely by studies that adopt too narrow a perspective on social life for they fail to take into sufficient consideration the intertwined social threads that weave out the EU’s economic fabric.

2.4 The Theory of Comparative Advantage – A General Idea

The early logic that free trade could be beneficial to countries was postulated by Adam Smith in 1776. He argued that,

If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.⁵⁰

And hence the concept of *Absolute Advantage* in production was conceived. In *The Wealth of Nations*⁵¹ Adam Smith postulated that the progress of human well-being is primarily attributed to free exchange which makes possible the division of labour. For instance the work of philosophers, scientists and engineers are examples that reflect such division of labour. Progress, it is argued is not the result of advances brought about by technology but rather by this division of labour which in itself makes it therefore possible for technology to develop. Thus, specialisation sits at the very heart of human well-being. Further, it is argued that all this evolves through a natural process. Governments cannot hasten such a process and as such

pg. vii. The works cited herein were written by Myrdal in 1953, Myrdal’s book was translated from German by Paul Streeten. Myrdal did not always hold such a belief because in 1929 he was of the opinion that through determined effort one could eliminate the metaphysical elements from positive economics. See also *ibid.* pg .9.

⁴⁹ See, Burt, E.J.J. 1972, *Social Perspectives in the History of Economic Theory*, St. Martin's Press, New York. pg. 8.

⁵⁰ See, Smith, A. 1776, "Book Four, Of Systems of Political Economy Introduction" in *An inquiry into the nature and causes of the wealth of nations*, pg. 12.

⁵¹ See, Smith, A. 1776, "The Wealth of Nations" in Clarendon Press, Oxford.

their main function is to protect freedom of exchange by upholding justice, i.e. property rights.

Thirty-nine years later the basic idea of *absolute advantage* as described by Adam Smith was claimed to be erroneous.⁵² It was demonstrated that the specialisation good held by any country should be that which enjoyed a *comparative advantage* in its production. The idea of *comparative advantage* was formalised by David Ricardo and thereafter referred to as the “Ricardian Model”. In his book, “*On the Principles of Political Economy and Taxation*” in 1817⁵³ David Ricardo presented this theory by way of a numerical model using his famous example of two imagined countries, England and Portugal producing two commodities, wine and cloth.⁵⁴ To identify a country’s *comparative advantage* one must compare the *opportunity costs*⁵⁵ when producing goods across countries. Ricardo's argument was that there are gains from trade if each country specializes completely in the production of the good in which it enjoys a *comparative advantage* in producing, and then trades with the other country for the other good.

Ricardo’s theory came during very turbulent times when the Industrial Revolution gave rise to heated political debates over the extent of control on industrial capitalism. Sympathetic towards capitalist enterprises for greater freedom from governmental restrictions his theory was capable of withstanding various criticisms and was supported by political victories.⁵⁶ The idea of comparative advantage has since then got to the nub of justification for universal free trade on the basis of productive specialisation. The notion for free trade derives its main support because it claims that it can raise aggregate economic efficiency.

⁵² This claim was postulated by Torrens, R. in 1815, see Torrens, R. *Essay on the External Corn Trade*, <http://internationalecon.com/Trade/Tch40/T40-0A.php> [15 June, 2010].

⁵³ See, Ricardo, D. 1817, *On the Principles of Political Economy and Taxation*, John Murray, London.

⁵⁴ See, Suranovic, S.M. *International Trade Theory and Policy*, <http://internationalecon.com/Trade/Tch40/T40-2.php> [28 June 2010].

⁵⁵ Choices often involve trade-offs that deny the possibility of other alternatives. The opportunity cost in Ricardo’s example is the amount of wine that England must give up in order to produce another unit of cloth. England is said to enjoy comparative advantage if it must give up relatively less wine to produce another unit of cloth than Portugal. So let England produce only cloth whilst Portugal produces only wine.

⁵⁶ See, Mangabeira Unger, R. 2007, *Free Trade Reimagined: The World Division of Labour and the Method of Economics*, Princeton University Press, New Jersey. chapter iv.

The Ricardian model is based on various assumptions. First and foremost it assumes that perfect competition prevails in all markets. It is based on the assumption of two countries, producing two goods with labour as the only factor of production. Goods are assumed to be homogenous across firms and countries whilst labour is homogenous within a country but heterogeneous across countries. Transportation costs do not feature into the equation whilst labour is assumed cannot move between countries. Production technologies differ across countries and hence impact productivity.⁵⁷

With the passage of time other alterations were made to the Ricardian model most notably the Heckscher-Ohlin model (also known as the Factor proportions model) originally developed in the 1920s. Other elaborations to this model were also provided in the 1930s, 1950s and 1960s.⁵⁸ The following attempts to capture the most salient points.

Whereas in the Ricardian model production technologies are assumed to differ across countries this is not the case with the Heckscher-Ohlin model as these are assumed to be the same. The Heckscher-Ohlin model as with the Ricardian model assumes that perfect competition prevails in all markets. The model takes into account two factors for production, namely labour and capital.⁵⁹ It is through the use of capital that income for the capital owner is generated (referred to as “rents”). A distinctive characteristic within this model is that it assumes that countries differ in their endowments (i.e. quantities) of labour and capital as inputs in the production process. Consequently, the differing capital to labour ratios in production processes across countries and industry makes it possible for trade to occur whilst impacting prices, wages and rents.

⁵⁷ See, Suranovic, S.M. *International Trade Theory and Policy*, <http://internationalecon.com/Trade/Tch40/T40-0A.php> [27 June 2010].

⁵⁸ See, Suranovic, S.M. *The Heckscher-Ohlin (Factor Proportions) Model Overview*, <http://internationalecon.com/Trade/Tch60/Tch60.php> [30 June 2010].

⁵⁹ The term capital refers to the factors of production used to create goods or services, for example, buildings, office and machinery.

2. 5 The Case For or Against Free Trade

In order to be able to assess the arguments in favour or otherwise for free trade it is best to have a clear and concise standard that frames our personal expectations when deriving with comparative judgements when it comes to defining what we expect from an optimal market economy. As such a distinction needs to be made between expectations that explicate an *ideal*⁶⁰ or *wished for* level of performance from expectations that explicate the *anticipated* level of performance. This thesis makes use of an *ideal* reference standard and thus defines the *wished for* or *ideal* market as that being.....*the one that exploits the potential and provides the greatest opportunities for all those wanting to engage in it in a sustained manner.* Attaining this *ideal* standard or *ideal* market exposes the presence of a gap between what the market economy embraces today and what we *wish for*. The closing of this gap calls for a re-ordering of Europe's economic and social dimensions, a matter that will be further elaborated upon as this thesis works its way through. Later on in this thesis we will revert to this definition that is, the *wished for* or *ideal* market, more specifically in chapter 6⁶¹ in the hope that at that point we would have acquired better understandings that enable us to come up with our own personal judgments on how we expect the *ideal* market to be.

The case for free trade appears to be particularly strong when the arguments emerge from the political branch. On the other hand the academic arguments for free trade take a more sophisticated twinge. Free trade can cause harm as well as good. The same could be said for protectionist policies.⁶² The following are some of the main issues that academia appears to have derived to:⁶³

⁶⁰ See, Parasuraman, A., Zeithaml, V. and Berry, L. 1988, "SERVQUAL : A Multiple-Item Scale for Measuring Consumer Perceptions of Service Quality", *Journal of Retailing*, 64, 12-40. Expectations are viewed as desires or wants of consumers, that is, what they feel a service provider *should* offer rather than *would* offer. This standard is similar to the *ideal standard* referred to as the *wished for* level of performance in Miller, J.A. 1977, "Studying Satisfaction, Modifying Models, Eliciting Expectations, Posing Problems and Making Meaningful Measurements" in *Conceptualisation and Measurement of Consumer Satisfaction and Dissatisfaction*, Bloomington School of Business, Indiana University.

⁶¹ Chapter 6, section 6.4, "*Arguing for a European Theory of Social Justice*" refers.

⁶² See, Suranovic, S.M. *International Trade Theory*, <http://internationalecon.com/Trade/Tch5/T5-5E.php> [28 June 2010].

⁶³ *ibid.*

- a) The main support for free trade arises because free trade can raise aggregate economic efficiency.
- b) Trade theory shows that some people will suffer losses in free trade.
- c) A country may benefit from free trade even if it is less efficient than all other countries in every industry.
- d) A domestic firm may lose out in international competition even if it is the lowest-cost producer in the world.
- e) Protection may be beneficial for a country.
- f) Although protection can be beneficial, the case for free trade remains strong.

Roberto Mangabeira Unger⁶⁴ delves into the very heart of the theory of comparative advantage on which the doctrine of free trade is based and puts into light other aspects that trigger further our thinking. Although he in no way denies the power of the concept he claims that the problem lies more in what the doctrine on comparative advantage leaves unsaid and hence remains beyond the reach of economic theorising. He argues that the theory is incomplete in three major ways.

First, “Incompleteness: Indeterminacy resulting from failure to justify unique assignments of comparative advantage.”⁶⁵ As soon as more than two countries with more than two commodities are put into question one realises that there can be multiple, infinite or no solutions. In the case of multiple or infinite solutions the doctrine of comparative advantage becomes inadequate. Further, Unger argues that the doctrine of comparative advantage deals with *static efficiency*. That is, it does not tell us anything on the possibilities deriving from innovation.

Second, “Incompleteness: Confusion Resulting from Uncertainty about the limits of our power collectively to shape comparative advantage”.⁶⁶ Comparative advantage can be acquired or shaped. But, when it comes to shaping comparative advantage institutions tend to be biased to a greater or lesser extent towards their own reputations and arrangements of productive specialisations and hence such bias restrains the way they are organised. Because

⁶⁴ See, Mangabeira Unger, R. 2007, *Free Trade Reimagined: The World Division of Labour and the Method of Economics*, Princeton University Press, New Jersey.

⁶⁵ *ibid.* pg. 28

⁶⁶ *ibid.* pg. 36

the doctrine on comparative advantage deals with *static efficiency* it entraps us into the belief that there is a single natural expression of what constitutes a market economy. The fact that a market economy can be realised within various institutional formats, although acknowledged in principle, Unger claims is given little force. Hence, in order to dispel such confusions when producing and reshaping comparative advantage one needs to cross boundaries. An inclusive market economy requires innovation in all its institutional forms. Experimentation is crucial in this respect – advancing with the benefit of hindsight gathered through experimentation rather than through blueprint becomes the key driver. However, neither the market economy nor democratic politics as presently organised can be trusted to promulgate this much needed experimentation. As such, in order to go beyond the world of *static efficiency* to produce comparative advantage through experimentation he finds scope in the creation of alternative regimes that could be assigned to different sectors or scales of production. The power to experiment for Unger, should not only come during times of crisis but be maintained at a continuous pace in small steps through the appropriate institutional settings.

Third, Incompleteness: Embarrassment resulting from the assumption that the world is divided into sovereign states.⁶⁷ Herein lies the paradox. Consistent with the claim to increased efficiency through freedom to trade and by combining factors of production the right of labour to cross boundaries features as a vital aspect congruent to the doctrine of comparative advantage. And yet, various States across the globe exert restrictions on the mobility of labour thus withholding the possibility of a universal right to live and work abroad. As soon as we acknowledge this, one realises that such political divisions in effect support substantive differences across States as to how they organise their work and arrange their economy. Indeed, the existence of separate States induces an everlasting diversity to the range of economic and institutional setups. Most importantly, diversity increases the opportunity to develop new and original institutional arrangements including the regimes of property and contract between government and private enterprise. Diversity enables varying ways of organising work, combining ideas and machines whilst moulding a market economy into its distinctive shape. According to Unger, the political separation of States grounds the theory of international trade. For without it trade would collapse.⁶⁸ But by standard economic

⁶⁷ *ibid.* pg. 44.

⁶⁸ “That such a collapse would occur is made explicit in the idea of ‘integrated world equilibrium’, or IWE, associated with Paul Samuelson and then with Avinash Dixit and Victor Norman.” *ibid.* pg. 48.

trade theory terms division is considered a costly burden. The relation between diversity and efficiency gains does not feature within the classical conceptions of comparative advantage. To this end the theory is blind.

2.6 Beyond Economical Theoretical Assumptions

Five years since the global financial crises of 2008 began which has led most of the world's developed economies into deep recession the global outlook remains very fragile with the pace of recovery varying across countries and regions. Global growth has been forecast to drop to 3.1 per cent in 2012 with slow growth to continue at 3.4 and 3.9 per cent in 2013 and 2014 respectively.⁶⁹ Growth forecasts for years 2013 and 2014 are especially weak in the Euro area with unemployment levels for some European countries described as having reached, 'depression-era unemployment rates with no sign of improvement.'⁷⁰ Greece, Ireland, Italy, Portugal and Spain are expected to suffer another year of recession in 2013 and meagre growth in 2014.⁷¹ As to the United States this is expected to grow for each year by 2.0 per cent in 2012 and 2013 respectively and 2.4 per cent in year 2014.⁷²

The global crises could be seen as a test that exposes a country's level of resilience or vulnerability. To this end, the manner as to how some of the countries and regions across the world have weathered or are weathering the financial storm is worth a fleeting glimpse.

Asia and the Americas appear to be recovering more rapidly than Europe.⁷³ Indeed, it has been claimed that Asia has come through with flying colours.⁷⁴ The world largest and fastest

⁶⁹ See, Armstrong, A., Delannoy, A., Fic, T., et al. November 1, 2012, "The World Economy – World Outlook", *National Institute Economic Review*, 222,, F11. Forecast reflects percentage change, year-on-year of Real GDP based on global PPP shares.

⁷⁰ See, *ibid.* F11.

⁷¹ *Ibid.* F14.

⁷² *Ibid.* F11.

⁷³ See, Holland, D., Barrell, R., Fic, T., et al. 2010, "Global prospects and sources of economic growth", *National Institute Economic Review*, 212, 76, F4-F11.

It is worth noting that in response to the financial crises the stimulus packages introduced in the larger Asian economies ".....dwarfs the size of packages introduced in most European economies, averaging 4-5 per cent of GDP" see, Holland, D. 2010, "China and world trade", *National Institute Economic Review*, 211, F25-F26.

emerging markets, the so called BRIC countries (Brazil, Russia, India and China)⁷⁵ have weathered the financial storm comparatively well and have been considered as fairly well positioned to stand up to the global challenge.⁷⁶ China, the fastest growing of the BRIC economies, considered as a vital source of global demand increased its GDP by 11.9 per cent year-on year in the first quarter of 2010 whilst imports rose by more than 60 per cent over the same period.⁷⁷ India comes out of the global crises almost unscathed with its economy expanding rapidly during 2009.⁷⁸ During the period 2008-2009 China, Brazil and India had a positive average annual per capita GDP growth of 8.1%, 1.5% and 5.3% respectively, whilst Russia is the only BRIC country that registered a decline of 1.3%.⁷⁹ The BRIC countries have provided vital support to the world economy although growth has been noted to slow down during 2012 and expected to remain so during 2013.⁸⁰ Notwithstanding the optimism that has been voiced in favour of the BRIC countries in that they will avoid 'hard-landings' whether or not their economic slowdown indicates the start to a possible downturn in which case recoveries in the West will be even more problematic still needs to be seen.⁸¹

Such a scenario begs the question of what makes it possible for some economies to expand and withstand tumultuous periods whilst others contract or crumble down. Has freer global trade anything to do with all this? For the EU the answer is a definite, yes. The re-launch of the Single Market Act adopted in April 2011 has been considered as an essential element of

⁷⁴ See, Roach, S. 2010, *The new lesson for resilient Asia*, June 9, Financial Times, London, UK.

⁷⁵ The average percentage per annum per capita GDP growth in the BRIC countries for the period between year 2000 – 2007 was as follows, 8.6 – China; 2.2 – Brazil; 5.5 – India; 7.5 – Russia; See, Holland, D., Barrell, R., Fic, T., et al. 2010, "Chinese revaluation and emerging market prospects", *National Institute Economic Review*, 212, April 2010, 87-89.

⁷⁶ *ibid.*

⁷⁷ See, Holland, D., Barrell, R., Fic, T., et al. 2010, "Global prospects and sources of economic growth", *National Institute Economic Review*, 212, 76, F4-F11.

⁷⁸ *ibid.*

⁷⁹ See, Holland, D., Barrell, R., Fic, T., et al. 2010, "Chinese revaluation and emerging market prospects", *National Institute Economic Review*, 212, April 2010, 87-89.

The authors attribute Russia's decline because of its reliance on oil production and the construction sector as limiting the government's ability to boost domestic demand.

⁸⁰ See, Armstrong, A., Delannoy, A., Fic, T., et al. 1 November, 2012, "At A Glance....The world economy", *National Institute Economic Review*, 222, F2.

⁸¹ *Ibid.*

Europe's 2020 strategy which sets ambitious goals for the attainment of smart, sustainable and inclusive growth. According to President Barroso, "Europe 2020 is about what we need to do today and tomorrow to get the EU economy back on track. The crisis has exposed fundamental issues and unsustainable trends that we cannot ignore any longer."⁸² The Europe 2020 strategy sets out Europe's vision for Europe's social market economy over the next decade. In this respect it proposes seven flagship initiatives: (i) an innovation Union, (ii) youth on the move, (iii) a digital agenda for Europe, (iv) a resource-efficient Europe, (v) an industrial policy for the globalisation era, (vi) an agenda for new skills and jobs and (vii) a European platform to tackle poverty. According to the European Commission, "[A]n up-to-date single market is the common foundation of all these structures."⁸³ It is considered as the, **"real growth engine within the European economy."**⁸⁴ Twelve priority actions were identified in the Single Market Act adopted in April 2011 and the reform of public procurement legislation constitutes one of these actions. Budgetary constraints have directed attention on the need for more efficient use of public money and have thus moved public purchasing up on the policy agenda for all Member States. The public procurement legislation reform seeks to incorporate more simplification and flexibility to reduce costs, duration of contracting procedures and better access to public procurement markets in particular for SMEs.⁸⁵

In effect, the re-launch of the single market seeks to address the shortcomings of the internal market. Such shortcomings were highlighted by, Professor Monti in his report⁸⁶ which he was commissioned to do by the President of the European Commission, and by the European

⁸² See, IP/10/225. *Europe 2020: Commission proposes new economic strategy in Europe*, 3rd March 2010, Brussels.

⁸³ See, COM (2010) 608 final. *Towards a Single Market Act for a highly competitive social market economy*, 27.10.2010, European Commission, Brussels. Pg.4.

⁸⁴ See, COM(2011) 206 final. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Single Market Act-Twelve levers to boost growth and strengthen confidence - "Working together to create new growth"*, 13.04.2011, European Commission, Brussels. pg. 3 [emphasis is theirs].

⁸⁵ See, IP/11/785. *Single Market Act: EU public procurement framework has saved around 20 billions euros*, 24 June 2011, European Commission, Brussels.

⁸⁶ See, Monti, M. *A new strategy for the single market: At the service of Europe's economy and society - Report to the President of the European Commission*: 9 May 2010, Brussels.

Parliament in Mr. Grech's report.⁸⁷ Accordingly, the remedial actions incorporated in the re-launch of the single market seek to address such shortcomings by,

putting an end to market fragmentation and eliminating barriers and obstacles to the movement of services, innovation and creativity. It means strengthening citizens' confidence in their internal market and ensuring that its benefits are passed on to consumers. A better integrated market which fully plays its role as a **platform** on which to build European competitiveness for its peoples, businesses and regions, including the remotest and least developed.⁸⁸

Indeed, worth recalling that the pursuit of freer trade and the economic integration of Europe have and remain the central source for the construction of the European Union since the signing of the Treaty of Rome, establishing the European Economic Community in 1957. In 1986 by way of the White Paper⁸⁹ market failures were acknowledged then. The White Paper set out a whole list of barriers that had to be removed by the end of 1992 in order to address market fragmentation. The elimination of all remaining barriers was the object of the 1992 single market programme and hence Europe's challenge at the time. In this respect the Single European Act which was signed on the 17 February of 1986 revised the Treaties of Rome in order to add momentum to European integration and the completion of the internal market. Twenty years following the 1992 single market programme Europe remains engrossed in, **"putting an end to market fragmentation and elimination of barriers."**⁹⁰

The challenges that Europe faces today are no greater than what it faced after the Second World War or during the time when the technical revolution coincided with the recession of the 1970s. As the facts now clearly reveal, addressing European challenges exclusively through the economic dimension is not sufficient. As was previously noted in chapter 1, the point of argument raised therein is again raised herein. Europe need not constrain itself and adopt such an overriding and unconditional attitude towards the single market project even though it now attempts to camouflage this by inserting the term *social market economy* in the Europe 2020 strategy. For what actually is being meant by a *social market economy* is highly

⁸⁷ See, Grech, L. *Delivering a single market to consumers and citizens*, 3rd May, 2010, European Parliament.

⁸⁸ See, COM(2011) 206 final. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Single Market Act-Twelve levers to boost growth and strengthen confidence - "Working together to create new growth"*, 13.04.2011, European Commission, Brussels. pg. 3 [emphasis is theirs].

⁸⁹ See, COM 85 (310) final. *Completing the Internal Market. White Paper from the Commission to the European Council*, 1985, Commission of the European Communities, Milan.

⁹⁰ See, COM(2011) 206 final. Op.cit. (n. 86) pg. 3 [emphasis is theirs].

obscure. We sink into further obscurity when the single market route is said to lay the common foundation for the seven flagship initiatives that set out Europe's vision for the Europe 2020 strategy. As was previously discussed,⁹¹ the theory of comparative advantage which lies at the heart of the doctrine of free trade deals with *static efficiency*. The theory does not factor in the possibilities deriving from innovation and it entraps us into the belief that there is a single natural expression of what constitutes a market economy. As such our institutions are biased towards this end. The single market route is not the only market route that is capable of leading Europe towards full integration, that is, in the political and economic sense. There are other various market routes and failure to acknowledge such means to deprive Europe of alternative opportunities.

2.7 And Further Beyond.....

Indeed, there are various complexities that drive world trade and the relevance of economic theories vis-à-vis free trade does not always appear to impart practical value. The following discussion attempts to highlight the significant role that politics play in driving world trade and yet it does not feature in the theory of comparative advantage.

China has 1,400 missiles pointed at Taiwan.⁹² June 2010 - China and Taiwan reached a historic agreement to lower tariffs on various items including goods in textile, auto-parts, and machinery as well as to open their markets for banking and other services.⁹³ This has taken place amidst protests by tens of thousands of Taiwanese who fear that such an agreement threatens the island's autonomy. The bottom line – by integrating the economy China hopes that political unification with Taiwan will become inevitable.⁹⁴

Chinese exporters are now keen on tapping previously untapped markets, for example, Brazil, the Association of South-East Asian Nations (ASEAN) and Africa. But, as China captures market share, others are drawn out of business. Governments are cautious on how to respond

⁹¹ To this effect see section 2.5, "*The case for or against free trade*".

⁹² See, Balfour, F. 2010, *China's Gravitational Pull on Taiwan*, June 17, Bloomberg Businessweek.

⁹³ See, Ting-I Tsai. 2010, *Taiwan Seeks Closer China Trade Ties*, June 27, Wall Street Journal, New York.

⁹⁴ See, Balfour, F. 2010, *China's Gravitational Pull on Taiwan*, June 17, Bloomberg Businessweek.

in such situations as China tends to react strongly to measures that target its exports. Thus, whilst countries with significant strategic clout, such as India, South Africa, Brazil, Turkey and Mexico are capable of putting up to China by resorting to temporary trade barriers when their domestic producers face increasing competition from China, the same cannot be said for less influential countries. When Argentina imposed a number of restrictions on Chinese imports at the beginning of 2010, China responded by raising quality standards on Argentine imports. The end result – China imports from Argentina fell to 42.3% year on year in the first five months of 2010, whilst Chinese exports to Argentina jumped to 74.7%! ⁹⁵

Multiple concerns have been voiced by the Americans over U.S. and Chinese relations including those relating to human rights, intellectual property rights and China's military might. But their greatest concern regards international trade. China is forecast to overtake in size the U.S. largest economy.⁹⁶ The U.S. claims that Beijing's cheap currency and general inability to play by the rules is harming America's economy.⁹⁷ Meanwhile, President Barack Obama is of the view that the Clinton administration has let off China into the WTO with a better hand than the one the U.S. has at hand. President Obama appears to be sceptical on the virtues of free trade and aware that voters and Democrats in Congress are of the same view.⁹⁸ Nevertheless, President Obama is all out to revive a free trade pact with South Korea with a view to increasing U.S. exports and reinforcing U.S. economic ties to Asia. He's also promised to push Russia into the WTO – Russia has in turn agreed to resume imports of U.S. chickens (previous sales amounted to \$750 million a year).⁹⁹

⁹⁵ See, The Economist Intelligence Unit. 2010, *China economy: New trade battle ground*, 28 June 2010, EIU ViewsWire, New York.

⁹⁶ See, Economic Watch. *US Economic Profile*, http://www.economywatch.com/world_economy/usa/ [10 July 2010]. and Holland, D. 2010, "China and world trade", *National Institute Economic Review*, 211, F25-F26.

⁹⁷ See, Anonymous 2006, "Portman's complaint", *Economist*, 378, 8465, 28-31.

⁹⁸ See, Wessel, D. 2010, *Free-Trade Winds May Be Blowing Again*, June 30, Wall Street Journal, New York. Worth noting that Roberto Mangabeira Unger (Professor of Law) taught President Barack Obama at Harvard University – see, Reuters. 2008, *Latin America optimistic about Obama*, November 6, NZ News,

⁹⁹ See, Wessel, D. 2010, *Free-Trade Winds May Be Blowing Again*, June 30, Wall Street Journal, New York.

2.8 The impact of EU Public Procurement legislation vis-à-vis the EU's Free Trade Agenda

As can be noted from the foregoing discussions the notion of free trade appears to conjure various facets and opens the floor to various complexities. As we adhere to this thesis' main concerns this fact needs to be borne in mind and be given its due weight especially in the light of the EU's overriding and unconditional attitude towards the single market project and public procurement's vital role in this respect. The economic approach to the regulation of public procurement seeks to promulgate further the integration of the single European Market by institutionalising the principles of transparency, non-discrimination and objectivity when awarding public contracts. As a consequence, companies from across the single market are expected to be able to compete better for public contracts (that is, contracts with an estimated value that is equal to or above the defined thresholds¹⁰⁰) therefore facilitating cross border procurement with the resultant increase in import penetration in the public sector across the EU.

Today, with the benefit of hindsight the inevitable question arises – can we assert that the EU legislative changes in public procurement are living up to its expectations? The following discussion will assess the impact that EU public procurement legislation has had on its proclaimed outcomes.

¹⁰⁰ By Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, the Council concluded the Agreement on Government Procurement. This needs to be applied to any procurement contract with a value that reaches or exceeds the amounts set in the Agreement and expressed as special drawing rights. The Public procurement directives are to comply with the obligations as laid down in the agreement. See, Commission Regulation. (EU) No 1251/2011 of 30 November 2011 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 awards of contract.

2.8.1 A foreword note on EU public procurement spend

The estimated total public procurement spend depends largely on the methodology adopted. This methodology has been clearly explained by the Commission in its working documents published in 2010¹⁰¹ and 2011.¹⁰² When it comes to the total expenditure on works, goods and services across the EU this is significant and when taken as a percentage of GDP this stood at 17.4%; 17.6%; 18.1%; 19.9% and 19.7% for years 2006 till 2010 respectively.¹⁰³ However, this expenditure must not be interpreted as the volume of procurement that is all subject to public procurement legislation. Such expenditure represents an estimate that includes payments in the form of social transfers in kind which may not necessarily involve public procurement.

For example, this measure includes the costs of health care and medical products reimbursed through statutory health insurance funds or by government (which alone accounts for approximately 4.5% of EU27 GDP) as well as other public transfers not organised through the form of public contracts or which are disbursed by non public entities.¹⁰⁴

The estimated value of tenders published in the Official Journal of the European Union through the Tenders Electronic Daily database (TED) appears to provide a more realistic picture of public procurement spend. More specifically this indicator attempts to represent the volume of procurement for which there has been a call for competition across the EU and which stood at €377,06 billion; €367.20 billion; €392,42 billion; €420.44 billion; €447.03 billion for the years 2006 till 2010 respectively.¹⁰⁵ It bears noting that this estimate which is calculated by the services of the Commission does not represent actual values but is an estimate based on the values contained in contract award notices (available for only 64% of published tenders) and a correction factor.¹⁰⁶ The Commission notes that in view of the large

¹⁰¹ See, European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels.; European Commission. *Public Procurement Indicators, 2009*, 11, November 2010, Brussels.

¹⁰² See, European Commission. *Public Procurement Indicators 2010*, 4 November, 2011, Brussels. European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels. European Commission. *Public Procurement Indicators 2010*, 4 November, 2011, Brussels.

¹⁰³ See, European Commission. *Public Procurement Indicators 2010*, 4 November, 2011, Brussels.

¹⁰⁴ See, European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels.

¹⁰⁵ See, European Commission. *Public Procurement Indicators 2010*, 4 November, 2011, Brussels. pg.3.

¹⁰⁶ See, European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels. pg. 3.

proportion for which the awarded contract value is unavailable the application of a correction factor was regarded as necessary in order to be able to arrive to a global estimate for all published procurement.¹⁰⁷ Therefore, in the methodology applied the **number of calls** as published in the Official Journal and the TED database is,

multiplied by an average based, in general, on all the prices provided in the contract award notices published during the relevant year.

Contracts above €100 Million have been taken at their own value but not included for the calculation of these averages. An estimate is necessary because the value of the contracts awarded is not always provided in the published contract award notices. It should also be noted that the indicator measures what is competitively advertised, rather than contracts actually awarded: a small proportion of all procedures advertised are either abandoned or for various reasons do not lead to a contract award.¹⁰⁸

For a picture on the magnitude of direct EU public procurement spend that falls within the remit of the EU legislation is the value of calls for tender published in the Official Journal as a percentage of GDP. Such percentage stood at 3.2%; 3.0%; 3.1%; 3.6% and 3.7% of Community GDP for the years 2006 – 2010 respectively.¹⁰⁹

Noteworthy, is the fact that Member States are obliged to forward to the Commission yearly statistical reports in order to permit assessment of the results of applying the Directive.¹¹⁰

¹⁰⁷ Ibid. pg. 3

¹⁰⁸ See, European Commission. *Public Procurement Indicators 2010*, 4 November, 2011, Brussels. pgs.2-3.

¹⁰⁹ See, European Commission. *Public Procurement Indicators 2010*, 4 November, 2011, Brussels. pg. 7.

¹¹⁰ Member States are obliged to present to the Commission statistical reports of the preceding year by the end of 31 October of each year. The following articles refer, see **Article 67** of 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 (30.04.2004); See **Article 75** of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004)

See **Article 42** of Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

See **Article 39** of European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively;

See **Article 31** of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts;

See **Article 34** of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts;

See **Article 42** of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

See **Article 39** of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;

However, failure to rely on such actual data reports when presenting public procurement statistics reflects upon the lack of transparency.

2.8.2 Impact on Transparency

Given the objective of creating flawless intra European community trade between the public and private sector the elimination of preferential and discriminatory purchasing behaviour posed as a mandatory element for its success. Hence, the legal significance of such economic logic has put an emphasis on the issue of transparency. Transparency it is claimed generates competition and this in turn helps bring about the anticipated savings. As such in order to ensure transparency the European Directives on public procurement adopted various measures which include:

- i. The publication of notices advertising across the Community information on the proposed or awarded contract.¹¹¹ Such notices can come in the form of:
 - a. A Prior Information Notice (PIN) providing information on forthcoming procurement. The publication of such notices is not mandatory.
 - b. A Contract Notice (CN) or invitation to tender. Publication is mandatory except under special circumstances as stipulated by law.
 - c. A Contract Award Notice (CAN) provides information on the awarded contract. Its publication is mandatory as stipulated by law.
- ii. The application of selection criteria – Responses need to be evaluated against pre-qualifying criteria reflecting upon the minimum level of standards possibly required. These represent tests of good standing (probity), technical competence and financial strength or capability. Such tests are independent of each other. Whilst the test of probity is an absolute test the other tests are relative to the size and complexity of the project.
- iii. The application of award criteria – Contracts need to be awarded on the basis of objective criteria that are linked to the subject matter of the procurement

¹¹¹ To this effect see Articles 35-37, 69,70, Annexes VII, VII A, VII B, VII C, VII D, VIII of Directive 2004/18/EC; Articles 41-44, Annexes XIII, XIV, XV A, XV B, XVI of Directive 2004/17EC and Articles 30-32, 64, Annexes IX, V, VI of Directive 2009/81/EC.

with a view to compliance with the principles of transparency, non-discrimination and equal treatment therefore ensuring that tenders are assessed in a transparent and objective manner under conditions of effective competition. Contracts may be awarded on the basis of either the lowest priced tender or the most economically advantageous tender.

- iv. The application of technical specifications – The subject matter of the purchase needs to be defined in accordance to non-discriminatory technical specifications example, specifications elaborating upon the requirements of a material, service quality, environmental performance or accessibility for disabled persons.
- v. The application of established procurement procedures – The Directives provide for the conduct of established public procurement procedures which include, the open procedure, restricted procedure, negotiated procedure, competitive dialogue and provisions on other procurement techniques including framework agreements, electronic procurement, electronic auctions, dynamic purchasing systems and central purchasing bodies.

In year 2004 following an assessment on the performance of the public procurement markets over the past ten years¹¹² it was reported that there was “overwhelming evidence”¹¹³ that the procurement regulations have contributed to increased transparency and as a consequence contributed towards the increase in cross border competition and price savings for public authorities. An upward trend in the number of Contract Notices published in the Official Journal of the European Union between 1995 and 2002 was noted with the number of publications for year 2002 being almost twice as that for year 1995. In effect, this steady growth appears to have been maintained across the EU 25 and the EU 27.¹¹⁴ However,

¹¹² See, European Commission. *A report on the Functioning of Public Procurement Markets in the EU: Benefits from Application of EU Directives and challenges for the future* February, 2004, Brussels.

¹¹³ *ibid.* see pgs. 2 and 24.

¹¹⁴ See, EU-25: European Union, 25 Member States before 1 January 2007. EU-27: European Union, 27 Member States. See also, European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels.

despite such steady growth the 2004 report¹¹⁵ noted that only 16% of the estimated public procurement was being published. The transparency rate defined as, "...the value of procurement published in the Official Journal as a percentage of estimated total public procurement"¹¹⁶ was found to vary between Member States and for different government levels and sectors. However, as was noted by the Commission itself, an increase in transparency rates does not necessarily mean an increase in transparency because large value public procurement projects can easily skew this measure. In addition as was also highlighted by the Commission in their 2010 working document report,

This ratio will, inter alia, be influenced by the extent to which indicator 1 includes expenditure which should not be construed as procurement.¹¹⁷

As it transpires indicator 1 refers to the *total EU public procurement spend* now referred to by the Commission as *Total Public Expenditure on Works, Goods and Services* which is not a direct measure of the value of EU public procurement. In view of the fact that it includes other components of public expenditure for some Member States this, "...may be significant and result in particularly inflated figures for this indicator."¹¹⁸

Drawing on a comprehensive body of evidence and new independent research in year 2011 the Commission claimed that,

EU public procurement Directives have helped to establish a culture of transparency and outcome-driven procurement in the EU. This has triggered competition for public contracts, and generated savings and improvements in the quality of procurement outcomes. Open and competitive public procurement has driven down costs by around 4%, generating savings of approximately €20 billion. This far exceeds the costs generated by the regulatory framework, which are estimated to be €5 billion.¹¹⁹

¹¹⁵ See, European Commission. *A report on the Functioning of Public Procurement Markets in the EU: Benefits from Application of EU Directives and challenges for the future* February, 2004, Brussels.

¹¹⁶ See, European Commission. *A report on the Functioning of Public Procurement Markets in the EU: Benefits from Application of EU Directives and challenges for the future* February, 2004, Brussels.

¹¹⁷ See, European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels.

¹¹⁸ See, European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels.

¹¹⁹ See, European Commission. "Press Release, Single Market Act: EU public procurement framework has saved around 20 billions euros, IP/11/785".

One of the reports that appear to have contributed to such claims is based on econometric analysis conducted by Europe Economics for DG internal market.¹²⁰ Their analysis has been based on a sample which contains information on 175,167 awards covering the years 2006 – 2009 and is derived from the MAPPS database which includes all notices published in the European public procurement journal Tenders Electronic Daily (TED) since 1993. Although the MAPPS database covers the publication of notices for all Member States the researchers note that the distribution of specific awards across Member States is uneven. Moreover, it is also noted that the sample is not a representative one. Nevertheless, the researchers attempt to justify extrapolation to the overall population, “because exclusion of observations seems to be at random (or at least not correlated with the dependent variables of our models) so that there are no obvious sample selection problems.”¹²¹

The analysis is based on two models, *the outcome model* and *the number of bidders model*. *The outcome model* postulates a relationship between final award value and procurement related indicators.¹²² *The number of bidders model* postulates a relationship between the number of bidders and the procurement related indicators (non-weighted).¹²³ The researchers claim that the procurement related indicators identify with the European public procurement directives as measures aimed at opening the procurement market. Such procurement related indicators include those that relate to:

- a. Transparency - to this effect this equates with the publication of notices (PIN, CN and CAN).
- b. Openness – to this effect this equates with the use of standard procedures, that is, the open or the restricted procurement procedure or the use of non-standard procedures which are used under exceptional circumstances.
- c. Aggregation – to this effect this equates with procurement that is made through central purchasing authorities.

In terms of transparency (transparency being equated with the publication of notices), it was found that when a contract notice is published¹²⁴ this leads to a reduction of roughly one per

¹²⁰ See, Europe Economics. *Estimating the Benefits from the Procurement Directives - A report for DG Internal Market*, 13 May, 2011, London.

¹²¹ Ibid. pg. v.

¹²² Ibid. pg. iv.

¹²³ Ibid.

¹²⁴ According to the researchers over a quarter of contracts do not publish a CN or a PIN. See, *ibid.* pg. v.

cent of contract award value when compared to the initial estimated total value. In terms of procedure, it was found that when the open procedure is adopted this increases the estimated savings by three per cent.

The Commission appears to build further on such findings and argue that the findings are consistent with previous reports that also attribute savings with the procurement Directives.¹²⁵ In this respect the Commission claims that previous estimates on savings as a result of EU advertised procedures come in the region of 2.5-10% lower than the initial estimated contract value.¹²⁶ Hence, on the basis of hypothetical savings of 5% realised on €420 billion¹²⁷ of public contracts the Commission further argues that this would translate into estimated savings of over €20 billion. They thus postulate that such savings, “could generate increases in employment and GDP of between 0.08 and 0.12% after one decade (160-240 000 jobs)”¹²⁸ and were such savings, “realised for all public procurement, the gains would be correspondingly greater (0.5% GDP and employment).”¹²⁹

Alas, and here is where we come in sync with the Cecchini report where efficiency gains amounting to 0.5 % (circa ECU 17.5 billion or ECU 21.5 billion if defence procurement was included) of 1986 Community GDP were projected.¹³⁰ However, it bears noting that such projections need to be interpreted with great caution as they do not appear to take into account other highly relevant factors. Indeed, in the report presented by Europe Economics the researchers noted as follows,

¹²⁵ See, European Commission. *EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report*, 2011, Brussels. pg. 20.

¹²⁶ Ibid.

¹²⁷ It appears that the €420 billion of public contracts reflects the estimated value of tenders published in the European Public Procurement Journal Tenders Electronic Daily (TED) for year 2009. To this effect see, European Commission. *Public Procurement Indicators 2010*, 4 November, 2011, Brussels.

¹²⁸ See, European Commission. *EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report*, 2011, Brussels. pg. 20.

¹²⁹ See, European Commission. *EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report*, 2011, Brussels. pg. 20.

¹³⁰ See, Cecchini, P. 1988, *The European Challenge, 1992: The benefits of a Single Market*. Wildwood House Limited, Aldershot, Hants. pg. 17.

We have not been able to identify the source of changes in procurement disciplines. This will become important in interpreting the results because, although we can see the effects of different procurement tools, we cannot disentangle the effects strictly derived from the compliance with the Directives, as some of the measures envisaged are voluntary.¹³¹

Nevertheless, the researchers make the following claim, “[B]ased on our modelling exercises, we find that good procurement practice in general has a beneficial effect on procurement outcomes.”¹³² However, such a claim is highly questionable in the light of the following:

First. The study under question examines relationships between the so called procurement practices and procurement outcomes. However, correlations by way of establishing relationships can in no way be interpreted as causation that is, the cause for bringing about the proclaimed beneficial effects on procurement outcomes. All that can be established is that there appears to be some relationship on the proclaimed beneficial effects of procurement outcomes.¹³³

Second. The study under question appears to define the notion of *good procurement practice in general* on the basis of the *procurement indicators* comprising, *Transparency*, *Openness* and *Aggregation*.

- Transparency - equates with the publication of notices (PIN, CN and CAN).
- Openness –equates with the use of standard procedures, that is, the open or the restricted procurement procedure or the use of non-standard procedures which are used under exceptional circumstances.
- Aggregation – equates with procurement that is made through central purchasing authorities.

¹³¹ See, pg. 10.

¹³² See, Europe Economics. *Estimating the Benefits from the Procurement Directives - A report for DG Internal Market*, 13 May, 2011, London. Executive summary, pg. v.

¹³³ “ ‘Correlation does not imply causation’ is a phrase used in science and statistics to emphasize that correlation between two variables does not automatically imply that one causes the other (though correlation is *necessary* for causation and can indicate possible causes or areas for further investigation). The opposite belief, *correlation proves causation*, is a logical fallacy by which two events that occur together are claimed to have a cause-and-effect relationship. The fallacy is also known as *cum hoc ergo propter hoc* (Latin for "with this, therefore because of this") and *false cause*. By contrast, the fallacy *post hoc ergo propter hoc* requires that one event occur before the other and so may be considered a type of *cum hoc*.” See, Wikipedia. *Correlation does not imply Causation*, http://en.wikipedia.org/wiki/Correlation_does_not_imply_causation [29 July 2010].

Such indicators touch only in a very superficial manner “*good procurement practice in general.*” Various other unobservable factors potentially affecting the procurement process have not been taken into consideration. Such unobservable factors may not necessarily take into account *good procurement practices* and yet may have had an impact on the proclaimed beneficial effects of the procurement outcomes.

In its declaration of assurance by Director General (DG) Regional Policy concerning the regularity and legality of the applicable EU budget in 2011, DG Regional Policy made various reservations one of which was in respect of, “serious deficiencies in the management and control systems with regard to the compliance of the operations with the public procurement rules.....”¹³⁴ Indeed, the Commission is highly aware of the recurring problems on the non-respect of public procurement rules by Member States as highlighted on various occasions by the Court of Auditors of the European Union (hereinafter referred to as the Court of Auditors) in their audits concerning projects co-financed by European Regional Development Fund (ERDF) and the Cohesion Fund under Cohesion policy. Irregularities relating to public procurement have accounted for 41% of the cumulative quantifiable errors¹³⁵ identified by the Court of Auditors for the years 2006 -2009 concerning projects co-financed by ERDF and Cohesion Fund.¹³⁶ For financial year 2009 the Court of Auditors noted as follows,

The non-respect of public procurement rules alone accounts for 43 % of all quantifiable errors and makes up for approximately three quarters of the estimated error rate.¹³⁷

In its report for financial year 2010 the Court of Auditors noted as follows,

Public procurement is one area where the Court often finds errors. EU public procurement law consists essentially of a series of procedural requirements. To ensure the basic principle of competition foreseen in the Treaty the contracts have to be advertised; bids must be evaluated

¹³⁴ See, European Commission. *2011 Annual Activity Report - Directorate General Regional Policy*, 2012, Brussels. pg. 6.

¹³⁵ The calculation of error rates is based on representative statistical samples with a 95 % confidence level. See, for example, Court of Auditors. *Annual report concerning the financial year 2009, (2010/C 303/01)*, 9.11.2010, Official Journal of the European Union,

¹³⁶ See, SEC(2011) 1179 final. *Commission Staff Working Paper - Analysis of errors in cohesion policy for years 2006-2009_Actions taken by the Commission and the way forward*, 5.10.2011, European Commission, Brussels.

¹³⁷ See, Court of Auditors. *Annual report concerning the financial year 2009, (2010/C 303/01)*, 9.11.2010, Official Journal of the European Union, paragraph 4.21

according to specified criteria; contracts may not be artificially split to get below thresholds, etc.¹³⁸

A repeat of the above statement can also be found in the auditor's financial report appertaining to year 2011¹³⁹ wherein, serious failures to respect public procurement rules were also noted. The errors observed affected one quarter of transactions audited and that the combined estimated contract value for the 298 audited public procurements amounted to €6,7 billion.¹⁴⁰ Such errors accounted for 44% of all quantifiable errors. The following presents some of the examples reflecting serious failures to respect public procurement rules as identified by the Court of Auditors in their year 2011 financial report:

Use of direct award without justification: In the case of an EEPR project concerning the construction of a gas pipeline, the contracts related to the works in the second and third stage of the project were awarded without tendering to the consortium that had been awarded a contract for the first stage of the pipeline five years earlier. This is not in line with the applicable EU and national public procurement laws.

Direct award of additional works in the absence of unforeseeable circumstances: In the case of a CF project related to road construction, additional works relating to amendments made subsequent to the approval of the original plan were awarded directly to the same contractor. These additional works were not due to unforeseeable circumstances, therefore a breach of public procurement rules occurred.

Significant changes in scope of the contracted works: In the case of a CF project related to the construction of a new metro line, the scope and budget of a related service contract was changed significantly through the involvement of experts who initially had not been foreseen. The additional tasks to be carried out were not due to unforeseeable circumstances, but rather to the way the contracting authority had planned the project.¹⁴¹

The Court of auditors have consistently noted that the errors relating to public procurement are not specific to cohesion policy but refer to non-compliance with internal market rules.¹⁴²

¹³⁸ See, Court of Auditors. *Annual report concerning financial year 2010*, (2011/C 326/01), 10.11.2011, Official Journal of the European Union, paragraph 10, pg. 34.

¹³⁹ See, Court of Auditors. *Audit report concerning financial year 2011*, (2012/C 344/01), 12.11.2012, Official Journal of the European Union, paragraph 10, C344/37.

¹⁴⁰ See, Court of Auditors. *Audit report concerning financial year 2011*, (2012/C 344/01), 12.11.2012, Official Journal of the European Union, paragraph 5.31, C344/128.

¹⁴¹ See, Court of Auditors. *Audit report concerning financial year 2011*, (2012/C 344/01), 12.11.2012, Official Journal of the European Union, C344/128 and C 344/129.

¹⁴² See, for example, SEC(2011) 1179 final. *Commission Staff Working Paper - Analysis of errors in cohesion policy for years 2006-2009_Actions taken by the Commission and the way forward*, 5.10.2011, European Commission, Brussels.; Court of Auditors. *Audit report concerning financial year 2011*, (2012/C 344/01), 12.11.2012, Official Journal of the European Union,, paragraph 5.31.

Thus, given the recurring nature of non-compliance with EU public procurement rules even in the light when contracting authorities are aware that eligibility of EU funds are highly dependent on compliance, there is thus good reason for one not to confine non-compliance solely with projects that benefit from EU funds but extend such unconformity as occurring across all EU public procurement irrespective as to whether or not they are benefitting from EU funding.

Third. Given that the study in question conducted by Europe Economics was concerned on investigating “the relationships between procurement practices and procurement outcomes”¹⁴³ more specifically, the relationships between the *procurement indicators* and their association with “*final*” award values in relation to estimated values before award and the number of bidders, the author claims that the cut off line delineating where procurement outcomes are measured is nothing but myopic. Reliance on the so called “*final*” award values which capture nothing other than the award price as published on the Contract Award Notices is not sufficient and can be highly misleading. What counts is the actual final price that the public purchaser pays up for. There can be major discrepancies between the initial award price that is, the price that the researchers capture in their analysis by way of the published Contract Award Notices and the actual final price especially for works and service contracts where cost overruns can flow during the contractual period. In the case of large construction projects cost overruns are a common feature due to various unforeseen reasons such as inflation of construction costs (wages and materials) and unforeseen additional works.¹⁴⁴ The Directives are silent when it comes to the post-contractual phase. But, as the Commission notes, “[T]he ultimate test of the effectiveness of public procurement legislation is the impact on prices actually paid for goods and services by public procurement authorities.”¹⁴⁵ However, measuring the actual prices that incorporate the variations that arise during the contractual period would appear to be a mammoth task.

¹⁴³ See, Europe Economics. *Estimating the Benefits from the Procurement Directives - A report for DG Internal Market*, 13 May, 2011, London. Executive summary, pg. iii.

¹⁴⁴ See, examples given above as reported upon by the Court of Auditors.

¹⁴⁵ See, European Commission. *A report on the Functioning of Public Procurement Markets in the EU: Benefits from Application of EU Directives and challenges for the future* February, 2004, Brussels. pg. 14.

2.8.3 Impact on Cross-border procurement

According to the Commission's 2004 report¹⁴⁶ on the performance of the public procurement markets, it was claimed that on the basis of the new evidence¹⁴⁷ the level of cross-border procurement increased. However, this increase which they claim comes as a result of the increasing level of transparency is mostly attributed to indirect cross-border procurement as foreign firms make use of local subsidiaries (30% of the bids in the sample). Only 3% of the total number of bids in the sample engaged in direct cross-border public procurement.

In the meantime, Mr. Alan Wood presents to the UK's Chancellor of the Exchequer and Secretary of State for Trade and Industry a report¹⁴⁸ wherein he was requested to investigate the difficulties UK suppliers were being confronted with when competing for public contracts in other EU countries. The report notes that competing for public contracts in other EU countries is not an easy task, but rather time consuming and resource intensive. Although, it was argued that EU public procurement rules were not a hindrance for UK suppliers, grey areas remain including a strong belief that local firms were being favoured. Nevertheless, UK firms were not apparently interested in challenging procurement decisions even when direct discrimination was believed to have occurred. Maintaining good relations was their preferred option. Most interestingly, cultural preferences where buying locally constituted an integral part of the culture was identified as one of the main hindrances affecting the openness of public procurement markets. This finding also tallies with the previously discussed empirical research¹⁴⁹ where border effects were attributed to consumer bias. Other trade barriers to intra EU trade that were reported upon included political factors as well as industrial policy. In addition, each industry appeared to possess its own specific concerns. The need for local

¹⁴⁶ Ibid.

¹⁴⁷ See, *ibid.* pg. 9, footnote 9. This new evidence is based on a sample study of 1500 firms actively involved in procurement. "COWI. *Monitoring Public Procurement in the European Union using Firm Panel Data*". Lot 1. Final report July 2003. This study is based on questionnaires addressed to a sample of firms from Austria (60 firms), Belgium (60 firms), Denmark (60 firms), France (360 firms), Germany (450 firms), Ireland (40 firms), Spain (120 firms) and the UK (360 firms). The targeted sample of firms was drawn from nine economic areas corresponding to Common Procurement Vocabulary sectors 24 (chemicals), 29 (machinery), 30 (office equipment), 33 (medical products), 34 (motor vehicles), 50 (motor repair), 45 (construction), 74 (business services) and 90 (sewage). These sectors account for 66% of all published Tenders."

¹⁴⁸ See, Wood, A. *A report to The Chancellor of the Exchequer & Secretary of State for Trade & Industry*, 2004, Office of Government Commerce, U.K.

¹⁴⁹ See discussion in section 2.1, "Introduction".

integration for example through subsidiaries was found to be one of the main success factors when aspiring to win public procurement contracts in other EU countries. This finding is also in line with the Commission's 2004 report and a more recent report presented by Ramboll Management Consulting together with the University of Applied Sciences HTW Chur (hereinafter referred to as the Ramboll report) to DG Internal Market and Services in 2011.¹⁵⁰

The Ramboll report aims to provide an update on the measurement of cross-border procurement in Europe. Data for 1995, 2000 and 2005 reveal an increasing trend towards import penetration. Such trend could be depicted in both the public and private sectors. Nevertheless, public sector import penetration remains significantly lower (7.5 % for year 2005) than private sector import penetration (19.1% for year 2005). The study makes a distinction between direct and indirect cross-border procurement. Direct cross-border procurement accounts for 1.6% of awards or circa 3.5% of the total value of contract awards published in TED for the period covering 2007 to 2009. In the case of indirect cross-border procurement for the same time period 11.4% occurs through affiliates when measured by the number of awards or 13.4% when contract values are used. Indirect cross-border procurement through wholesalers/distributors also appears to be a common channel for procurement. For the period 2007 to 2009 this type of procurement accounted for 11.9% when both the number of awards and volume procured were taken into consideration.

The Ramboll report also compares the impact of cross-border procurement between Category 'A' services and Category 'B' services as differentiated by the public procurement directives and laid down in Annex II of Directive 2004/18/EC and Annex XVII of Directive 2004/17/EC. In essence, category 'B' services are not subject to the detailed procedural rules of the directives especially those rules appertaining to selection and award.¹⁵¹ The reason for such is because such services have been recognised as being less suited for cross-border procurement in comparison to category 'A' services.

¹⁵⁰ See, Ramboll Management Consulting and University of Applied Sciences HTW Chur. *Final Report - Cross-border procurement above EU thresholds*, March 2011.

¹⁵¹ Pursuant to Article 21 of Directive 2004/18/EC contracts referring to services listed in Annex II B shall be subject solely to Articles 23 relating to Technical Specifications and Article 35(4) which refers to the publication of the contract award notice.

Pursuant to Article 32 of Directive 2004/17/EC contracts referring to services listed in Annex XVII B shall be subject solely to Article 34 relating to Technical Specifications and Article 43 which refers to the publication of the contract award notice.

According to the Ramboll report it was found that type 'A' service contracts have a share of 1.4% of direct and 11.0% of indirect cross-border procurement when examined on the basis of number of awards, total number amounting to 218,644 awards.¹⁵² When compared to category 'B' services, 0.7% and 3.3% for direct and indirect cross-border procurement respectively, total number amounting to 91,078 awards,¹⁵³ category 'A' services appear to have a higher share of cross-border procurement. On examining the value of procurement it was found that the share of 'A' services amounted to 2.8% of direct and 16.2% of indirect cross-border procurement, total value amounting to €117,185.9 million.¹⁵⁴ In the case of category 'B' services the volume of cross-border procurement amounted to 1.2% and 12.1%, total value amounting to € 40,156.9 million.¹⁵⁵ In their report the researchers note as follows:

In line with the distinction between A and B services, it might be expected that the share of cross-border procurements (direct and indirect through affiliates) would be significantly higher for A services than for B services. This can be confirmed, at least to a certain extent.¹⁵⁶

They further argue that,

For some of the B service subjects, direct cross-border procurement plays only a very small role, with a share of less than 0.5%. However, in other categories of B service the extent of cross-border procurement is even higher than the average for A services. However, this study only covers contract awards that were published in the OJ/TED, i.e. the cross-border performance of B services contracts which were not published in the OJ/TED could not be analysed. Thus, the proportion of B services contracts awarded cross-border could be different in reality.¹⁵⁷

It bears noting that the same argument that is, in respect of B services contracts not being published in the Official Journal and TED database also holds true for category A services. Despite the fact that in both categories¹⁵⁸ the publication of a contract award notice is

¹⁵² See, Ramboll Management Consulting and University of Applied Sciences HTW Chur. *Final Report - Cross-border procurement above EU thresholds*, March 2011, Table 37, pg. 63.

¹⁵³ Ibid. Table 37, pg. 63.

¹⁵⁴ Ibid. Table 38, pg. 64.

¹⁵⁵ Ibid. Table 38, pg. 64

¹⁵⁶ Ibid. pg. 61.

¹⁵⁷ Ibid. pg. 62.

¹⁵⁸ Ibid. Table 38, pg. 64.

mandated by the directives, “[O]n average contract award notices are published for 80% of procedures which are publicly tendered through TED”¹⁵⁹ the reality could be quite different.

It is interesting to note that according to the Ramboll report certain category ‘B’ services were identified as having higher than average for ‘A’ services. For example, 1.9% of the total number of contracts for legal services was awarded directly cross-border, compared to the average of 1.4% of category ‘A’ services.¹⁶⁰ In terms of value, this comes at 21.2% of the total value of contracts for legal services awarded directly cross-border, compared to the average of 2.8% of category ‘A’ services.¹⁶¹ In the case of hotel and restaurant services this comprised 10.9% of the total number of contracts awarded indirectly cross-border, compared to the average of 11.0% of category ‘A’ services.¹⁶² In terms of value, this accounts for 39.1% of indirect cross-border procurement, compared to the average of 16.2% for category ‘A’ services.

The Commission notes that such findings, “as far as some sectors are concerned, the distinction between tradable and non-tradable sectors is somewhat arbitrary.”¹⁶³ Indeed, in effect it could be argued that for some sectors the adoption of a lighter public procurement regime resulted into apparently more effective cross-border trade than other sectors that are exposed to a fuller regime. Moreover, such findings need to be interpreted in the light of previous empirical research¹⁶⁴ such as those conducted by Geroski,¹⁶⁵ Head and Mayor¹⁶⁶ and

¹⁵⁹ See, European Commission. *Working Document - Public Procurement Indicators 2008*, 27 April, 2010, Brussels, pg. 3.

¹⁶⁰ See, Ramboll Management Consulting and University of Applied Sciences HTW Chur. *Final Report - Cross-border procurement above EU thresholds*, March 2011, Table 37, pg. 63.

¹⁶¹ Ibid. Table 38, pg. 64.

¹⁶² Ibid. Table 37, pg. 63.

¹⁶³ See, European Commission. *EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report*, 2011, Brussels. pg.16.

¹⁶⁴ To this effect see discussion in the introduction to this chapter, section 2.1.

¹⁶⁵ See, Geroski, P. 1991, "1992 and European Industrial Structure" in *The Economics of the Single European Act*, Macmillan, London.

¹⁶⁶ See, Head, K. and Mayer, T. 2000, "Non-Europe: The Magnitude and Causes of Market Fragmentation in the EU", *Review of World Economics*, 136, 2, 284-314.

Nevan and Rollers¹⁶⁷ where serious doubts were expressed on the impact of the identified non-tariff barriers on Europe's single market programme and that other factors such as consumer bias were attributed to market fragmentation. Such empirical reports appear to support the reality that Europe faces today where overall cross-border procurement in the public sector over the past 20 years have remained relatively low. Notwithstanding such facts, the Commission in its proposal for a directive of the European Parliament and of the Council on public procurement noted as follows:

[t]he traditional distinction between so-called priority and non-priority services ('A' and 'B' services) will be abolished. The results of the evaluation have shown that it is no longer justified to restrict the full application of procurement law to a limited group of services. However, it became also clear that the regular procurement regime is not adapted to social services which need a specific set of rules.....¹⁶⁸

Previous attempts albeit failed ones for the Commission's desire to expose category 'B' services to the full public procurement regime is clearly reflected in the Irish *An Post* case.¹⁶⁹ In proceedings under Article 226 EC¹⁷⁰ the European Commission alleged failure to fulfil obligations on grounds of infringements of Articles 43 EC and 49 EC.¹⁷¹ In this case the European Commission sought to extend the obligations of Member States with respect to services coming within the ambit of Annex 1B to Directive 92/50 relating to the coordination of procedures for the award of public service contracts. In its judgment the Court held that, "[a] mere statement by it that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest and that there was therefore a failure to fulfil obligations."¹⁷² In the present scenario, in essence it could be argued that on the basis of the Ramboll report cross border procurement was and remains significantly low. Moreover, on the basis of this analysis 'A' services have a relatively significant higher share than 'B' services and that in the case of certain 'B' services such as legal, hotel and restaurant services a lighter public procurement regime have resulted into

¹⁶⁷ See, Neven, D.J. and Rollers, L.H. 1991, "European Integration and Trade Flows", *European Economic Review*, 35, 6, 1295-1309.

¹⁶⁸ See, COM(2011) 896 final. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20.12.2011, European Commission, Brussels. Pg. 8.

¹⁶⁹ See, Case C-507/03. *Commission of the European Communities v Ireland*, [2007] ECR I-09777

¹⁷⁰ Article 226 EC has now been replaced by Article 258 TFEU.

¹⁷¹ Articles 43EC and 49EC have been replaced by Articles 49 TFEU and 56 TFEU respectively.

¹⁷² See, Case C-507/03. *Commission of the European Communities v Ireland*, [2007] ECR I-09777 paragraph 34.

apparently more effective cross-border trade than the other sectors exposed to the fuller public procurement regime. Therefore, in the light of such findings there are no grounds for the Commission to recommend the abolishment of the traditional distinction between category 'A' services and 'B' services.¹⁷³ If anything, such findings point in the direction that a serious re-think on how the EU public procurement regime could be better utilised needs to be taken into consideration. This thesis endeavours to do such.

2.8.4 Impact on Small and Medium Enterprises

Small and medium sized enterprises (hereinafter referred to as SMEs) have been described as the true back-bone of the European economy, being primarily responsible for wealth and economic growth whilst playing a key role in innovation and R&D.¹⁷⁴ They comprise more than 99% of all European businesses, provide two out of three of the private sector jobs and contribute to more than half of the total value added created by business in the EU.¹⁷⁵

Against such a scenario it becomes difficult to comprehend how SMEs remain under-represented in above EU threshold public procurement. A fact long acknowledged by the Commission.¹⁷⁶ It bears noting that one of the projected beneficial effects that the 1992 single market programme was expected to reap was the greater opportunities public procurement contracts were to offer to SMEs.

In a study conducted on behalf of the Commission in 2007¹⁷⁷ it was estimated that in 2005, sixty-four percent of the number of contracts above EU thresholds were awarded to SME's (this corresponds to 42% of the procurement value above EU threshold). This figure does not

¹⁷³ See, COM(2011) 896 final. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20.12.2011, European Commission, Brussels. Pg. 8.

¹⁷⁴ See, DG Enterprise and Industry. *European Small Business Portal - Facts and Figures*, http://ec.europa.eu/small-business/policy-statistics/facts/index_en.htm [30 September 2011].

¹⁷⁵ Ibid.

¹⁷⁶ To this effect see for instance, COM(1989) 400 final. *Public Procurement Regional and Social Aspects (Communication from the Commission)*, 24 July, 1989, European Commission, Brussels. in particular paragraph 41 and Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit D.2 and Directorate-General for the Internal Market and Services, Unit C.3. *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*, European Commission, 2010, European Commission, Brussels., in particular page 25.

¹⁷⁷ See, GHK and Technopolis. *Evaluation of SME Access to Public Procurement Markets in the EU, Final Report*, 2007, European Commission, Brussels.

take into account subcontracts secured by SME's. In addition, major discrepancies across Member States were also found. For example, in Slovenia and Slovakia, SMEs captured 78% and 77% of the public procurement market, whilst France and the UK captured 35% and 31% respectively.

According to a follow up report¹⁷⁸ there was not much change in the share of public contracts awarded to SME's for the period 2005 to 2008. In the period 2006-2008 an estimated 60% of above EU threshold contracts were awarded to SME's. This accounted for 33% of the market share in terms of value.

With a view to facilitate access by SMEs to public procurement contracts the Commission in year 2008 issued a European Code of Best Practice¹⁷⁹ in order to ensure a level playing field for all economic operators. In 2010 the European Parliament called upon the Commission to take stock of the situation and encourage wider dissemination across Member States of the Small Business Act's European Code of Best Practices because SME's were struggling to gain access to public procurement markets.¹⁸⁰

2.8.5 Impact on the International Public Procurement Market

Apparently not only SME's are the only ones facing problems. When it comes to the international scenario EU suppliers in the Utilities public procurement market are facing discriminatory practices that in effect close off their exporting opportunities.¹⁸¹

Most of the EU's major trading partners operate restrictive public procurement practices which discriminate against EU suppliers. The current economic crisis increased the use of such practices.¹⁸²

¹⁷⁸ See, GHK. *Evaluation of SMES' Access To Public Procurement Markets In The EU*, 2010, DG Enterprise and Industry, Brussels.

This study is a follow up to the earlier report published in 2007 cited above.

¹⁷⁹ See, SEC(2008) 2193. *European Code of Best Practices Facilitating Access By SMEs To Public Procurement Contracts*, 25.6.2008, Commission of the European Communities, Brussels.

¹⁸⁰ See, European Parliament - Committee on the Internal Market and Consumer Protection. *New Developments in Public Procurement*, INI/2009/2175, Report Adopted 18 May 2010, 2010, Brussels.

¹⁸¹ See, COM(2009) 592 final. *Report from the Commission concerning negotiations regarding access of Community undertakings to the markets of third countries in fields covered by the Directive 2004/17/EC*, 28.10.2009.

To date, the Agreement on Government Procurement is the only legally binding instrument for opening up multilateral obligations within the World Trade Organisation (WTO). Although the EU is strongly committed to the multilateral trading system and keen on focusing on areas not covered by the multilateral WTO rules including public procurement, the plurilateral WTO Government Procurement Agreement (GPA) remains the main instrument for opening up international procurement markets. This as the Commission points out is mainly due to the highly sensitive political nature of government procurement.¹⁸³ GPA parties are reluctant to further open public procurement to international competition. Thus, for example, the US, Japan and Korea maintain set asides for their national SME's and the Japanese preclude other international economic operators to access their railway procurement market.¹⁸⁴ Meanwhile, as noted by the Commission, when procurement opportunities are not offered in finalised negotiations the other party nevertheless is fully aware that after all EU procurement is not "sheltered with a wall, which would be impossible to penetrate."¹⁸⁵ With a view to address imbalances the Council requested the Commission to *rebalance the Agreement*¹⁸⁶ and hence the revised offer in February 2008 took account for the possibility of other GPA parties to reciprocate the opening of the procurement markets. When reciprocity is not met, then for the EU this notion is interpreted more strictly. Further, in cases where other parties are profiting from the EU's general openness, the EU now appears to be contemplating on imposing carefully targeted restrictions in order to encourage reciprocity.¹⁸⁷

¹⁸² *ibid.* pg. 18

¹⁸³ *ibid.* pg. 4

¹⁸⁴ *ibid.* pg. 10

¹⁸⁵ *ibid.* pg. 19

¹⁸⁶ See, 2780th EXTERNAL RELATIONS Council meeting. *Nr 6039/07*, p.6, 12 February, 2007, Brussels.

¹⁸⁷ According to the Commission this approach is not targeted for poorer developing countries. See, COM(2009)592 final, op.cit. (n. 133) pg. 19. footnote 42.

2.9 Concluding Remarks

If we revert to the history of European economic integration since 1815 one finds that there have been basically two major forces shaping European economic integration – technological innovations and political forces.¹⁸⁸ Technological innovations have made it necessary that structures and systems be adapted in order to be able to catch up with the new demands. Hence, from this line of advance the drive towards economic integration has come by as a seemingly natural process. Thus, as railways for instance became more efficient natural logic forced European countries to give up some of their decision making power so as to enable the railway cut across the whole continent rather than stop at frontiers. The second line of advance which comes from the political plane has been in existence since the Middle Ages where an idealised concept of a European continent with a common Christian cultural heritage was put forth. Whether under the support of the Christian religion or under the plight of common humanity of the Enlightenment, calls for a unified Europe increased in frequency during the late eighteenth and nineteenth centuries. Thus, from the historical dimension the drive towards economic integration was never the main motive but it emerged as a by-product, a gradual and piecemeal process while other interests were being pursued. And yet, European economic integration stood out for its significant development. Today, the European Commission boasts that the EU has traditionally been an open economy and an advocate of free trade.¹⁸⁹

The 1992 single market programme marks a departure from where history has proceeded. This is the era where fervent calls for greater European economic integration became the main focus of Europe's agenda. A total of 282 measures of which public procurement played but a small part sought to abolish the physical, technical and fiscal restraints. The ultimate goal in

¹⁸⁸ See, Milward, A.S. 1981, *The Integration of the European Economy since 1815*, George Allen & Unwi Ltd, London. Most contemporary accounts of European integration begin with the aftermath of the Second World War. However, such accounts need also be considered from a much longer time frame as calls for European integration have been articulated long before the twentieth century, including the call in 1693 by a prominent English Quaker, William Penn, for a European parliament and the end of the state mosaic in Europe. See, Urwin, D. *The Community of Europe: A History of European Integration*, second edition, Longman, in Craig, P. and De Búrca, G. 2011, *EU Law – Text, cases and materials*, Fifth edition, Oxford University Press, Oxford. pg. 4

¹⁸⁹ See, COM(2009) 592 final. *Report from the Commission concerning negotiations regarding access of Community undertakings to the markets of third countries in fields covered by the Directive 2004/17/EC*, 28.10.2009.

this purposeful and forceful drive centred on the achievement of prosperity for the people of Europe.

We now come full circle and revert back to the expected benefits that were to emanate from the opening up of public procurement¹⁹⁰ and put into context the findings of Geroski,¹⁹¹ Head and Mayer¹⁹² where they claimed that market fragmentation was attributed to the diversity in national and regional tastes and that the 1992 Programme would do little to reduce this type of market fragmentation.¹⁹³ We combine their findings with the Wood report¹⁹⁴ wherein deeply ingrained cultural preferences appeared to feature as one of the main trade barriers and bear in mind that we are holding on to an abstract concept.

How can actions at the supranational level be legitimated when we are confronted with abstract concepts? As discussed in the preceding sections the notion of free trade and the theories that emanate from it are based on various assumptions. Moreover, the models on which such theories are based assume that perfect competition prevails.¹⁹⁵ Can there be such a thing as perfect?¹⁹⁶ Abstract concepts cannot provide us with clear, specific and measurable targets. As a consequence as we muddle through abstractness evaluations become too discretionary.¹⁹⁷

All this is especially highly relevant when it comes to institutions that are not directly accountable to their elected representatives. Accountability by results is said to be an

¹⁹⁰ See discussion in Section 2.8 “*The impact of EU Public Procurement legislation vis-à-vis the EU’s Free Trade Agenda*”.

¹⁹¹ See, Geroski, P. 1991, “1992 and European Industrial Structure” in *The Economics of the Single European Act*, Macmillan, London.

¹⁹² See, Head, K. and Mayer, T. 2000, “Non-Europe: The Magnitude and Causes of Market Fragmentation in the EU”, *Review of World Economics*, 136, 2, 284-314.

¹⁹³ See discussion in Section 2.1, “*Introduction*”.

¹⁹⁴ See, Wood, A. *A report to The Chancellor of the Exchequer & Secretary of State for Trade & Industry*, 2004, Office of Government Commerce, U.K. See discussion in Section 2.8.3. “*Impact on Cross-Border Procurement*.”

¹⁹⁵ See, section 2.4 entitled, “*The theory of Comparative Advantage- A General Idea*”.

¹⁹⁶ Discussions in sections 2.6, “*Beyond Economical Theoretical Assumptions*” and 2.7, “*And Further Beyond...*” reveal a market which is far from perfect.

¹⁹⁷ Discussion in section 2.8, “*The impact of EU Public Procurement legislation vis-à-vis EU’s Free Trade Agenda*” reveals this.

important standard of substantive legitimacy, a powerful tool to control the discretion of administrative bodies.¹⁹⁸ Can all this perhaps be deduced to an accountability problem? Others may refer to it as a democratic deficit.¹⁹⁹

The main argument here and which in no way attempts to ease the significance of the issue concerning the accountability problem/democratic deficit is that Europe is utilising public procurement as a tool to directly promote an abstract concept as is the market economy. Muddling through abstractness places us in the midst of a gap. One that reflects what the market economy embraces today from an ideal or wished for level of performance. Far too much attention, energy and resources have been given and continues to be given to the non-tariff issue vis-à-vis the public procurement regime. By adopting such an overriding and unconditional attitude Europe is overlooking alternative opportunities for achieving its desired objectives.

¹⁹⁸ See, Majone, G. 1998, "Europe's 'Democratic Deficit': The Question of Standards", *European Law Journal*, 4, 1, 5-28.

¹⁹⁹ *ibid.*

3.0 Poverty and Justice within context

Chapter Summary

Poverty features as a real problem across Europe. It is a direct insult to the dignity of the human person. Poverty exposes the depth to the gap limiting European integration aims. The concept of poverty raises important political questions because it is fundamentally linked with how society distributes and re-distributes its resources and opportunities and therefore, by and large exposes the inadequacy of our current systems. It is argued that the poverty of choices and opportunities is more relevant for policy makers than the poverty of income. In this respect public procurement, as a vital policy tool which is indissolubly linked to national policies and in particular social policies, can assist towards poverty reduction. It has the potential of fulfilling treaty objectives such as social cohesion, combatting long term unemployment and the achievement of acceptable standards of living. However, in so far as EU public procurement is utilised to promote single market objectives that verge into abstractness and seek to promote the greatest good of the greatest number, at the very conceptual level the respect towards the human dignity is conferred with subordinate status. The analysis reveals how the EU public procurement regime stands the hallowed principles of Europe's social market model on its head as it superimposes upon potential social dynamic welfare effects. Whilst Europe engages in dismantling its non-tariff barriers it concurrently erects social barriers and as a consequence a vacuum that encroaches upon the attainment of Treaty principles and fundamental rights results. Only when an acceptable level of European social justice is achieved through the unconstrained recognition of social rights which essentially incorporates cultural rights can we progress any further. Public procurement as a vital policy tool needs also be viewed from its cultural dimension. The potential for the EU public procurement regime in bridging the gap approximating European integration aims calls for a re-ordering of Europe's economic and social dimensions in line with permissible European moral ideals.

3.1 Introduction

According to the vice president of the European Commission Joaquín Almunia, public services are acknowledged as playing a key role in Europe's model of society and that certain services such as health care, education, social housing, communications, energy and transport cannot be subjected to the whims of market forces alone.¹ The Lisbon Treaty has brought about significant changes that clearly support the provision of public services.² Thus, all this essentially highlights the pivotal role that the State has in its system of *Welfare*. In essence, systems of *Welfare* seek to secure a basic level of equal well-being and a minimum acceptable level of quality of life for all its citizens. For among the various virtues identified with *Welfare*, although not having escaped a fair share of criticism, are that it promotes national efficiency, fosters social cohesion, promotes the potential of individuals and narrows social inequalities.³ This clearly signifies that the merits of *Welfare* feed back into the economy. The economic and social dimensions are “mutually reinforcing” and “offer a vision of Europe's social market economy for the 21st century”.⁴ Towards this end five EU measurable targets for 2020 have been earmarked. One of these targets relates to the promotion of social inclusion, in particular through the reduction of poverty.⁵ It aims at lifting twenty million out of poverty or exclusion by 2020.

Notwithstanding the various ideological debates appertaining to *Welfare* there appears to be serious concern over the ability of governments to adequately fund and provide public

¹ See, Joaquín Almunia. *The role of public services in “Europe 2020”*, 31 May 2010, CEEP Congress, speech 10/276, CEEP Congress.

² With the entry into force of the Lisbon Treaty, The Charter of Fundamental Rights of the European Union has achieved a legally binding status. Various articles contained within the Charter recognise the fundamental nature of public service obligations. According to Article 36 of the Charter, access to Services of General Economic Interest is a fundamental right which is protected by the Union. Further, Article 9 TFEU stipulates that the Union shall “take into account requirements linked tothe guarantee of adequate social protection” and “the fight against social exclusion.....” Article 14 TFEU and Protocol (No. 26) on Services of General Interest envisage a role for competition policy in shaping Services of General Economic Interest. Non economic activities are excluded from the scope of application of the Treaty (Article 2 of Protocol no. 26 refers).

³ See, Heywood, A. 2004, *Political Theory: An Introduction* third edition, Palgrave Macmillan, Houndmills. pg. 315

⁴ See, COM(2010) 2020 final. *Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth*, 3.3.2010, European Commission, Brussels. pg. 10

⁵ The five measurable EU targets for 2020 as proposed by the Commission are for employment, research and innovation, climate change and energy, education and for combating poverty. *ibid*.

services.⁶ But, one has to bear in mind that such concerns need to be balanced out with the fact that all systems of *Welfare* are related to the question of poverty. The concept of poverty raises important political questions because it is fundamentally linked with how society distributes and re-distributes its resources and opportunities and therefore, by and large exposes the inadequacy of our current systems.

This chapter will explore the link between poverty and justice. And in so doing will attempt to understand how the EU public procurement regime shapes into it all. By way of introduction it is hoped that this section has enabled the reader to put into perspective the pivotal role the provision of public services have on a State's system of welfare. Section 3.2, "Poverty across the EU- A snapshot" attempts to provide the reader with an idea of the extent of poverty.

We then narrow our focus by presenting understandings as derived from the academic literature in the field of poverty. Section 3.3 on, "The Nature of Poverty: Definitions Abound" attempts to reveal the difficulties faced by researchers when conceptualising the notion of poverty. Failure in arriving to a universally accepted definition by academia poses difficulties when it comes to measuring the extent of poverty, identification of its causes and the way one best deals with it. For the concept of poverty appears to change over time, within one society and from one society to another. Influential attempts in defining the notion of poverty have been presented by Sen who looks at poverty from the perspective of *capabilities* or more specifically *capabilities to function*. However, Sen found difficulties in identifying a set of *capabilities* and *functionings* that could reflect fundamental values and meanings to life. However, this thesis argues that the grey areas encountered by Sen can very well find further illumination and support if we refer to a theory of natural law. There is no discontinuity between Sen's conception of *capabilities* and *functioning's* and natural law theory. For in effect *capabilities to function* seek to bring about the full realisation of one's humanity wherein the dignity of the human person is accorded full respect. According to natural law theory, the full realisation of one's humanity as a free and equal being forms the basis of the moral good. Natural law theory is the subject matter discussed in section 3.4, "Freedom for Human Flourishing as Conceived through Natural Law Theory". At the heart of natural law theory the respect to human dignity stands as the basic moral premise. The elevated status that

⁶ See, Needham, C. and Murray, A. *The future of Public Services in Europe*, 2005, UNISON and Ver.di, Catalyst and the Centre for European Reform for UNISON and Ver.di.

dignity acquires in natural law theory can also be found in the Charter of Fundamental Rights. The, “Respect for Human Dignity – A Legally Enforceable Fundamental Right” is discussed in section 3.5.

In view of the fact that poverty features as a direct insult to the dignity of the human person it is argued that an understanding of poverty and social justice requires us also to undertake an understanding of the policies that emanate to their response. Such reasoning leads the way to the discussions in the sections that ensue. Thus, the discussion in section 3.6, “On Theories of Social Justice” presents an outline of two influential theories of social justice and their social application namely, Utilitarianism - section 3.6.1, and Egalitarian Liberal Perspectives - section 3.6.2. The ensuing discussion puts into perspective real life applications in an attempt to understand better how Europe translates applicable social justice theories. In this respect section 3.7, “On Europe’s Social Model”, starts off by putting into perspective Europe’s 2020 strategy which essentially refers to a “social market economy”. The discussion in this section attempts to decipher understandings on what is meant by a, “social market economy” by drawing on its intellectual rationale that finds support in Ordoliberalism. “Ordoliberalism” is the subject matter discussed in section 3.7.1.

Fundamental to this thesis’ methodology is the grasping of understandings from as much a broad perspective as is possible. Therefore, keeping in touch with what actually happens on the ground features as one of the important elements throughout this research and which needs to be factored in as we trod along in our journey capturing understandings. For the principles that stand at the very heart of Europe reflect and express themselves in our institutions that are ultimately bounded by the stark realities of society’s concrete experiences. In this respect, section 3.7.2. presents, “The EU’s social dimension and its implementing instruments: an overview”. The manner in which Europe translates its social policies into real life scenarios is the subject matter that is discussed in section 3.7.3, “Social Europe on the move”. This section attempts to portray how the austerity measures adopted by some Member States in response to a background of national debts and global financial and economic crisis comes in stark contrast to governments’ refined oratory and orchestrated rhetoric. Section 3.8 on, “The Quest for Justice in Poverty Reduction: Putting EU Public Procurement into Perspective” reveals how the EU public procurement regime stands the hallowed principles of Europe’s social market model on its head as it superimposes upon potential social dynamic welfare effects. A vacuum that encroaches upon the attainment of Treaty principles and fundamental rights is revealed as the EU public procurement regime

helps dislocate Europe's founding values. Section 3.9 draws "Concluding Remarks". It devotes the discussion by focussing on the notion of culture because European social models are deeply ingrained into European cultures. Culture in effect can be used as a device to set up boundaries when the integrity of the self or of a nation is felt under threat or insecure. Therefore, it is worth highlighting the fact that culture exerts a powerful determining role when it comes to cross-border trade and yet it does not appear to have been factored in the European Community's list of non-tariff barriers.

3.2 Poverty across the EU – A snapshot

Poverty in the EU features as a real problem and its reduction is one of the key targets of the Europe 2020 strategy.⁷ The strategy highlights a social inclusion target that is based on a combination of three indicators of poverty and exclusion wherein indirect and direct measures to poverty and social exclusion are taken into consideration. This set of indicators which have been agreed to in 2009 are said to provide a better picture of the diversity of living conditions in the EU⁸ and includes measuring the *persons at-risk-of poverty*⁹, the *severely materially deprived persons*¹⁰ and *people living in households with very low work intensity*.¹¹ According to the Europe 2020 strategy which replaces the 2000-2010 Lisbon Strategy¹² the aim is to

⁷ See, COM(2010) 2020 final. 3.3.2010, *Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth*, Brussels.

⁸ See, Atkinson, A.B. and Marlier, E. *Income and living conditions in Europe*, Eurostat Statistical Books, 2010, European Commission, Luxembourg.

⁹ Eurostat defines *persons at-risk-of poverty* as, "...those living in a household with an equivalised disposable income below the risk-of-poverty threshold, which is set at 60% of the national median equivalised disposable income (after social transfers). The equivalised income is calculated by dividing the total household income by its size determined after applying the following weights: 1.0 to the first adult, 0.5 to each other household members aged 14 or over and 0.3 to each household member aged less than 14 years old." See, Eurostat newsrelease. 171/2012, *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.

¹⁰ Eurostat defines the *severely materially deprived persons* as having, "...living conditions constrained by a lack of resources and experience at least 4 out of the 9 following deprivation items: cannot afford 1) to pay rent/mortgage or utility bills on time, 2) to keep home adequately warm, 3) to face unexpected expenses, 4) to eat meat, fish or a protein equivalent every second day, 5) a one week holiday away from home, 6) a car, 7) a washing machine, 8) a colour TV, or 9) a telephone (including mobile phone)." See, Eurostat newsrelease. 171/2012, *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.

¹¹ Eurostat defines *people living in households with very low work intensity* as, "those aged 0-59 who live in households where on average the adults (aged 18-59) worked less than 20% of their total work potential during the past year. Students are excluded." See, Eurostat newsrelease. 171/2012, *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.

¹² See, European Parliament. *Lisbon European Council 23 and 24 March 2000, Presidency conclusions*, http://www.europarl.europa.eu/summits/lis1_eno.htm [December, 2010].

lower by 20 million the number of people who are at-risk-of poverty, the severely materially deprived and the number of people with very low work intensity. For the EU 27, in 2011, 24% of the population compared with 23.4% in 2010 and 23.5% in 2008, were at risk of poverty or social exclusion.¹³ This corresponds to circa 120 million persons. Worth noting that the total number of people at-risk-of poverty or social exclusion is lower than the sum of the number of people falling under each of the three categories of poverty or social exclusion in view that some persons experience simultaneously more than one of the three indicated situations.¹⁴ In 2011, Bulgaria (49%), Romania and Latvia (40%), Lithuania (33%), Greece and Hungary (both 31%) had the highest share of persons at risk-of-poverty or social exclusion.¹⁵ The lowest share being recorded in Czech Republic (15%), the Netherlands and Sweden (16%) Luxembourg and Austria (both 17%).

The at-risk-of poverty, a measure well established in the EU since 2001, is considered as an indirect approach to measuring poverty and social exclusion as its focus is on the lack of financial resources for meeting minimum living standards relevant to the society where they live. Nearly 1 in 7 people in the EU are at-risk-of poverty. In year 2011 seventeen per cent of the population across the EU were identified as being at risk of poverty.¹⁶ This figure is not so different for the past decade and over, (17% - 1995; 16%-1997; 15%- 2001; 17% - 2008) or for the EU as a whole (15% -2002).¹⁷ The at-risk-of-poverty rates vary across the EU ranging from 22% in Bulgaria, Romania and Spain, and 21 % in Greece to 10% in the Czech Republic, 11% in the Netherlands, and 13% in Austria, Denmark and Slovakia for year 2011.¹⁸

Nine percent of Europeans (EU 27) experienced severe material deprivation in year 2011¹⁹ compared to 8% in year 2010.²⁰ This indicator, recognised as a direct approach for measuring

¹³ See, Eurostat newsrelease. 171/2012, *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ See, Eurostat newsrelease, 1. *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.

¹⁷ See, European Anti Poverty Network. *Poverty and Inequality in the EU 2009*, EAPN Social Inclusion Working Group, Brussels.

¹⁸ See, Eurostat newsrelease. 171/2012, *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.

¹⁹ Ibid.

poverty and social exclusion is based on non-monetary indicators of material deprivation and is said to improve further the picture that captures the multidimensional nature of poverty and social exclusion.²¹ Unlike the at-risk-of poverty indicator, this measure is not a relative one as the set of items²² identified are assigned equal weights and therefore a common standard is applied across Member States. The share of severely materially deprived persons across the EU varies significantly. In year 2011 this indicator ranged from 1% in Luxembourg and Sweden to 44% in Bulgaria and 31% in Latvia.

In year 2011 as in year 2010, 10% of the population in the EU27 were identified as living in households with very low work intensity.²³ That is, 10 % of the population aged 0-59 lived in households where the adults worked less than 20% of their total work potential for the past year.²⁴ Belgium (14%) was identified as having the largest proportion of those living in very low work intensity households whilst Cyprus (5%) the lowest.²⁵

²⁰ See, Eurostat newsrelease. 21/2012, *At risk of poverty or social exclusion in the EU27*, 8 February 2012, Brussels.

²¹ See, Atkinson, A.B. and Marlier, E. *Income and living conditions in Europe*, Eurostat Statistical Books, 2010, European Commission, Luxembourg.

²² The nine items as endorsed by the EU that attempt to reflect upon severe material deprivation seek to capture the actual experiences that individuals manage to achieve and are therefore considered as a direct measure. For a list of the nine indicators refer to the definition provided by Eurostat on *severe materially deprived persons*. (op.cit. n. 18).

²³ See, Eurostat newsrelease. 171/2012, *At risk of poverty or social exclusion in the EU 27*, 3 December 2012, Brussels.; Eurostat newsrelease. 21/2012, *At risk of poverty or social exclusion in the EU27*, 8 February 2012, Brussels.

²⁴ Ibid.

²⁵ Ibid.

3.3 The Nature of Poverty: Definitions Abound

Poverty is a multi-dimensional concept and therefore the challenge posed is multi-dimensional. At the heart of the poverty debate lies the difficulty of arriving to a universally accepted definition of poverty. In essence, all this ties up with issues of measurement, causes and solutions which in effect are all highly interrelated. As it turns out, the concept of poverty appears to change over time and can vary within one society and from one society to another.

One concept referred to as *Absolute* or *Extreme* poverty relates this phenomenon with the economic side of poverty and is based on the notion of subsistence, that is, the minimum needed to sustain life. *Absolute* (or *Extreme*) poverty is very often contrasted with *Relative* poverty.

.....an absolute poverty line is one which is constructed as an estimate of families' minimum consumption needs; this is done without reference to the income or consumption levels of the general population. In the same context, a relative poverty line is one which is set as a fraction of the median or mean income or consumption of the population as a whole (generally with appropriate adjustments for family size)²⁶

In other words, absolute poverty perceives poverty when people lack the basic necessities to survive. During the World Summit for Social Development held in March, 1995 in Copenhagen, absolute or extreme poverty was defined as,

.....a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services.²⁷

The 1995 UN Summit²⁸ left it to governments to define poverty and its reduction according to national standards. The UN General Assembly's Millennium Declaration of September 2000 set the target of halving by 2015 the proportion of people world-wide whose income is less than one dollar a day (in purchasing power parity dollars and not nominal exchange rate dollar).²⁹

²⁶ See, Fisher, G.M. 1995, *Is There Such a Thing as an Absolute Poverty Line Over Time? Evidence from the United States, Britain, Canada, and Australia on the Income Elasticity of the Poverty Line*, Poverty Measurement Working Papers, US Census Bureau.

²⁷ See, United Nations. *World Summit for Social Development, Copenhagen, Denmark, 6-12 March 1995*, A/CONF.166/9 19 April 1995, <http://www.un.org/esa/socdev/wssd/index.html> [29 October 2010]. pg. 41

²⁸ *ibid.*

²⁹ See, Kofi, A.A. *We the Peoples-The Role of the United Nations in the 21st Century*, <http://www.un.org/millennium/sg/report/full.htm> [29 October, 2010].

Absolute definitions based on the notion of subsistence and the minimum need to sustain life, begs the question of what in effect constitutes life?³⁰ Ways of life differ depending upon place and time. It therefore follows that simultaneously also necessities differ. For a donkey may constitute a necessity for a family living in a remote village in Africa but not for someone living in the city hub. In other studies it has been noted that with absolute definitions of poverty there is a tendency to raise minimum levels as general living standards tend to improve with the passage of time.³¹ Others³² noted that when it came to identify needs, such needs were found to reflect cultural norms and consequently incorporated relative judgments (that is, relative to the society in which poverty was being measured). It therefore transpired that absolute definitions of poverty were not solely based on objective logic as was sometimes claimed.

Relative poverty involves determining a poverty level and comparing it across members of society. This measure is linked to income distribution and takes account of market income and social transfers. Relative poverty includes an element of subjectivity because the determination of the poverty level³³ necessitates that value judgements be taken. Poverty levels commonly range between 40-70% of household income. The question as to whose judgement this should be appears to be a controversial one.³⁴

The relative definition of poverty was developed by Townsend in his important work on poverty in the U.K.

Individuals, families and groups in the population can be said to be in poverty when they lack the resources to obtain the types of diet, participate in the activities and have the living conditions and amenities which are customary.....in the societies to which they belong. Their

³⁰ See, Alcock, P. 2006, *Understanding Poverty* Third edition, Palgrave Macmillan, Houndmills. pgs.63-80

³¹ See, Fiegehen, G.C., Lansley, P.S. and Smith, A.D. 1977, *Poverty and Progress in Britain 1953-73* Cambridge University Press, UK.

³² See, Stitt, S. and Grant, D. 1993, *Poverty*, Rowntree Revisted, Avebury.

³³ This involves working out the average or median equivalised household incomes, defined as the household's total disposable income divided by its "equivalent size", in a country. Comparing relative poverty levels between different countries does not sufficiently take into account the differences in standards of living and thus it is argued, in effect it becomes more a question of measuring and comparing inequality levels rather than poverty levels.

See, European Anti Poverty Network. 2009, *Poverty and Inequality in the EU* Brussels.

³⁴ See, Alcock, P. 2006, *Understanding Poverty* Third edition, Palgrave Macmillan, Houndmills.

resources are so seriously below those commanded by the average individual or family that they are, in effect, excluded from ordinary living patterns and activities.³⁵

Townsend therefore in his definition broadened the concept of poverty and took into account the fact that human beings are not only physical but also social beings. Relative poverty prevents people from participating in activities that are customary in the society in which they live. However, the relative definitions on poverty as with the absolute ones are not without their problems. For it is argued, when poverty levels change as may occur during a period of recession, the actual change in poverty levels need not necessarily be reflected when a relative picture of poverty is being captured.³⁶

In essence, according to the debate, absolute definitions of poverty incorporate relative judgments whilst relative definitions of poverty need to incorporate some absolute core in order to distinguish them from the broader forms of inequalities.³⁷ Poverty cannot be depicted through the light of inequalities as seems to be the case when viewed through relative terms. Relatively lower standards of living confirm inequalities but not necessarily poverty. Nevertheless, whilst the absolutist approach cannot simply be dismissed as wrong a workable definition of poverty needs to combine both absolutist and relative elements.³⁸

Amartya Sen³⁹ contends that the “relative” view appears to be the generally accepted measure for poverty in advanced countries. This he considers as positive when compared to the simplistic absolute definitions. Nonetheless, Sen argues that poverty contains an, “.....irreducible absolutist core...”⁴⁰ because when there is poverty there is no denying it, irrespective of the relative situation. However, Sen moves the definition of poverty by incorporating a different specification. He draws on the explanation put forth by Adam Smith when discussing the concept of *necessaries* to explain this.

By necessaries I understand not only the commodities which are indispensably necessary for the support of life, but whatever the custom of the country renders it indecent for creditable

³⁵ See, Townsend, P. 1979, *Poverty in the United Kingdom: a Survey of Household Resources and Standards of Living* Penguin, Harmondsworth. pg 31

³⁶ See, Sen, A. 1983, "Poor, Relatively Speaking", *Oxford Economic Papers*, 35, 153-169.

³⁷ *ibid.*

³⁸ See, Alcock, P. 2006, *Understanding Poverty* Third edition, Palgrave Macmillan, Houndmills.

³⁹ See, Sen, A. 1983, "Poor, Relatively Speaking", *Oxford Economic Papers*, 35, 153-169.

⁴⁰ *ibid.* pg. 159

people, even the lowest order, to be without. . . . Custom. . . has rendered leather shoes a necessary of life in England. The poorest creditable person of either sex would be ashamed to appear in public without them.⁴¹

Thus, for the typical English citizen of the eighteenth century being in possession of leather shoes was not simply a question of being *less ashamed* (that is relatively speaking) but was perceived as a basic necessity. This according to Sen clearly captured the notion of poverty in absolute terms rather than in relative terms. Not being in possession of leather shoes is a shameful affair and bears a direct effect on one's dignity. Hence, it is this very basic requirement, that is, the *capability* of avoiding shame that Sen conceives as constituting the absolute notion to poverty. It is within the space of *capabilities* (*capability to function*) that one can derive with an *irreducible absolutist core* when it comes to conceptualising poverty. On the other hand, the *commodity* needed to put into effect the *capability* for avoiding shame, in the case as exemplified by Adam Smith, were the possession of a pair of leather shoes. Indeed, as Sen contends the *commodity* requirement for avoiding shame would be a different *commodity* altogether in richer communities. It is within the *commodity* space that the notion of relative poverty comes to play a part when conceptualising poverty.

As noted by Sen himself John Rawls⁴² analysis of social justice greatly influenced the philosophical underpinnings that helped him conceptualise poverty.⁴³ According to Sen, one needs to take account of the *capability to function* when assessing whether or not state support should be offered rather than going about measuring resources or levels of welfare.⁴⁴ A functioning is what a person can do or be and freedom provides the capability to achieve this functioning. Thus, a *capability set* comprises the alternative sets of functionings made possible through the available resources and opportunities. The functionings that feature within the *capability* space as referred to by Sen differ both from utilitarian or Rawlsian concerns.⁴⁵ However, Sen refrained from presenting a definitive list of capabilities and functionings and as such this has been a cause for criticism. It was claimed that this rendered

⁴¹ See, Smith, A. 1776, *An Inquiry into the Nature and Causes of the Wealth of Nations* Everyman Edition, Home University Library, London. pg. 351-352 in Sen, A. 1983, "Poor, Relatively Speaking", *Oxford Economic Papers*, 35, 153-169.

⁴² See, Rawls, J. 1971, *A theory of Justice*, Oxford University Press, Oxford.

⁴³ See, Sen, A. 1983, "Poor, Relatively Speaking", *Oxford Economic Papers*, 35, 153-169.

⁴⁴ See, Sen, A. 1992, *Inequality re-examined*, Clarendon Press, Oxford.

⁴⁵ According to Sen, Rawls' analysis of social justice differs greatly from utility based theories because his focus is on primary goods which are resource based.

his theory unworkable in practice except in a rudimentary form. For which set of capabilities and functionings could reflect fundamental values and meanings to life unless they are conceived as either, too abstract and therefore impractical to be put to any use or insufficiently neutral. Such were the challenges that arose that it left wide open the question as to how government and civil society can implement the capabilities approach.⁴⁶ Despite such criticisms Sen's contribution has been often regarded as more realistic.⁴⁷ It has greatly influenced policy within the United Nations Development Programme⁴⁸ promoting a focus on *lack of basic functioning* whilst moving away from income based measures.⁴⁹ Indeed, the richness of the concept cannot be captured through a single measure. It calls for more methodological development, an affair that cannot be classified as mission impossible.⁵⁰ In its Human Development Report 1997⁵¹ the United Nations Development Program introduced a Human Poverty Index (HPI) which recognises that poverty goes beyond material well-being. The claim is that, the poverty of choices and opportunities is more relevant for policy makers than the poverty of income. The HPI uses the following indicators to signify the most

⁴⁶ Martha Nussbaum has proposed a list of 10 capabilities and functionings. These include, the capability for physical survival; the capability for bodily health; the capability for bodily integrity; the capability for the exercise of imagination; the capability for emotional response and exploration; the capability for practical reason; the capability for love and friendship; the capability for connection with nature and other species; the capability for play; the capability for the exercise of control over environment, including political control.

See, Nussbaum, M.C. 1999, *Sex and social justice*, Oxford University Press, Oxford, pp 40-41; Nussbaum, M.C. 2000, *Women and human development: The Capabilities approach* Cambridge University Press, Cambridge.; Nussbaum, M.C. 2003, "Capabilities as fundamental entitlements: Sen and social justice", *Feminist Economics*, 9, 2-3, 33-59.

Whilst Nussbaum emphasises universality of the capabilities and functionings, Sen by contrast emphasises the importance of adopting a participatory approach that is open to democratic scrutiny and amendment in order to ensure that capabilities and functionings are put into the right context.

See, Sen, A. 1996, "Freedom, capabilities and public action: a response ", *Politeia*, 12, 43/44, 107-125.

⁴⁷ See, Wolff, J. 2008, "Social Justice and public policy: a view from political philosophy" in *Social Justice and Public Policy*, The Policy Press, Bristol.

⁴⁸ See, United Nations Development Programme. *Human development report 2010, The real wealth of Nations: Pathways to Human Development*, http://hdr.undp.org/en/media/HDR_2010_EN_Complete.pdf [12 November 2010].

⁴⁹ Worth noting that Sen's work in this respect has been among the contributions that won him the Nobel Prize in Economics in 1998.

⁵⁰ Following the recommendations of the U.K.'s Equality Review, 2007 for a measurement framework based on the capability approach, Tania Burchardt, member of the steering committee presented an analysis of the work in this respect.

See, Burchardt, T. 2008, "Monitoring inequality: putting the capability approach to work in " in *Social Justice and Public Policy*, The Polity Press, Bristol.

⁵¹ See, United Nations Development Programme. *Human development report 1997 - Human Development to eradicate poverty* <http://hdr.undp.org/en/reports/global/hdr1997/> [12 November 2010].

basic dimensions of deprivation: a short life, lack of basic education and lack of access to public and private resources.

3.4 Freedom for Human Flourishing as Conceived through Natural Law Theory

So it seems that the grey areas encountered by Sen when conceptualising poverty can very well find further illumination and support if we refer to a theory of natural law. There does not appear to be any discontinuity between Sen's conception of *capabilities* and natural law theory. For in effect *capabilities to function* seek to bring about the full realisation of one's humanity wherein the dignity of the human person is accorded full respect. The flourishing of the human being turns out to be the common denominator in both Sen's work and natural law theory. But Sen apparently found difficulties in identifying a set of capabilities and functionings that could reflect fundamental values and meanings to life. Natural law theory presents the logic encompassing the principles that elucidate upon the fundamental premise for the human flourishing. More specifically the principles of natural law include:

- a) A set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realised.
- b) A set of basic methodological requirements of practical reasonableness (one of the goods), distinguishing sound from unsound practical thinking, i.e. between acts that are reasonable-all-things-considered or acts that are unreasonable-all-things-considered. Therefore distinguishing ways that are morally right or morally wrong.
- c) A set of general moral standards.⁵²

All is in synch with Sen's *capability set*. There is therefore much significance and potential when a deep-seated commitment underlying any public policy is guided by a vision of the human flourishing.

⁵² See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford. Pg 23.

3.4.1 Morality in Natural Law Theory

The notion of morality appears to conjure various meanings. The term morality is derived from the Latin *mos/moris* which for the Romans refers to *customs*. However, this term appears to have acquired various conceptual meanings. For instance, every religion is based on certain moral beliefs. In the Hindu morality, *Dharma* and *Karma* are the underlying principles of nearly all conceptions of morality and ethics in Hinduism.⁵³ If we take into consideration the ‘morality’ of marriage – according to Roman Catholic morality strict monogamy refers where marriage is deemed to be a lifelong union ‘until death do us part’. On the other hand, according to generic Christian morality, marriage of one man and one woman is soluble at any time through divorce (loose monogamy). Such morality is now also extending marriage to include unions of the same sex. According to Islamic morality, it is morally correct for a man to marry and have simultaneously more than one wife (polygamy). Thus, Morality when conceived through the paradigm of a particular religious belief provides a clear and comprehensive body of rules. However, the very existence of such diverse views leaves unsolved the pertinent question as to which moral principles are valid.

In view of such conflicting views, when it comes to Natural law Theory, instead of the term *Morality* Finnis advocates we employ the term, ‘*Practical Reasonableness*’ and that this be used as the standard of reference by any theorist when describing features of legal order.⁵⁴ Hence, the meaning of morality in Natural law theory does not derive its force from any particular religious belief/s but attempts to present a universal conceptual meaning. By ‘*Practical Reasonableness*’ it is meant that assessments of what are considered as important or significant in similarities and differences for those concerned be put into perspective when selecting and formulating concepts. Max Weber also acknowledged the importance of *practical reasonableness*. The Weberian concept of *ideal type* recognises recurring social actions. They exemplify mental constructs that direct individual knowledge through an abstract process. Thus, according to Weber such actions need to be recognised by the researcher as standing at the core of every social phenomenon in order to be able to derive to

⁵³ Dharma is said to be one of the most complex and all-encompassing concepts in Hinduism: it can mean religion, law, duty, order, proper conduct, morality, righteousness, justice, and norm. Karma is intimately linked to dharma and understood as a universal law of cause and effect.

See, Kinnard, J.N. *Hinduism, Principles of Moral Thought and Action*
<http://www.patheos.com/Library/Hinduism/Ethics-Morality-Community/Principles-of-Moral-Thought-and-Action.html>

⁵⁴ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford. pg.15

an understanding.⁵⁵ According to Personal Construct Theory, Kelly,⁵⁶ an American psychologist, proposed that individuals behave like scientists, striving to make sense out of their own universe, of themselves and of particular situations. As experience is gained people learn to codify their observations (of events, people and things) into a framework of personal constructs by which they learn to anticipate future events. According to the theory, a person continues to employ constructs within a context to which the user finds their application useful.

3.4.2 Practical Reasonableness: distinguishing sound from unsound practical thinking

How, it is argued can one come up with universal conceptual meanings given the heterogeneity by which mental constructs are derived to? Indeed, they differ from person to person from one society to another, across place and time. Finnis explains how Aristotle regularly employed “the philosophical device” and referred to it as the “identification of focal meaning”.⁵⁷ The explanation given is illustrated by an example - that of *friendship*. So standing at the core is the concept of *friendship*. Emanating from this core are, “watered down versions of the central cases...”⁵⁸ as in the case of business friendship, friendship of convenience, etc. However, there appears to be some difficulty when it comes to getting to the core of concepts. How can one distinguish what constitutes centrality for instance in the case when deciding what is to count as law? According to Finnis the moral obligation constitutes the central case. However, he maintains that usage of the term *practical reasonableness* is preferable. Therefore, in the case of law what is relevant for the theorist is the practical viewpoint.

But what is practical? What is reasonable? These are the questions that appear to have pervaded over two millennia since Plato and Aristotle. On the basis of what has been learnt through the passage of time a number of methodological requirements based on philosophical reflection have been presented by Finnis and which therefore set out the basic requirements

⁵⁵ See, Corbetta, P. 2003, *Social Research Theory, Methods and Techniques*, Sage Publications, London. pgs. 9-29

⁵⁶ See, Kelly, G.A. 1955, *The Psychology of Personal Constructs* Norton, New York.

⁵⁷ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford. pg. 9

⁵⁸ See, *ibid.* pg. 11.

for practical reasonableness. These requirements, nine in all, “express the ‘natural law method’ of working out the (moral) ‘natural law’.”⁵⁹ Table 1 attempts to capture in a summary format the gist of what has been postulated by Finnis.⁶⁰

Table 1: Summary description of the basic requirements of practical reasonableness as postulated by Finnis

Number	Basic requirements of practical reasonableness	Summary description
First	A coherent plan of life	A deep and harmonious commitment to one’s rational plan of life realisable through intelligent actions, opportunities and a high internal locus of control.
Second	No arbitrary preference amongst values	A fundamental impartiality of recognition of each of the basic forms of good. ⁶¹ Notwithstanding this, a rational commitment to one’s plan of life may entail preference to certain values on the basis of one’s rational assessment of capacities, circumstances and tastes.
Third	No arbitrary preference amongst persons	A fundamental impartiality of recognition among the human subjects. Everyone is entitled to get for themselves what you are trying to get for yourself.
Fourth and Fifth	Detachment and Commitment	Meaningful commitments to projects during one’s life time should not entail an overriding and unconditional attitude so as to feel drained of meaning when projects fail. On the other hand, commitments are not to be abandoned lightly. Creative, new and better ways need to be constantly sought.
Sixth	The (limited) relevance of consequences: Efficiency, within reason	Conduct through practical reasonableness must seek to bring about the good in one’s own life and the life of others and judgement made in accordance to their effectiveness. One must not waste one’s opportunities by using inefficient methods.
Seventh	Respect for every basic value in every act	Do not choose directly against a basic value. One should not choose to do any act which of itself does nothing but damage or impede a realisation or participation of any one or more of the basic forms of human good. Reason requires that every basic value be at least respected in each and every action.
Eight	The requirement of the common good	Favour and foster the common good in one’s community.
Ninth	Following one’s conscience	One must act in accordance to one’s conscience.

⁵⁹ See, *ibid.* pg. 103.

⁶⁰ This summary table is based on Finnis, see Part II, section V, pgs. 100-133, *ibid.*

⁶¹ An explanation of the *basic forms of good* is provided in table 2, section 3.4.3.

The nine basic requirements of practical reasonableness are all interrelated and equally basic. They necessitate that they all be taken into consideration when endeavouring in rational thinking. They express the language of morality and are thus not to be considered only as simply a mechanism for reaching correct judgments but also as a mechanism for expressing the human flourishing in which flows the human dignity.

3.4.3 Dignity as the basic moral premise

Despite differing views that emanate from the relationship between morality and law, moral principles are generally assumed as principles of justice and which in effect underlie the law.⁶² The concept of *Justice* covers both *Formal Equality* (treating like cases alike) and *Substantive Equality* (giving each person his or her due as a matter of right). The latter, appears largely incompatible with utilitarian thought. From the times that date back to Aristotle, the issue concerning substantive equality has been the subject of profound thought and its implications for morality, justice and law form the core of natural law theory. Finnis provides a sophisticated elaboration and reformulation of Thomas Aquinas's account of natural law theory.

Natural law theory calls for the rational reflection on human beings in their interaction with other human beings.⁶³ Each and every person as a rational human being has a *Dignity*.

Man regarded as a person [rather than a mere animal], that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for

⁶² See, Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75, 1859-1893.

That law and morality are separable is a claim commonly attributed to legal positivists including John Austin, Jeremy Bentham, Hans Kelsen, and H.L.A. Hart. However, Joseph Raz (an esteemed legal positivist) argues that such claims should not come as the distinguishing factor that marks the division in legal philosophy. For Raz the necessary connections between law and morality are obvious.

See, Raz, J. 2003, "About Morality and the Nature of Law", *American Journal of Jurisprudence*, 48, 1-17.

Despite such prevailing scepticism among legal positivists there are others that maintain the view and argue for the separability of law and morality. For arguments in this respect see, Kramer, M.H. 2004, "On the Separability of Law and Morality", *Canadian Journal of Law and Jurisprudence*, 17, 2, 315-335.

⁶³ See, George, R.P. 2008, "Natural Law", *Harvard Journal of Law & Public Policy*, 31, 1, 171-196.

George, R.P. (2008) notes how the notion of rationality is disputed by some, notably, David Hume, where for him reason is, "*the slave of the passions*" (see, Hume, D. 1888, *A treatise of human nature*, bk. ii, pt. iii, § iii, at 415 (1739), Clarendon press, and Thomas Hobbes (see, Curley, E. 1994, *Hobbes, T., Leviathan*, pt. 1, ch. viii, at 41 (1651), Hackett Publishing Co., It is argued that the ends people pursue are driven by non-rational motivating factors such as feelings, emotion and desire.

himself with every other being of this kind and value himself on a footing of equality with them.⁶⁴

This *Dignity* flows from the very fact that as rational human beings we have the freedom to make choices and make conscious decisions which in turn construe one's self and identity. Immanuel Kant, one of the great philosophers of the Enlightenment has also emphasised this fundamental point, that as Free and Equal individuals one's humanity is subjected to the universal law of morality in order to distinguish and hence free ourselves from animal inclinations.⁶⁵

Morality therefore employs judgement. According to Aquinas, when a person reaches a reasoned conclusion about his/her own duty, then the conclusion reached is a practical judgement. This judgement according to Aristotle is referred to as 'Psyche' whilst Aquinas refers to it as 'Soul'.⁶⁶ From its very existence each and every individual is armed with this 'Soul' even though it is at first somewhat undeveloped. It is this freedom as rational beings that bestow an absolute moral worth, a dignity that is equal amongst all rational beings. Even in cases where for various reasons the mental capacity to reach reasoned conclusions and employ reasoned judgements remains temporarily or permanently undeveloped, by virtue of its human nature, it nevertheless remains in possession of a profound and inherent dignity.⁶⁷ It therefore follows that simply by virtue of our humanity it is morally right that this dignity be protected by law. It becomes a human right.

As rational beings empowered with freedom we are capable through the good of practical reasonableness of making choices in the pursuit of the '*Basic Goods*'. Finnis lists seven *basic goods* which include: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion.⁶⁸ Table 2 attempts to capture the gist of each of these basic goods as postulated by Finnis.

⁶⁴ See, Kant, I. 1991, *The Metaphysics of Morals*, 1797, Cambridge University Press, Cambridge in Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75 pg. 1862.

⁶⁵ See, Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75, 1859-1893.

⁶⁶ Ibid.

⁶⁷ See, George, R.P. 2008, "Natural Law", *Harvard Journal of Law & Public Policy*, 31, 1, 171-196.

⁶⁸ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford, part two, section IV, pgs. 81-97.

Table 2: Summary description of the basic goods as postulated by Finnis

Basic Good	Summary Description
Life	Refers to the value of life including all aspects of its vitality such as health.
Knowledge	An intrinsic good, desirable for its own sake not merely instrumental. May also be described as speculative as it is concerned with the uncovering of truths. Knowledge is to be pursued whilst ignorance avoided.
Play	Play can enter any human activity but can always be distinguished from its 'serious' context. Some activities, enterprises and institutions are entirely or primarily pure play.
Aesthetic Experience	The valued experience that is found in the creation and/or active appreciation of some work of significant and satisfying form.
Sociability (Friendship)	In its weakest form this basic good is manifested by the maintenance of peace and harmony through the forms of human community. In its strongest form it is manifested through the flowering of full friendship. It involves acting for the sake of one's friends well being.
Practical Reasonableness	The capability to bring one's own intelligence to bear effectively. It requires that one has a measure of effective freedom so as to be able to bring an intelligent and reasonable order in one's own actions, habits and practical attitudes. An order that is characterised through an inner integrity and outer authenticity (i.e. genuine realisations).
Religion	A concern for a good that consists of an irreducible distinct form of order. An order that goes beyond humanity. A concern which at any rate has been reasonably thought of as important irrespective of the answer, even if sceptic or pessimistic.

According to Finnis, the *basic goods* are all equally fundamental. Each and every *basic good* is to be given its due merit as they all bear a particular mark. All are interrelated and can be regarded as aspects of one another. As such, an objective priority of value amongst the *basic goods* cannot be assigned - there is no hierarchy of importance amongst the *basic goods*. However, on the other hand, Finnis acknowledges that the order cannot be described as fixed, but partly stable and partly shifting when the *basic goods* are being participated upon. That is, at the individual level, one subjectively assigns an order that is in tune with one's own personal characteristics and opportunities.

The ultimate goal in the pursuit of such *basic goods* is the flourishing of the self, a self-fulfilment, a '*beatitudo*', '*felicitas*'. Therefore, the flourishing of the self is something that goes much more beyond the achievement of mere pleasure. It is about the capacity of human beings to live in harmony with rational principles in pursuit of a complete, self fulfilling life,

indeed a human flourishing. As such, these *basic goods* lay the foundations for moral judgments, including judgements pertaining to justice and human rights.⁶⁹ Thus, according to natural law, rational human behaviour needs also recognise its obligations towards others whilst the flourishing of the self is being pursued.

According to the principles of natural law, the sole purpose of the state and thus of politics and law is the attainment of the common good via the human flourishing or fulfilment of each person in the community.⁷⁰ Aristotle views the state as a diverse plurality where citizens are free and equal.⁷¹ The diverse plurality is essential for the complete flourishing of its citizens. The full realisation of one's humanity as a free and equal being forms the basis of the moral good as conceived in natural law theory. It calls upon humanity a right which others are bound to respect and to protect to the extent possible.⁷² However, this conception is found to be in conflict with Utilitarian Theories and its modern variant, Economic Efficiency Theory which are more concerned with the maximum distribution of wealth rather than how such distribution is affecting the individual.

3.5 Respect for Human Dignity – A Legally Enforceable Fundamental Right

The Treaty of Lisbon⁷³ signed on 13 December 2007 in Lisbon and which entered into force on 1 December 2009 recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights.⁷⁴ More specifically, Article 6(1) of the Treaty confers on the Charter the same legal value as the Treaties.

⁶⁹ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford.

⁷⁰ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford.

⁷¹ See, Aristotle. 1984, "Politics bk.3, ch.9" in *The Complete Works of Aristotle 1986*, in Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75, 1859-1893.

⁷² See, George, R.P. 2008, "Natural Law", *Harvard Journal of Law & Public Policy*, 31, 1, 171-196.

⁷³ The Treaty of Lisbon amends the Treaty on European Union (TEU; also known as the Treaty of Maastricht) and the Treaty establishing the European Community (TEC; also known as the Treaty of Rome) now renamed to the Treaty on the Functioning of the European Union.

⁷⁴ See, Official Journal of the European Union. *Notices from European Union Institutions and Bodies, European Parliament, Council, Commission, Charter of Fundamental Rights of the European Union*, 2007/C 303/01.

The very first article in the Charter of Fundamental Rights refers to Human Dignity and reads as follows, “Human dignity is inviolable. It must be respected and protected.” The courts of the Union and the Member States are to interpret the Charter and give due regard to the explanations put forth by the Praesidium.⁷⁵ In its explanation on Human Dignity, the Praesidium elucidates that,

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights..... It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.⁷⁶

Human Dignity in the Charter of Fundamental Rights builds upon the 1948 Universal Declaration of Human Rights.⁷⁷ The notion of dignity is recognised as inherent in human nature ascribing an equal and inalienable right amongst “all members of the human family.” It asserts that respect for human dignity provides the “.....foundation of freedom, justice and peace in the world.”

What natural law holds on human dignity⁷⁸ is reflected in the Charter of Fundamental Rights. Respect for human dignity has now become a legally enforceable fundamental right in the European Union. Within the Lisbon Treaty’s hierarchy of rights, human dignity acquires an elevated status that is “superior to human rights and fundamental freedoms who owe their origin and existence to the dignity of the human person.”⁷⁹

⁷⁵ See, *ibid.* Preamble to the Charter of Fundamental Rights of the European Union.

⁷⁶ See, Official Journal of the European Union. 14 December 2007, *Explanations (*) Relating to the Charter of Fundamental Rights*, 207/C 303/2. Title I – Dignity Explanation on Article 1 — Human dignity.

⁷⁷ *ibid.*

⁷⁸ Discussion in section 3.4.3 entitled, ‘Dignity as the basic moral premise’ refers.

⁷⁹ See, Aquilina, K. *Respect for Human Dignity and the Law*
<http://www.statecareandmore.eu/index.php/blogs/respect-for-human-dignity-and-the-law-by-prof-kevin-aquilina-.html> [23 November 2010].

3.6 On Theories of Social Justice

Our concern here is with Justice and its social application. It is not concerned with the action of individuals, but “.....as a predicate of societies – particularly of such societies called nations – and of their acts and institutions.”⁸⁰ Social justice has come to stand out as a distinctive concept in the early nineteenth century. Being more concerned with ‘who should get what’ in terms of the moral distribution of societal benefits or rewards it represents a shift from the more classical ideal of justice where the main concern is with legal penalties and punishments.⁸¹ Social justice is thus more concerned with the social well-being.

Justice is said to constitute one of the four “cardinal virtues” of classical moral philosophy together with courage, temperance (self-control) and prudence (efficiency). All these virtues are concerned with elevating the dignity and sovereignty of the human person.⁸² It has been argued that in order for a society to be fully just, social justice needs to be considered both from its formal aspect, that is the legal aspect and its informal aspect including cultural institutions, conventions, moral rules and moral sanctions.⁸³

A review of the theories on social justice reveals that there are a range of disagreements within political philosophy. There are various competing conceptions of what constitutes Justice such as libertarian, utilitarian, egalitarian, contractarian and various others. This is definitely a stumbling block in particular when it comes to examine and generate public policy. The following discussion will provide an outline of two influential theories on social justice focusing on principles of distributive justice that entail the distribution of benefits and burdens of economic activity across society. An attempt to understand how these theories translate into real life policy issues will also be made.

⁸⁰ See, Frankena, W.K. 2003, "The Concept of Social Justice" in *Equality and Justice: Justice in General*, Routledge, London. pg. 63.

⁸¹ See, Heywood, A. 2004, *Political Theory: An Introduction* third edition, Palgrave Macmillan, Houndmills. chapter 10.

⁸² See, Centre for Economic and Social Justice. *Defining Economic Justice and Social Justice*, <http://www.cesj.org/thirdway/economicjustice-defined.htm> [18 November 2010].

⁸³ See, Frankena, W.K. 2003, "The Concept of Social Justice" in *Equality and Justice: Justice in General*, Routledge, London. pg. 63.

It appears that there never has been and never will be a society whose distribution could be said to be in conformity with one of the proposed theories.⁸⁴ Indeed, we lack a single determinate concept of justice and instead are confronted with fundamentally different concepts. The theories vary in various dimensions and attempt to provide us with an explanation on various fundamental issues. For instance, when it comes to distribution, what should be considered as the subject for distribution? Should it be income, jobs, opportunities, welfare? The theories also attempt to explain the basis upon which the distribution should be made. There are theories that argue for maximisation of utility others for example argue in favour of equality. But what do we mean by equality? Equality of what? How can one go about specifying what constitutes a minimum decent life? In the midst of such theoretical confusion then not surprisingly, Hayek argues that social justice is a ‘weasel word’ used to evade or mislead, an excuse for increasing state control and government interference.⁸⁵ For social justice also represents a political ideal and pivotal to the political debate comes the role of the state.⁸⁶

Notwithstanding the various controversies before entering into the philosophical debates, it is hoped that the foregoing discussion on natural law helped clear some ground in providing us with pointers on the principles of natural law. As such, when deciphering what is illuminating and significant in our evaluations, a theory of natural law can be useful when engaging in practical reflections though not necessarily accepting it as the ultimately justified conceptual framework. It is with this in mind that a recapitulation of the most salient points derived from the above discussion is worth re-mention before we proceed any further.

According to natural law theory:

- The full realisation of each and every individual as a free and equal being forms the basis of the moral good;⁸⁷
- The sole purpose of the state and thus of politics and law is the attainment of the common good via the human flourishing or fulfilment of each person in the community;⁸⁸

⁸⁴ See, Lamont, J. and Fodor, C. *Distributive Justice* <http://plato.stanford.edu/entries/justice-distributive/> [October, 2010].

⁸⁵ See, Heywood, A. 2004, *Political Theory: An Introduction* third edition, Palgrave Macmillan, Houndmills. chapters 10 and 11. Friedrich Hayek (1899-1992) an influential Austrian economist and political philosopher, was a stout believer in individualism and market order and a critic of socialism.

⁸⁶ See, Lister, R. 2007, "Social Justice meanings and politics", *Benefits*, 15, 2, 113-125.

⁸⁷ See, Section 3.4.3, "*Dignity as the basic moral premise*".

⁸⁸ See, *ibid.*

- Each person is not to be valued merely as a means to the ends of others or even to his/her own ends, but as an end in himself/herself;⁸⁹
- Moral principles are principles of justice;⁹⁰
- The equal dignity of persons stands as the basic moral premise;⁹¹
- *Life, knowledge, play, aesthetic experience, Sociability (friendship), practical reasonableness and religion* provide the set of basic principles that indicate the basic forms of human flourishing that are to be pursued and realised;⁹²
- *A coherent plan of life, No arbitrary preference amongst values, No arbitrary preference amongst persons, Detachment and Commitment, The (limited) relevance of consequences: Efficiency within reason; Respect for every basic value in every act, The requirement of the Common Good; Following one's conscience* – provide the set of basic methodological requirements for practical reasonableness;⁹³
- Practical reasonableness is reasonableness in deciding, distinguishing “sound from unsound practical thinking”, i.e. between acts that “are reasonable-all-things-considered” or acts that are “unreasonable-all-things-considered”. Therefore distinguishing ways that are morally right or morally wrong”⁹⁴

⁸⁹ See, *ibid.*

⁹⁰ See, section 3.4.1, “*Morality in Natural Law Theory*” and section 3.4.3, “*Dignity as the basic moral premise*”.

⁹¹ See, section, 3.4.3, “*Dignity as the basic moral premise*” and section 3.5, “*Respect for Human Dignity – A Legally Enforceable Fundamental Right*”.

⁹² See, section 3.4.3, “*Dignity as the basic moral premise*”. See also Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford. Part I, section 2, Images and Objections, pgs. 23-55.

⁹³ Section 3.4.2, “*Practical Reasonableness: distinguishing sound from unsound practical thinking*”. See also Finnis, *ibid.* Part I, section 2, Images and Objections, pgs. 23-55.

⁹⁴ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford. pg. 23, see also section 3.4.2, “*Practical Reasonableness: distinguishing sound from unsound practical thinking*”.

3.6.1 Utilitarianism

In its classical form according to Utilitarianism, in order to obtain the social good, social institutions are to be arranged so as to maximise the *greatest happiness*. This being the sum total of individual ‘utilities’. The principle of *utility* as developed in particular by Jeremy Bentham is understood as pleasure, or happiness, or preference-satisfaction.⁹⁵ Inspired by a slogan that read, “the greatest happiness of the greatest number”⁹⁶ Bentham sometimes used this slogan to describe the principle of utility. However, Utilitarianism is solely concerned with those actions that yield the greatest utility to its citizens in the aggregate irrespective of its distribution, ignoring distributional inequalities.⁹⁷ According to the utilitarian viewpoint social *injustice* results in the aggregate loss of utility when this could have been potentially achieved. Indeed, utilitarians insist on the principle of equality. That is, when it comes to calculating the *greatest utility* each person’s utility counts equally with that of each and every other person.⁹⁸ Everyone counts as one. The notion of equality of persons in utilitarianism serves as a means in the methodology when calculating the aggregate sum. Thus, for instance, individual freedom, autonomy, rights, quality of life are only valuable in so far as they increase aggregate utility. In other words, such values acquire a subordinate status in relation to the maximisation of aggregate utility notwithstanding the fact that in the calculation of the aggregate utility all desires are taken up including “selfish” and “external” preferences.⁹⁹ The particular intrusion on the individual’s autonomy and rights according to utilitarians is justified when one considers that the total benefits will be outweighed by such intrusions.¹⁰⁰

⁹⁵ See, Bentham, J. 1789 republished 1907, *An Introduction to the Principles of Morals and Legislation* Clarendon Press, Oxford.

⁹⁶ See, Warnock, M. 1962, "Introduction to John Stuart Mill, Utilitarianism" in *On Liberty, Essay on Bentham*, in, Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75. pg. 1868.

⁹⁷ It has been argued that it is impossible for a theory to have a double maxim, that is, in this case one cannot produce simultaneously the greatest happiness and the happiness of the greatest number. See, Kymlicka, W. 1990, "Contemporary Political Philosophy: An Introduction ", 47, 1, in Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75.pg. 1868.

⁹⁸ See, Mill, J.S. 1962, "Utilitarianism, [1861]" in *John Stuart Mill's Utilitarianism*, William Collins, Glasgow. pgs. 251-321

⁹⁹ See, Dworkin, R. 1977, *Taking Rights Seriously*, Harvard University Press, Cambridge. pg. 234.

¹⁰⁰ See, Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75. pg. 1870.

It has been claimed that utilitarian logic is mirrored in the golden rule of Jesus of Nazareth. Mill affirms, "In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. 'To do as you would be done by,' and 'to love your neighbor as yourself,' constitute the ideal perfection of utilitarian morality."¹⁰¹ Accordingly, utilitarians hold self-interests equally with those of others, be it family, friends or groups. However, this interpretation of the golden rule has been criticised and considered implausible.¹⁰² For, it is argued, to maintain a complete impartiality of interest, goes against the thoughts and actions of rational individuals as it ultimately leads towards self-abnegation and destruction. Indeed, one cannot expect others to sustain his or her desires at the expense of their own.¹⁰³ Utilitarianism fails to provide a proper interpretation of the equal respect for each individual.¹⁰⁴

According to classic utilitarianism the success or otherwise of States and their policies in generating *total happiness* needs to be determined according to three distinct informational components.¹⁰⁵ First, actions, rules, institutions and so on are to be judged by their results. This first component is referred to as "consequentialism". However, it appears that the main bone of contention in this respect is what gets included in the list of the so called consequences and how can one justify that such consequences are attributable to certain decisions. Second, judgements are to be restricted to the utilities generated in their respective states. This second component is referred to as "welfarism". The third component referred to as "sum-ranking" simply requires the summation of the utilities of different people so as to come up with the aggregate utility of the citizenry.

But, the subject of interpersonal comparisons of happiness received major criticism because it was argued that happiness as experienced by one person could not be compared with that of

¹⁰¹ See, Mill, J.S. 1963, "Utilitarianism, [1861]" in *10 Collected Works of John Stuart Mill*, University of Toronto Press, in *ibid* pg. 1868.

¹⁰² See, Wright, R.W. 2000, "The Principles of Justice", *Notre Dame Law Review*, 75. pg 1869. According to Wright, Finnis and Kant have noted that such impartiality of interest leads to, "..... complete self-abnegation and to the destruction of personhood, rather than to its complete fulfilment, and thus is not a principle that any rational person would adopt as the supreme principle of morality."

¹⁰³ See, Kymlicka, W. 1990, *Contemporary Political Philosophy*, Clarendon Press, Oxford. pg. 40.

¹⁰⁴ See, Rawls, J. 1971, *A theory of Justice*, Oxford University Press, Oxford. pg. 27.

¹⁰⁵ See, Sen, A. 1999, *Development as Freedom*, Anchor Books, New York. chapter 3.

another because, “...no common denominator of feeling was possible”.¹⁰⁶ Consequently, such criticisms gave way to what has become known as ‘the new welfare economics’ and often referred to as ‘*welfarism*’.¹⁰⁷ Although the notion of pleasure/happiness remains the driving force behind the theory it concurrently dispenses of the interpersonal comparisons of utilities.

Modern forms of utilitarianism appear to have shifted their focus on to desire fulfilment instead of happiness generation. What becomes relevant is the strength of the desire that is being fulfilled. Nevertheless, because of the difficulties encountered in measuring happiness and desire, according to modern economic analysis, the measurement of utility is represented by a person’s observable choices.¹⁰⁸ The methodology does not make use of interpersonal comparisons and as such cannot accommodate the *sum ranking* approach other than approaches that invoke *welfarism* and *consequentialism*. It is for this reason that the method has been regarded as deficient and as a consequence a major demerit in the utilitarian calculus.¹⁰⁹

Despite the debate on the various demerits of utilitarianism Sen draws out two particular insightful points that are worth noting. Utilitarianism necessitates that in judging social arrangements one needs to take into consideration *results* and the *well-being* of people (despite the disagreements on the “utility-centred mental-metric”).¹¹⁰ This he argues provides much relevance especially when most institutions are advocated on the basis of their constitutive features without taking into consideration their consequential outcomes.

Drawing on utilitarian theories economic liberal arguments support the idea that the distribution of social resources produced by market exchanges is innately fair and just as long as there are unfettered market exchanges. Standing at the heart of the theory is the

¹⁰⁶ See, Robbins, L. 1938, "Interpersonal Comparisons of Utility: A Comment ", *Economic Journal*, 48, in Sen, A. 2009, *The Idea of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachusetts. Chapter 13.

¹⁰⁷ See, Sen, A. 2009, *The Idea of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachusetts.pg. 278.

¹⁰⁸ “The basic formula is this: if a person would choose an alternative x over another, y, then and only then that person has more utility from x than from y.” See, Sen, A. 1999, *Development as Freedom*, Anchor Books, New York. pg. 59.

¹⁰⁹ See, Sen, A. 1999, *Development as Freedom*, Anchor Books, New York. Chapter 3.

¹¹⁰ *ibid.* pg. 60.

assumption that all human decision making is driven in pursuit of individual pleasure/happiness (utility) and its maximisation. Therefore, it is argued that as long as individual decision making is allowed to occur without government interference there will be a just and fair distribution of social resources. The theory thus advocates a minimal role for the government in the economy. At the macroeconomic level, government policy is necessary to regulate fiscal and monetary policy whilst at the microeconomic level there are those who argue in favour of a laissez-faire attitude by government whilst others advocate regulation in order to remove market distortions.¹¹¹ Consequently, when a state of perfect competitive market equilibrium is reached this is said to be Pareto efficient.¹¹² However, this should not be taken to mean that the efficient distribution of resources have been allocated in a socially desirable manner.¹¹³ Indeed, as discussed above, utilitarian concern is with the maximum distribution of wealth rather than how such distribution is affecting the individual.

Economic liberal arguments hold that wealth is the result of hard work and thrift whilst those who become poor do so because of their recklessness and laziness. It is argued that the provision of a social minimum policy regime reduces incentives to work, to save and dampens entrepreneurship.¹¹⁴ On one hand, it is alleged that the rich would want to work less as otherwise they will be made to pay more tax to make good for the social minimum policy regime. On the other, the poor need not work hard and can save less because they know that they have access to a welfare-safety net to fall back on. This is broadly speaking the utilitarian argument against the enactment of a social minimum. Such have been the arguments that lay behind the principles of U.K.'s 1834 New Poor Law. It explains why nineteenth century utilitarian reformers such as Edwin Chadwick had serious reservations on enacting a social minimum. Thus, whilst conceding to the need for some kind of safety-net

¹¹¹ Wikipedia. *Economic Efficiency*, http://en.wikipedia.org/wiki/Economic_efficiency [October, 2010].

¹¹² ".....a change to a different allocation that makes at least one individual better off without making any other individual worse off is called a Pareto improvement. An allocation is defined as "Pareto efficient" or "Pareto optimal" when no further Pareto improvements can be made." See, Wikipedia. *Pareto Efficiency*, http://en.wikipedia.org/wiki/Pareto_efficiency [November, 2010].

¹¹³ See, Barr, N. 2004, *Economics of the welfare state*, Oxford University Press, New York. See also, Sen, A. 1993, " Markets and freedom: Achievements and limitations of the market mechanism in promoting individual freedoms", *Oxford Economic Papers*, 45, 4, 519-541. in *ibid*.

¹¹⁴ See, White, S. *Social Minimum*, <http://plato.stanford.edu/entries/social-minimum/> [October 2010].

for the very poor, state assistance was set at a very low level and provided on deliberately punitive terms.¹¹⁵

3.6.2 Egalitarian Liberal Perspectives

Within contemporary political philosophy, John Rawls' *A Theory of Justice*¹¹⁶ published in 1971 has had profound impact in shaping modern liberal and social democratic concepts of social justice. Rawls' theory of Justice as fairness is considered as the most influential theory of justice in modern moral philosophy.¹¹⁷ According to Rawls, Justice is founded on the demands of fairness. Justice as fairness constitutes Rawls' basic idea for justice in a liberal society. A society where citizens are free, hold equal basic rights and cooperate within an egalitarian economic system. Justice as fairness aims to describe the just arrangements of major social institutions (political constitution, legal system, the economy, the family and so on) in a liberal society. For Rawls the arrangement of these institutions form the basic structure of society and it is within this basic structure that justice is located. Accordingly, justice is about, '.....the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social co-operation'.¹¹⁸ Given that such institutions have a major impact on the lives of people their justification becomes imperative. In a 'well-ordered society' vested interests are put aside.

In order to derive with principles of justice that are based on the notion of fairness, Rawls employs the device of the social contract¹¹⁹ and sets off from an ideal world by making use of ideal theory. Ideal theory assumes that people are willing to comply with whatever principles of justice are chosen and it also assumes reasonably favourable social conditions, free from historical, cultural and empirical barriers, thus making it possible for people to abide by

¹¹⁵ See, Roberts, D. 1960, *Victorian Origins of the British Welfare State* Yale University Press, New Haven.

¹¹⁶ See, Rawls, J. 1971, *A theory of Justice*, Oxford University Press, Oxford.
John Rawls (1921-2002) an American political philosopher continued throughout his life to work further on his theory of justice as fairness. Subsequent publications include *Political Liberalism* (1993), *The Law of Peoples* (1999), and *Justice as Fairness* (2001).

¹¹⁷ See, Sen, A. 2009, *The Idea of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachusetts. pg. 59.

¹¹⁸ See, Rawls, J. 1971, *A theory of Justice*, Oxford University Press, Oxford. pg. 6.

¹¹⁹ "The notion of the *social contract* implies that the people give up sovereignty to a government or other authority in order to receive or maintain social order through the rule of law."
See, Wikipedia. *Social Contract*, http://en.wikipedia.org/wiki/Social_contract.

principles of political cooperation. In Rawls view it is in this ideal state that the fundamental principles of justice that govern the basic institutions of society can be revealed. He maintains that the conception of the ideal of a just society needs to proceed prior to moving towards justice in the non-ideal circumstances because otherwise we would be lacking fundamental ideals.¹²⁰

Rawls then poses the intriguing question inquiring on the principles of cooperation that free and equal citizens would ultimately agree to under fair conditions. By employing the original position argument principles of justice emerge with unanimous agreement. The original position is a thought experiment, an imaginary situation where independent citizens come together to select and agree upon the principles of justice that would govern the entire society. The move to agreement is instigated through the social contract device. In the original position everyone is under a *veil of ignorance*. Behind this *veil of ignorance* participants are deprived of any information concerning race, gender, class position, natural endowments, educational attainment, religious beliefs, and so on. As such, participants are placed fairly with respect to one another and prevented from being influenced from arbitrary facts. In the original position according to Rawls all relevant conceptions of the citizen¹²¹ and society¹²² are embodied making it possible for judgments about justice to be made.

¹²⁰ Critics of ideal theory have questioned the usefulness of deriving with principles that are applicable in ideal circumstances when these need to be applied in a non-ideal world shadowed by various forms of injustices and oppression. One of Rawls' well known critics is Amartya Sen who argues that ideal theory which he refers to as *transcendental theory* is redundant because, "If a theory of justice is to guide reasoned choice of policies, strategies or institutions, then the identification of fully just social arrangements is neither necessary nor sufficient." Sen argues in favour of a comparative theory of Justice. See, Sen, A. 2009, *The Idea of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachusetts.

¹²¹ For Rawls citizens are not only free and equal but reasonable and rational. Citizens are reasonable because of their capacity for a sense of justice and rational because of their capacity for a conception of the good. In effect, these capacities give citizens moral powers. In order to develop and exercise these moral powers which are needed for pursuing a good life, citizens are driven by fundamental interests which Rawls refers to as primary goods.

Primary goods include: the basic rights and liberties; Freedom of movement and free choice among a wide range of occupations; the powers of offices and responsibility; Income and wealth.

See, Kelly, E. 2001, *Justice as Fairness: A Restatement*, Harvard University Press, Cambridge, MA. pgs. 58-59.

¹²² Rawls' conception of society draws on social institutions which he maintains need to be fair for all cooperating members of society irrespective of their race, gender, religion, class of origin and so on. Social institutions need to stand up to public scrutiny. Publicity for Rawls is an integral aspect of fairness because for, "public political life, nothing need be hidden." See, Rawls, J. 1993, *Political Liberalism*, Second edition, Columbia University Press, pg. 68.

The selection of principles from the argument in the original position is derived following a two stage process. First, participants agree on the selected principles which in effect are principles that are perceived to work in favour of the citizens they represent. Then participants check that a society that is ordered by these selected principles remains stable over time. Consequently, the following two principles of justice are proposed:

- a. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
- b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.¹²³

Rawls claims that participants would prefer these principles over utilitarian principles (Rawls sees utilitarianism as the main competitor). Given that participants could secure equal liberties for their citizens who would dare gamble their citizen's basic liberties by favouring average utilities lest they represent a minority group. Further, Rawls argues that equal basic liberties for all encourage mutual respect and cooperation and as such increase social harmony. On the other hand utilitarianism can be driven by various partisan policies that put forward speculative claims with respect to the relative average utility increase. This in turn creates a utilitarian society that is driven by mutual suspicion. In essence, Rawls argues that his principles provide a better basis for fostering cooperation and mutual trust from amongst the citizenry. When it comes to *The Check for Stability* Rawls maintains that the argument from the original position will hold that the two principles are congruent with the citizen's good because they affirm the freedom and equality of each citizen. This provides sufficient reason for citizens to develop an *enduring overlapping* consensus which provides reasonable support to expect that citizens will abide with the principles. "The most stable conception of justice is one that is perspicuous to our reason, congruent with our good, and rooted not in abnegation but in affirmation of the self."¹²⁴

Rawls assigns absolute or *lexical priority* to the first principle, the *liberty principle*. That is, in cases of conflict between the principles, for instance if one had to advance the economic interests of the worst-off at the expense of restricting individual liberties, the liberty principle

¹²³ See, Rawls, J. 1993, *Political Liberalism*, Second edition, Columbia University Press, pg. 291.

¹²⁴ See, Rawls, J. 1971, *A theory of Justice*, Oxford University Press, Oxford. pg. 261.

takes precedence. The second principle, the *equality principle* focuses on two particular aspects of justice, the first part relates to the *principal of fair equality of opportunity* and the second part which is referred to as the *difference principle* advances that social and economic inequalities between citizens are to be limited as long as they favour the least well off members of society. In addition, in cases of conflict the *principal of fair equality of opportunity* takes priority over the *difference principle*.

When it comes to translate these principles into the specifications of a socio-political economy Rawls for instance emphasises that the state must fund high-quality education for the least well-off because the enactment of laws and policies that solely prevent discrimination do not suffice in ensuring equal opportunities to all citizens. Rawls also advocates that the state must guarantee a basic minimum income and health care for all. In Rawls view, “The least advantaged are not, if all goes well, the unfortunate and unlucky—objects of our charity and compassion, much less our pity—but those to whom reciprocity is owed as a matter of basic justice.”¹²⁵ However, Rawls explicitly rejects the welfare state.¹²⁶ It is argued that it tends to create a demoralised under class as is the case with laissez-faire capitalism. In the case of a socialist command economy the state is afforded with too much power that can threaten the basic liberties.

In John Rawls’ *A Theory of Justice: Revised Edition* published in 1999, Rawls claims that if he were to rewrite *A Theory of Justice* again there were two things that he would handle differently. The first would be the way he presented his argument of the two principles of justice from the original position and the second would be ‘to distinguish more sharply the idea of a property-owning democracy..... from the idea of a welfare state.’¹²⁷ Indeed, due to the fact that the notion of property-owning democracy was not discussed in detail, various left-wing critics were led to believe that Rawls was advocating welfare state policies where capitalists produced as much wealth as possible while the state assured the “least well-off” through re-distributive policies. The notion of a capitalist welfare state was deemed as implausible for critics on the left.

¹²⁵ See, Kelly, E. 2001, *Justice as Fairness: A Restatement*, Harvard University Press, Cambridge, MA.pg. 139.

¹²⁶ See, *ibid.*, pg. 137-140.

¹²⁷ See, Rawls, J. 1999, *A Theory of Justice: Revised Edition*, Cambridge, MA, pg. xiv.

Rawls claims that both the term property-owning democracy as well as certain features of the idea, he borrowed from Meade.¹²⁸ Unlike the welfare-state, whose basic institutions are designed to “assist those who lose out through accident or misfortune”, the basic institutions of a property-owning democracy attempt to make use of progressive taxation and rely on competitive markets, “to disperse the ownership of wealth and capital, and thus to prevent a small part of society from controlling the economy and indirectly political life itself.”¹²⁹ Without going into the details of the political economic regime of a property-owning democracy Rawls indicates its general outline that may be consistent with the principles of justice as fairness. Broadly speaking the institutional structure that Rawls envisions in a property-owning democracy is familiar with citizens living under welfare state capitalism. Welfare state capitalism aims to provide through redistributive taxation an economic baseline to the *least well-off* including the provision of public services such as health care, education and social housing. A property-owning democracy also aims to provide such an economic baseline but has an additional goal: that of seeking the wide dispersion of capital.¹³⁰ Therefore, property-owning democracy described in a nutshell not only seeks to secure a social baseline as is the case with state capitalism but also seeks to set limits to the accumulation of wealth across a concentrated narrow band of citizens by dispersing capital holdings across the population. As such, property-owning democracy seeks to narrow the margins of inequalities from two different levels – from the uppermost level of society’s strata and the lowermost level.¹³¹

Rawls’ theory of justice has been and remains the subject of huge debate and not in the least the subject of major criticisms. Dworkin¹³² highlights the importance of factoring in an

¹²⁸ See, Meade, J.E. 1964, *Efficiency, Equality and the Ownership of Property*, London, G. Allen and Unwin, in Rawls, J. 1999, *A Theory of Justice: Revised Edition*, Cambridge, MA. pg. xiv.

¹²⁹ See, Rawls, J. 1999, *A Theory of Justice: Revised Edition*, Cambridge, MA, pg. xiv-xv.

¹³⁰ Here the notion of capital besides income also includes capital assets as well as the equitable distribution of human capital.

¹³¹ See, Williamson, T. and O’Neil, M. 2009, *Property Owning Democracy and the Demands of Justice*, <http://democracy.livingreviews.org/index.php/lrd/article/viewArticle/lrd-2009-5/15>,

The concept of property owning democracy and its relevance to Public-Private Partnerships will be further explored and discussed in Chapter 6.

¹³² See, Dworkin, R. 1981, "What is equality? Part 1: equality of welfare", *Philosophy and Public Affairs*, 10, 185-246.

See, Dworkin, R. 1981, "What is equality? Part 2: equality of resources", *Philosophy and Public Affairs*, 10, 283-345.

element of *responsibility* when discussing inequalities. For it is argued inequalities on one hand may arise due to misfortune that go beyond individual control but on the other they may also arise as a consequence of individual preferences and choices that one makes during life. He argues that Rawls' principles of distributional justice fail to make such a distinction and therefore allows for the subsidisation of scroungers. Other challenges to Rawls as raised by Dworkin have taken issue with his account of *primary goods* in particular income and wealth which fail to recognise the more expensive needs that certain groups of people as is the case with the disabled entail. According to Sen, there is a strong case for shifting the focus from primary goods to an assessment of actual freedoms and capabilities.¹³³ In addition, Sen views the absolute priority of liberty as too extreme because he cannot see why for instance starvation or medical neglect need be regarded as invariably less important than the violation of any kind of liberty.

3.7 On Europe's Social Model

End 2012 marks the 20th anniversary of the Single Market. But Europe has still yet to reap its full potential.¹³⁴ Since the inception of the single market, 1 January 1993, the world has changed. And, so we are told, globalisation and technological changes have created new challenges, new competitors. Europe has, "been reunified, enlarged and deepened."¹³⁵ The economic crisis has had its toll. Europe needs to move on in "completing, deepening and making full use of the single market...."¹³⁶ Towards this end in the re-launch of Europe's single market, Professor Mario Monti¹³⁷ in his report to President Barroso advocates a new strategy - "a social market economy approach"¹³⁸ that puts "Europeans at the heart of the

See, Dworkin, R. 2000, *Sovereign virtue: The theory and practice of equality*, Harvard University Press, Cambridge, MA.

¹³³ See, Sen, A. 2009, *The Idea of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachusetts. pg. 66.

¹³⁴ See, COM (2010) 608 final. 27.10.2010, *Towards a Single Market Act for a highly competitive social market economy*, Brussels. pg. 4.

¹³⁵ *ibid.* pg. 3.

¹³⁶ *ibid.* pg. 4.

¹³⁷ See, Report by Mario Monti to the President of the European Commission: "A new strategy for the single market", 9 June 2010

¹³⁸ *ibid.* pg. 3

market once again” so as “.....to safeguard the single market from the risk of economic nationalism....” The “success of the European model depends on its ability to combine economic performance with social justice and to involve economic operators and the social partners in achieving this goal.”¹³⁹ Fifty measures are thus proposed. The re-launch of the single market strategy is considered as imperative for enabling Europe’s 2020 strategy¹⁴⁰ and as a consequence a growth of circa 4% of GDP over a ten year period is expected. This estimate takes into particular account measures to reduce administrative and regulatory burdens and not in the least the promotion of open public procurement.

Does this sound like a déjà vu? But it’s a *social market economy* we now need in order to deepen further our single market resolve. And is this *social market economy* synonymous with Europe’s social model? An understanding of poverty and social justice requires us also to undertake an understanding of the policies that emanate to their response. In the following section we will first attempt to derive an understanding of Europe’s social model and then proceed to take a reality snap shot of how Europe’s social features are currently unfolding.

3.7.1 Ordoliberalism

Following various contested debates¹⁴¹ the term *social market economy* finds its place in the Lisbon Treaty, more specifically in Article 3(3) TEU.¹⁴² There are those who speculate that the inclusion of such a term is intended to reflect the desired character of Europe’s new constitutional order.¹⁴³ But what exactly is it that is desired? Perhaps something that

¹³⁹ *ibid.* pg. 4

¹⁴⁰ See, COM(2010) 2020 final. 3.3.2010, *Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth*, Brussels.

¹⁴¹ See, Joerges, C. and Rödl, F. 2004, ‘*Social Market Economy*’ as *Europe’s Social Model*? Florence. See in particular footnote 38.

¹⁴² Article 3(3) TEU states as follows: The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

¹⁴³ See, Joerges, C. and Rödl, F. 2004, ‘*Social Market Economy*’ as *Europe’s Social Model*? Florence. pg.10

corresponds to a *social state*? Despite the ambiguity, the term *social market economy* conjures a clear and specific meaning for the Germans as it carries a long standing history that extends over the past fifty years.

For the Germans a clear distinction needs to be made between a *social market economy* and a *social state*. According to German constitutional literature a *social market economy* is an approach that enables the state to perform as a *social state*.¹⁴⁴ Simply put, though the state¹⁴⁵ and society¹⁴⁶ are considered as having diametrically different functions they concurrently influence each other striking a balance that preserves the democratic order of society. A *social market economy* is conceived within this diametric function.

The notion of a *social market economy* as employed by the Commission¹⁴⁷ in its Communication for the re-launch of the EU's single market strategy appears to draw largely on Müller-Armack's¹⁴⁸ *social market economy* which is deeply ingrained in the concept of ordoliberalism. Ordoliberalism is primarily concerned with the protection of the free market economy and the role of law is to maintain a healthy level of competition through measures that adhere to market principles and the prevention of overconcentration of both public and private power (corporatism, cartelisation and monopolies). As such, ordoliberalism seeks to impose a stable legal framework on the economy whilst the political system from its part is required to respect it.

According to Müller-Armack when a *social market economy* is realised the market economy becomes infused with the social dimension.¹⁴⁹ As long as one remains faithful to ordoliberal principals social effects are generated automatically and directly. Müller-Armack's *social*

¹⁴⁴ See, Joerges, C. and Rödl, F. 2004, '*Social Market Economy*' as Europe's Social Model? Florence. pg. 11

¹⁴⁵ ".....the possibility of the state to influence the sphere of society should establish and secure the democratic character of society, shaped and guided according to the classical liberal imperatives." Ibid. pg. 11

¹⁴⁶ ".....the influence of the society upon the state should guarantee the liberality (*Freiheitlichkeit*) of the democratic order as a whole against a totalitarian threat and danger of state usurpation of society." Ibid. pg. 11

¹⁴⁷ See, COM (2010) 608 final. 27.10.2010, *Towards a Single Market Act for a highly competitive social market economy*, Brussels.

¹⁴⁸ See, Müller-Armack, A. reprinted in 1966, "Wirtschaftslenkung und Marktwirtschaft (1946)" in *Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur sozialen Marktwirtschaft und zur europäischen Integration*, Freiburg i. Br., Verlag Rombach.pgs. 19-170 in Joerges, C. and Rödl, F. 2004, '*Social Market Economy*' as Europe's Social Model? Florence.

¹⁴⁹ See, Joerges, C. and Rödl, F. 2004, '*Social Market Economy*' as Europe's Social Model? Florence.

market economy takes into account redistributive policies via taxation and subsidies, measures to combat economic fluctuations in order to safeguard employment, laws on minimum wages and welfare aid. However, Social policies in a *social market economy* are subordinated to market principles. Müller-Armack also elucidates on the need to focus on societal problems. It is argued that such problems could lead to individual isolation and feelings of uncertainty with their eventual possibility of triggering off anti-liberal or totalitarian movements. He thus for instance advocates, the expansion of public services including increased public investment in higher education, the advancement of career opportunities and regional and urban planning. However, none of these measures should interfere with the functioning of market mechanisms.

Has Müller-Armack's model been successful? In the case of Germany the principles were never really followed according to Joerges and Rödl who contend that the model's, "theoretical weakness ensures its political survival....."¹⁵⁰ It presupposes a social balance but the opposite has been claimed to be true for it "consists of a clear restriction of instruments to achieve any social objective at all."¹⁵¹

3.7.2 The EU's social dimension and its implementing instruments: an overview

Within the EU, social issues fall mainly under the prerogative of the Member States. At the European level actions in this respect remain constrained by the subsidiarity principle and the European Treaties. The Treaty establishing a Constitution for Europe recalls the Union's objectives: 'a highly competitive social market economy, aiming at full employment and social progress [...]. It shall combat social exclusion and discrimination, and shall promote social justice and protection'. The European Union is first and foremost an economic constitution. The social constitution as already noted remains a national prerogative.

Noteworthy, are the following **articles enshrined in the constitution**. Article 9 TFEU stipulates that the Union shall "take into account requirements linked tothe guarantee of adequate social protection" and "the fight against social exclusion....." Article 14 TFEU

¹⁵⁰ "- the ordoliberal argument perpetually immunises itself: Its promises would be fulfilled if the political system, the law and economic actors would comply with the imperatives of ordoliberalism. They never fully complied." See, Joerges, C. and Rödl, F. 2004, '*Social Market Economy*' as Europe's Social Model? Florence. pg. 14.

¹⁵¹ See, Joerges, C. and Rödl, F. 2004, '*Social Market Economy*' as Europe's Social Model? Florence. pg. 20.

and Protocol (No. 26) highlight the important role of Services of General Interest in social and territorial cohesion. The European Union and Member States, both in accordance to their relative competencies and within the scope of application of the Treaties are to ensure that these services fulfil their mission. Under Title X, Social Policy, Article 152 TFEU refers to the facilitation of dialogue between the social partners and stipulates that, “The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.” The annual tripartite social summit seeks to add impetus to the social dialogue at national and EU level. The summit brings together the Presidency of the Council, the Presidency of the Commission and the European social partners. Article 153 TFEU enlists a number of areas where the Union is to support and compliment the activities of Member States in the social field. When it comes to, *social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers and conditions of employment for third-country nationals* (Articles 153 (c), (d), (f) and (g) respectively refer) actions are subject to a unanimous vote. Article 153 (5) TFEU explicitly excludes Union action with respect to pay, the right of association, the right to strike or the right to impose lock-out.

The charter of Fundamental Rights of the European Union, now having the same legal value as the treaties includes various provisions on social rights and in particular Title IV on solidarity. However, it appears to lack binding specifications as rights are recognized pursuant to national legislation.¹⁵²

The European Union has an annual **budget** of around €120 billion which represents about 1% of the Member States’ total GDP. For the period running from 1 January 2007 till 31 December 2013, a budget of € 348 billion (35% of the Community budget) was allocated to regional policy comprising € 278 billion for Structural Funds and € 70 billion for the Cohesion Fund.¹⁵³ Structural Funds and Cohesion Funds comprise the EU’s financial instruments that aim to reduce regional disparities in terms of income, wealth and opportunities with the poorer regions receiving most of the support. Structural Funds incorporate the European Regional Development Fund (ERDF) and the European Social Fund (ESF). ESF spending amounts to circa 10% of the EU’s budget and focuses on promoting

¹⁵² See, Mathieu, C. and Sterdyniak, H. 2008, *European social model(s) and social Europe*, Paris.

¹⁵³ See, Europa Glossary. *Structural Funds and Cohesion Fund*, http://europa.eu/scadplus/glossary/structural_cohesion_fund_eno.htm [December 2010].

employment in the EU in particular the integration of the unemployed and those that are more vulnerable to unemployment and social exclusion.

In March 2006, the European Commission decided upon the creation of the European Globalisation Adjustment Fund.¹⁵⁴ This funding for instance aims to support re-training schemes and job search assistance for workers who have been made redundant as a result of globalisation or as a direct result of the global financial and economic crisis. Although the EU budget allocated towards this end is limited to a maximum amount of € 500 million per year, it covers directly some of the social expenditure. This funding has been interpreted as the EU's attempt to influence and raise its budget in an effort to exert more direct influence on social expenditure.¹⁵⁵

Serving as a vehicle for cooperative exchange between Member States and the European Commission the **Social Protection Committee** established pursuant to Article 160 TFEU¹⁵⁶ seeks through the framework of the **Open Method of Co-ordination (OMC)** on social protection and social inclusion to monitor the social situation and the development of social protection policies across Member States. The OMC is a voluntary process for political cooperation. Initially the method was only applied to Employment and Economic policy.

The OMC on social inclusion was introduced by the European Council of Lisbon in March 2000. It was introduced as, “the means of spreading best practice and achieving greater convergence towards the main EU goals”¹⁵⁷ thus helping Member States progress jointly in their reforms towards the Lisbon goals. Hence, on one hand within the OMC framework, Member States report upon their strategies, goals and policies to the EU. On the other, the EU collates the national strategic reports and draws common policy conclusions that are jointly adopted by the European Commission and Member States. Most importantly, is the

¹⁵⁴ See, Employment, Social Affairs and Inclusion. *EGF- European Globalisation Adjustment Fund*, <http://ec.europa.eu/social/main.jsp?catId=326&langId=en> [December 2010].

¹⁵⁵ See, Mathieu, C. and Sterdyniak, H. 2008, *European social model(s) and social Europe*, Paris.

¹⁵⁶ Article 160 TFEU assigns the following tasks to the Social Protection Committee: “- to monitor the social situation and the development of social protection policies in the Member States and the Union; - to promote exchanges of information, experience and good practice between Member States and with the Commission; - without prejudice to Article 240, to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council or the Commission or on its own initiative.”

¹⁵⁷ See, European Parliament. *Lisbon European Council 23 and 24 March 2000, Presidency conclusions*, http://www.europarl.europa.eu/summits/lis1_eno.htm [December, 2010].

fact that under the OMC framework social policy remains under the competency of Member States.

3.7.3 Social Europe on the move

European social policies have played a central role in building Europe's economic strength, through the development of a unique social model. This has proven to be both flexible and dynamic in responding to rapid changes in Europe's economy and society over the past decades.¹⁵⁸

In year 2000 the European Union was described as “experiencing its best macro-economic outlook for a generation.”¹⁵⁹ The internal market was at the time considered as “largely complete and is yielding tangible benefits”.¹⁶⁰ European Governments hence set forth committing themselves to a new strategic goal, “to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.”¹⁶¹ Towards this end, the modernisation of “the European social model, investing in people and combating social exclusion”¹⁶² constituted one of the strategic measures in order to pursue its goal. European Governments clearly acknowledged the essential link between sustainable economic growth and Europe's social dimension. Indeed, the link between social expenditure and its “*consequent* economic benefits”¹⁶³ was also highlighted in the European Commission's Social Policy Agenda.

During Council conclusions, June 2009, European Governments stressed,

¹⁵⁸ See, Com(2000) 379 final. 28 June 2000, *Social Policy Agenda, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions*, Brussels.

¹⁵⁹ See, European Parliament. *Lisbon European Council 23 and 24 March 2000, Presidency conclusions*, http://www.europarl.europa.eu/summits/lis1_eno.htm [December, 2010].

¹⁶⁰ *ibid.*

¹⁶¹ See, European Parliament. *Lisbon European Council 23 and 24 March 2000, Presidency conclusions*, http://www.europarl.europa.eu/summits/lis1_eno.htm [December, 2010].

¹⁶² *ibid.*

¹⁶³ See, Com(2000) 379 final. 28 June 2000, *Social Policy Agenda, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions*, Brussels. emphasis added.

the increased need for social services in the current economic crisis, as these services may help to mitigate the social impact of the crisis and could act both as a safety net and an additional support for active inclusion and employment for people affected by the crises;¹⁶⁴

Council conclusions, December 2010 underlined the fact that social services of general interest,

.....are *person-oriented* services, designed to respond to human vital needs, generally driven by the principle of solidarity and *often rooted in (local) cultural traditions* and contribute to the safeguard of fundamental rights and human dignity, to non-discrimination and to ensuring the creation of equal opportunities for all, therefore *enabling individuals* to play a significant part in the economic and social life of the society;¹⁶⁵

Meantime, behind such refined oratory and orchestrated rhetoric, social reality is always obliged to appear and unfold itself at some point. The following attempts to depict a few of the welfare reform measures that some Member States adopted in response to a background of growing national debts and the global financial and economic crisis.

Denmark's national debt amounts to 38.10% of its GDP (2009 estimates). Known for its most generous cradle-to-grave social welfare system in the world, Denmark, May 2010 launched an austerity plan in an attempt to avoid following the fate of Greece. Slashing by half its unemployment benefits, minister's salaries by 5%, capping family welfare payments and abolishing tax breaks. Public deficit is expected to reach below the EU limit of 3.0% of GDP by 2013.¹⁶⁶

France's national debt amounts to 79.70% of its GDP (2009 estimates). French President Nicolas Sarkozy plans to raise the retirement age from 60 to 62. This has spurred strong protests and workers nationwide went on strikes. The French health care system is gradually increasing its co-payments' systems.¹⁶⁷

¹⁶⁴ See, Council of the European Union. 8 June 2009, *Council Conclusions on Social Services as a tool for active inclusion, strengthening social cohesion and an area for job opportunities*, 2947th Employment, Social Policy, Health and Consumer Affairs Council meeting Luxembourg. pg. 3.

¹⁶⁵ See, European Council. 6 December 2010, *Council conclusions, Social Services of General Interest: at the heart of the European social model*, 3053rd Employment, Social Policy Health and Consumer Affairs Council meeting, Brussels. Emphasis added.

¹⁶⁶ See, Lanka Business on line. *Debt Crisis – Denmark launches austerity plan, slashes benefits*, <http://www.lankabusinessonline.com/fullstory.php?nid=1629811302> [November 2010].

See, Economics. *List of national debt by Country*, <http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

¹⁶⁷ See, Beardsley,E. *Can the European Welfare State Survive?* <http://www.npr.org/templates/story/story.php?storyId=128485416> [November, 2010].

Germany's national debt amounts to 77.20% of its GDP (2009 estimates). It's national debt has been forecasted to rise beyond 2 trillion euro by 2013. Measures to slash down eighty billion euro in government budget by 2014 include modest cuts in parental benefits and unemployment benefits. Government universities, previously free have begun to charge tuition. The retirement age will be raised from 65 to 67 by 2029.¹⁶⁸

Greece's national debt amounts to 108.10% of GDP (2009 estimates). Its welfare system established in the early 1980s is relatively new. The austerity measures have been described by union groups as *savage* and include second round wage cuts for public workers and a three year pension freeze. Till May of year 2010 Greece had already experienced three general strikes and protests are expected to continue to escalate.¹⁶⁹

Ireland's national debt amounts to 63.7% of GDP (2009 estimates). Having received a bailout package in the region of 85 billion euro, in November 2010, Irish government outlines its four year austerity plan. Measures include a reduction in the minimum wage, a new property tax, and the slashing down of 25,000 public sector jobs.¹⁷⁰

See, Tanner,M.D. *As Europe laments welfare state, U.S. turns to it*, http://www.usatoday.com/news/opinion/forum/2010-06-26-tanner25_ST_NO.htm

See, Economics. *List of national debt by Country*, <http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

See, Economics, "List of national debt by Country," 7 February 2010
<http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

¹⁶⁸ See, Ecommerce journal. *German debt may top 2 trillion euros by 2013*, http://ecommerce-journal.com/news/16736_german_debt_may_top_2_trillion_euros_by_2013

See, The Local - Germany's news in English. *Where the axe has fallen: a budget cut breakdown*, <http://www.thelocal.de/money/20100608-27715.html> [November, 2010].

See, Tanner,M.D. *As Europe laments welfare state, U.S. turns to it*, http://www.usatoday.com/news/opinion/forum/2010-06-26-tanner25_ST_NO.htm

See, Economics. *List of national debt by Country*, <http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

¹⁶⁹ *ibid.*

See, Petrakis,M. *Greek State Workers Escalate Protests at Budget Cuts (Update 1)* <http://www.businessweek.com/news/2010-05-04/greek-state-workers-escalate-protests-at-budget-cuts-update1-.html>

¹⁷⁰ See, Economics. *List of national debt by Country*, <http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

Italy's national debt amounts to 115.20% of GDP (2009 estimates). Thirty billion euro in budget cuts over a period of two years was proposed by Prime Minister Silvio Berlusconi. The austerity measures include a billion euro cut in its national health care system, a cleanup on fraudulent disability payments and a three year pay freeze for all government workers.¹⁷¹

Portugal's national debt amounts to 75.20 of GDP (2009 estimates). Considered as a potential candidate for bailout, in November 2010, Portuguese Parliament voted to adopt the 2011 austerity budget. The government is focusing on budget savings of around five billion euro through a combination of tax hikes and a reduction in public sector wages. Although drastic changes to welfare benefits are being avoided unemployment benefits will be slashed down. The austerity measures triggered the largest general strike ever seen in the country over the past two decades.¹⁷²

Spain's national debt amounts to 59.5% of GDP (2009 estimates). Facing the worst economic crises in decades, Spanish Prime Minister Jose Luis Rodriguez-Zapatero has slashed government spending by 15 million euro, abolished payments to parents of newborn children and cut on disability payments. Retirement age for men is expected to rise from 65 to 67.¹⁷³

United Kingdom's national debt amounts to 68.5% of GDP (2009 estimates). Prime Minister David Cameron plans to raise retirement age to 66 and bring an end to payments to parents of newborn children. Spending cuts are expected to lead to the loss of about 490,000 jobs in the

See, Murchie,K. *Ireland unveils tough austerity measures* <http://www.financemarkets.co.uk/2010/11/24/ireland-unveils-tough-austerity-measures/>

¹⁷¹ See, Economics. *List of national debt by Country*, <http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

See, Tanner,M.D. *As Europe laments welfare state, U.S. turns to it*, http://www.usatoday.com/news/opinion/forum/2010-06-26-tanner25_ST_NO.htm

¹⁷² See, Economics. *List of national debt by Country*, <http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

See, stuff.co.nz.Business day. *Europe's welfare system under threat*, <http://www.stuff.co.nz/business/world/3730479/Europes-welfare-system-under-threat> [November, 2010].

¹⁷³ See, Economics. *List of national debt by Country*, <http://www.economicshelp.org/blog/economics/list-of-national-debt-by-country/>

See, Tanner,M.D. *As Europe laments welfare state, U.S. turns to it*, http://www.usatoday.com/news/opinion/forum/2010-06-26-tanner25_ST_NO.htm

public sector over a four year period. Education spending is expected to be cut down by 25% over the next four years.¹⁷⁴

3.8 The Quest for Justice in Poverty Reduction: Putting EU Public Procurement into Perspective

The reduction of poverty is back on the EU's agenda. Europe's 2020 strategy for smart and sustainable growth targets that by year 2020 Europe will have 20 million less people at the risk of poverty.¹⁷⁵ Worth recalling that in year 2000 the number of people living below the poverty line and social exclusion in the Union was described as unacceptable.¹⁷⁶ Indeed, poverty is an unacceptable state of affairs because simply put we all deserve to live in dignity and actively participate in society. Human dignity is inviolable and the Union accords Dignity with a fundamental constitutional right.¹⁷⁷ Year 2010 was designated as the European Year for combating poverty and social exclusion with the aim of reaffirming the EU's political commitment at the start of the Lisbon strategy, March 2000, so as to "make a decisive impact on the eradication of poverty".¹⁷⁸ Nevertheless, poverty rates have not decreased in the EU whilst social exclusion has risen from the 1980s.¹⁷⁹

¹⁷⁴ See, UK economy. *UK National Debt*, <http://www.economicshelp.org/blog/uk-economy/uk-national-debt/> [November, 2010].

See, Underhill, W. *Britain's Unions cautious about austerity measures*, <http://www.newsweek.com/2010/10/22/britain-s-unions-cautious-about-austerity-measures.html>

See, Richardson, H. *Budget: Education spending faces 25% cut*, <http://www.bbc.co.uk/news/10378384> [November, 2010].

¹⁷⁵ See, COM(2010) 2020 final. 3.3.2010, *Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth*, Brussels.

¹⁷⁶ See, European Parliament. *Lisbon European Council 23 and 24 March 2000, Presidency conclusions*, http://www.europarl.europa.eu/summits/lis1_eno.htm [December, 2010]. paragraph 32.

¹⁷⁷ See discussion in Section 3.4.3, "Dignity as the Basic Moral Premise" and Section 3.5, "Respect for Human Dignity – A Legally Enforceable Fundamental Right".

¹⁷⁸ See, European Parliament. *Lisbon European Council 23 and 24 March 2000, Presidency conclusions*, http://www.europarl.europa.eu/summits/lis1_eno.htm [December, 2010]. paragraph 32.

¹⁷⁹ See discussion in Section 3.2, "Poverty Across the EU-A Snapshot" and Mathieu, C. and Sterdyniak, H. 2008, *European social model(s) and social Europe*, Paris.

The “fight” against poverty cannot be subscribed solely to strategies and targets that fail to acknowledge a fuller understanding of the moral dimension.¹⁸⁰ The principles that stand at the very heart of Europe reflect themselves in our institutions that are ultimately bounded by the stark realities of society’s concrete experiences.¹⁸¹ Europe’s concern with economic efficiency appeals to the principle which is more concerned with the maximum distribution of wealth rather than how this is affecting the individual. It is grounded in utilitarian logic.¹⁸² The individual is assigned subordinate status in relation to maximisation of aggregate utility. Consequently, respect to the human dignity at the very conceptual level acquires subordinated status relative to European economic efficiency logic. When economic efficiency logic is assigned with a supremacy against which all other practical logic needs to revolve it denies rationality and practical reasonableness and is hence immoral.¹⁸³

A case in point is European public procurement legislation. As an instrument public procurement is indissolubly linked with national policies and in particular social policy.¹⁸⁴ Historically, there have been consistent attempts to link public procurement with the government policy of the day. EU public procurement did not always have the economic and open market access objectives.¹⁸⁵ For instance, Italian procurement law made it possible to

¹⁸⁰ See, Grima, G. *Eradication of Poverty As A Moral Commitment - Paper Presented during the Civil Society Project Conference*, http://www.um.edu.mt/edrc/books/CD_CSP4/contents.html [September, 2010].

¹⁸¹ The discussions in sections, 3.2 “Poverty across the EU – A snapshot” and section 3.7.3, “Social Europe on the move” refer.

¹⁸² See discussion in section 3.6.1, “Utilitarianism”.

¹⁸³ The argument for its immorality is deduced from the discussion as set out in sections 3.4.2, “Morality in Natural Law Theory” and section 3.4.2, “Practical Reasonableness: distinguishing sound from unsound practical thinking”.

¹⁸⁴ See, Bovis, C. 2006, *EC Public Procurement Case Law and Regulation*, Oxford University Press, Oxford. pg. 24.

See also, Fernández Martín, J.M. 1996, *The EC Public Procurement Rules: A Critical Analysis*, Clarendon Press, Oxford. pg.45.

Fernandez also contends that there is wide agreement on the use of public procurement as an instrument of economic and social policy and cites the following in this respect:

Jeanrenaud. 1984, “Marchés publics et politique économique”, *Annales de l’Économie Publique, Sociale et Coopérative*, 72, 2, 153.

Turpin. 1972, *Government Contracts*, Harmondsworth, Chapter 9, pg. 244.

Turpin. 1989, *Government Procurement and Contracts*, Harlow, pg. 73.

¹⁸⁵ See, article 29(4) and 29(a) of the EC Public Works Directive 71/305; Article 26 of EC Public Supplies Directive 77/62.

favour bidders from less developed regions of the country. Dutch procurement law and Danish local government law allowed for the creation of jobs for the long-term unemployed. German rules allowed favourable terms for bidders with a refugee background from the former German lands in Poland, the Soviet Union and Czechoslovakia, to mention only a few.¹⁸⁶

The claim that EU public procurement contributes to the Single European Market is highly questionable.¹⁸⁷ But let us assume for argument's sake that EU public procurement is bearing some sort of contribution and make a distinction between its current contribution and a hypothetical contribution were Member States to utilise public procurement as an instrument to advance directly their country's socio-economic interests without any of the EU procurement restrictions¹⁸⁸ as encountered today. It could still be argued that Member States would work just as hard to produce as much welfare as when bound by EU procurement restrictions. Indeed, they could even be better off especially when it comes to competencies in the field of social policy as they would not have to give up part of their purchasing power to serve European integration aims. For it appears that at EU level in the so called "*fight*" against discrimination, poverty and social exclusion the EU treads very cautiously and recognises the legitimate freedom of Member States in pursuing their social policy goals.¹⁸⁹ And yet, within the same breadth, Member States are constrained when it comes to the use of vital policy tools that have the power to steer a state's social policy agenda as is the case with public procurement. Indeed, public procurement has the potential to serve, "aims and objectives stipulated in the European treaties, such as social cohesion, combating of long-term

¹⁸⁶ See, Trybus, M. 2008, Corporate Social Responsibility, Business Responsibilities for Human Rights and International Law, Paper delivered during the Copenhagen Conference, organised by Copenhagen University and Copenhagen Business School, 6-7 November, Copenhagen University and Copenhagen Business School, Copenhagen.

¹⁸⁷ The discussion in Chapter 2 refers and in particular section 2.8, "*Public Procurement vis-à-vis EU's Free Trade Agenda*".

¹⁸⁸ EU procurement directives, namely Directive 2004/18/EC and Directive 2004/17/EC are stated to be based on Article 53(1) TFEU, Article 59 TFEU and Article 114 TFEU. Arrowsmith and Kunzlik question whether Community social policies that fall within the fields of activity of the EU procurement legislation finds authorisation in such Treaty basis. See, Arrowsmith, S. and Kunzlik, P. 2009, *Social and Environmental Policies in the EC Procurement Law - New Directives and New Directions*, Cambridge University Press, Cambridge.

¹⁸⁹ See discussion in section 3.7.2, "*The EU's social dimension and implementing instruments: an overview*".

unemployment, and, finally, the achievement of acceptable standards of living”.¹⁹⁰ But, because public purchasing can also serve Europe’s internal market aims the latter takes precedence. And so, it is argued, if the contribution of EU public procurement relating to the internal market is highly vague do not such restrictions represent a straightforward socio-economic burden on Member States? For in exchange to the dismantling of the so called *trade barriers* we concurrently erect social barriers by way of restricting Member States’ public purchasing autonomy in the pursuit of their social policies. Does this equate with social justice? Is this in line with Europe’s fundamental constitutional values? If in this counter-argument public procurement freed from EU procurement restrictions appears to potentially offer a better alternative would it not therefore yield a morally preferable social Europe?

The justifying point of law according to Aquinas is the common good.¹⁹¹ However, this should not be interpreted in the utilitarian mode, *the greatest good of the greatest number*, but rather as a shared good where the dignity and rights of each and every member of the community is respected including the equal right to have one’s dignity respected in the exercise of public authority.¹⁹² Moral principles are generally assumed as principles of justice and which in effect underlie the law.¹⁹³ According to Raz¹⁹⁴ the most significant connection between morality and the law is what gives it its intrinsic moral excellence. For the only way for the law to claim intrinsic excellence is to claim that it has legitimate moral authority. But legitimate authority cannot be established by those who have de facto power and legal control. In meeting the conditions of legitimacy according to Raz two criteria need to be fulfilled. The first criterion concerns the “success condition”¹⁹⁵ wherein the authority of the government is derived from its ability or likelihood to succeed in discharging the job. The second legitimacy criterion is related to the “relevance of the needed job”¹⁹⁶ in the sense that the job’s success is

¹⁹⁰ See, Bovis, C. 2006, *EC Public Procurement Case Law and Regulation*, Oxford University Press, Oxford. pgs. 24-25.

¹⁹¹ See, St. Thomas Aquinas. *Summa Theologica I-II Q. 96, art. 1*, <http://www.sacredtexts.com/chr/aquinas/summa/index.htm> [November, 2010].

¹⁹² See, George, R.P. 2008, "Natural Law", *Harvard Journal of Law & Public Policy*, 31, 1, 171-196.

¹⁹³ See comments at footnote 62.

¹⁹⁴ See, Raz, J. 2003, "About morality and the nature of law", *American Journal of Jurisprudence*, 48.

¹⁹⁵ *ibid.* pg. 9.

¹⁹⁶ *ibid.* pg. 9.

“confined to its actions aimed at discharging this job”.¹⁹⁷ In other words those in authority are not endowed with a general authority to do whatever they deem fit. Legitimate authority is hence grounded in the success of the morally sanctioned task. Now were we to subject EU public procurement legislation to the *success condition* and the *relevance of the needed job* condition as specified by Raz we no doubt find that even taken from this dimension EU public procurement falls short of moral ideals.¹⁹⁸

In an endeavour “.....to ensure that decisions are taken as closely as possible to the citizens of the Union”¹⁹⁹ article 5 of the Treaty establishing the European Union and protocol no. 2 establish the principles of subsidiarity and proportionality including a system of monitoring to assess whether action at Community level is justified in the light of the possibilities available at the national, local or regional level. Paragraph 3 of Article 5 TEU holds that,

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.....

Paragraph 4 of Article 5 TEU establishes that, “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” Whilst it has been observed that the principle of subsidiarity has the potential to exert an influential impact on the development of the EU’s social dimension, to date, subsidiarity has been most often concerned with arguments between the EU institutions and the Member States as to who is responsible for action and decision making. The idea of decisions being taken closer to the individual has not fully materialised.²⁰⁰

The debate on poverty²⁰¹ has revealed that poverty is more than a state of hunger or nakedness that relies on whatever remnants are thrown out by the wealthy others. For respect to human

¹⁹⁷ *ibid.* pg. 9.

¹⁹⁸ Such conclusions are based on the discussions so far. For instance Majone (See, Majone, G. 1998, "Europe's 'Democratic Deficit': The Question of Standards", *European Law Journal*, 4, 1, 5-28.) also concurs that efficiency-oriented policies need to be legitimated by results provided that there is an adequate system of accountability. The question of accountability was highlighted in Chapter 2.

¹⁹⁹ See, Article 5 TEU.

²⁰⁰ See, Burchill, R. 2004, "The EU and European Democracy – Social Democracy or Democracy with a Social Dimension?", *Canadian Journal of Law and Jurisprudence*, Vol. XVII, 1, 185-207. pg. 198.

²⁰¹ See discussion in chapter 3.2, “Poverty across the E.U.- A snapshot” and chapter 3.3, “The Nature of Poverty: Definitions Abound”.

dignity is as important as the satisfaction of hunger. Rawls has emphasised the importance of primary goods and Sen has emphasised the importance of capabilities. In their idea of social justice the notion of opportunities plays a pivotal role. And who can negate the fact that public procurement is also essentially concerned with the provision of access to opportunities. But as the current state of affairs reveal, EU public procurement doesn't seem to be improving much the opportunities for SME's. According to a European Commission report²⁰² there was not much change in the share of public contracts awarded to SME's for the period 2005 to 2008. In the period 2006-2008 an estimated 60% of above EU threshold contracts were awarded to SME's which accounted for 33% of the market share in terms of value. Are not these inequalities consistent with Rawls' second principle of justice that relates to the equality principle which includes the *principal of fair equality of opportunity* and the *difference principle* postulating that social and economic inequalities between citizens are to be limited as long as they favour the least well off members of society?²⁰³ Indeed, we now need realise the fact that the economic benefits that the European Single Market reaps do not trickle down as easily as imagined.

For in advancing Europe's theory of social justice we need to reflect and make a distinction between what truly constitutes permissible European moral ideals from those that do not. The European constitution centres on the human person. The value of respect to human dignity identifies with the social conscience of the people of Europe. It also finds its expression through the principle of democracy. The moral debate relating to EU public procurement though largely confined to above EU threshold public procurement requires that it be extended beyond such boundaries. It points towards a re-ordering of Europe's economic and social dimensions. Because the acceptance of Europe's founding values is not only about embracing a compassionate understanding but it's also about living them. The liberation of the poor also calls for the self-liberation manifest in our un-bounded ways of thinking.

²⁰² See, GHK. 2010, *Evaluation of SMES' Access To Public Procurement Markets In The EU*, Brussels. This study is a follow up to an earlier report by the European Commission published in 2007 and which has been cited and referred to in Chapter 2, section 2.8.4, "*Impact on Small and Medium Enterprises*".

²⁰³ For a discussion on Rawls' theory of justice see section 3.6.2, "*Egalitarian Liberal Perspectives*".

3.9 Concluding Remarks

Poverty features as a real problem across Europe. In effect it reveals the depth to the gap limiting European integration aims. From the foregoing discussion in this chapter it could be argued that the poverty of choices and opportunities is more relevant for policy makers than the poverty of income. This has direct implications on the potential impact that public procurement can impart when it comes to reducing poverty. Indeed, public procurement as a vital policy tool that is indissolubly linked to national policies and in particular social policies offers great potential in fulfilling European treaty objectives such as social cohesion, combatting long term unemployment and the achievement of acceptable standards of living. However, in so far as EU public procurement is utilised to promote single market objectives that verge into abstractness²⁰⁴ and seek to promote the greatest good of the greatest number, respect towards the human dignity at the very conceptual level is assigned with subordinate status.

The full realisation of one's humanity wherein the dignity of the human person is accorded full respect transpires to be the common denominator and plays a pivotal role in both Sen's work concerning *capabilities to function* when conceptualising poverty and natural law theory where the attainment of the common good via the flourishing or fulfilment of each person in the community becomes the sole purpose of the State and thus of politics and law. Notwithstanding the pivotal role that respect for the human dignity plays it bears noting that the notion of dignity intricately links to another important issue that cannot be left ignored.....this appertains to culture.

Europe has been described as a State of culture that finds the strengthening of human dignity through its cultural dimension.²⁰⁵ European social models are deeply ingrained into European cultures.²⁰⁶ Habermas contends that the Constitution is a book of culture that defines the people's identity at a given point in history.²⁰⁷ For culture is not a static phenomenon but is

²⁰⁴ To this effect see discussion in chapter 2, in particular section 2.5, "*The Case for or Against Free Trade.*"

²⁰⁵ See, Andò, S. 2003, "Human Rights And The Protection Of Different Cultural Identities", *Mediterranean Journal of Human Rights*, 7, 3, 17-47.

²⁰⁶ See, Joerges, C. and Rödl, F. 2004, '*Social Market Economy' as Europe's Social Model?* Florence.

²⁰⁷ See, Habermas. 2001, *Per una dottrina della Costituzione come scienza della cultura*, Roma. in *ibid.*

subject to regular evolution in response to the circumstances in which a society finds itself.²⁰⁸ Culture is viewed as a programme or blueprint for survival that involves strategies by which social groups maximise their perceived advantage. This programme includes a set of ideas and beliefs also referred to as ideologies so that culture not only contains survival instructions but also an elaboration for their justification, type and purpose.²⁰⁹ People thus, acquire their culture and use it as a device to solve problems. When the integrity of the self or the nation is thought to be under threat or insecure boundaries are set up.²¹⁰

The frontier is both an opening and a closing. All frontiers, including the membrane of living beings, including the frontier of nations, are, at the same time as they are barriers, places of communication and exchange. They are the place of dissociation and association, of separation and articulation.²¹¹

The case of language recognition in the European Union is a classic example exposing how Member States are not indifferent to cultural identities. We thus, must exercise caution before placing all barriers on the same footing. Let us recall at this point the Wood report²¹² and the findings of Geroski,²¹³ Head and Mayer²¹⁴ who attributed market fragmentation in the case of EU public procurement to the diversity in national and regional tastes and that the 1992 single market programme would do little to reduce it. Today, with the benefit of hindsight such findings appear to have proved their point.²¹⁵ Indeed, public procurement as a dynamic policy tool needs also be viewed from its cultural dimension. For only when an acceptable level of European social justice is achieved through the unconstrained recognition of social rights and hence in effect cultural rights can we progress any further.

²⁰⁸ See, Bidney, D. 1967, *Theoretical Anthropology* Second edition, Schocken Press, New York.

²⁰⁹ See, Bullivant, B.M. 1984, *Pluralism: Cultural Maintenance and Evolution*, Multilingual Matters Ltd., Avon.

²¹⁰ See, Peterson, A. and Lupton, D. 1996, *The new public health: Health and self in the age of risk*. Sage, London.

²¹¹ See, Edgar Morin in Bennington G. 1990, "Postal politics and the institution of the nation " in *Nation and Narration*, pg. 121.

²¹² See discussion in chapter 2, section 2.8.3, "*Impact on Cross-Border Procurement*".

²¹³ See discussion in chapter 2, section 2.1, "*Introduction*".

²¹⁴ See discussion in chapter 2, section 2.1, "*Introduction*".

²¹⁵ To this effect see discussion in chapter 2 in particular section 2.8, "*The impact of EU Public Procurement legislation vis-à-vis the EU's Free trade Agenda.*"

Part 2

Closing the Gap

4.0 On the mission of serving the Public: Services of General Interest and Community Law

Chapter Summary

In 1996 the European Commission coined a term, “services of general interest” and claimed that it stood for services that public authorities identify as being of a general interest and subject to specific public service obligations. Accordingly, services of general interest were projected as covering economic and non-economic services. Thus, whilst public authorities perform tasks in the public interest as soon as such activities are deemed as “economic” they transform into services of general economic interest and Community rules on Competition and the internal market apply instantaneously, unless they become subject to the derogation provided by Article 106(2) TFEU. Against a backdrop of internal market tensions and a quest for legal clarity the distinction between economic and non-economic activities poses as a major problem. Nevertheless, captured within the paradigm of the Community’s shared values, a growing proportion of public authority tasks including social services now fall under Community rules on Competition and the internal market.

Two major inter-related difficulties are brought to light. The first revolves around the derivation for defining the scope of a service of general economic interest, the boundaries of which have become increasingly circumscribed. The second, concerns Community actions that are grounded on illusory dichotomous beliefs based on economic v. non-economic services. By drawing on the marketing literature, wherein the notion of services have been profoundly researched, failure to derive with a similar division further confirms that the term is nothing but a label devoid of true meaning. Concepts require clear operational definitions. Europe’s attempts in closing the gap by way of injecting the notion of services of general interest have been mainly unresponsive. The *public interest* function that the EU actively puts into motion draws heavily on aggregative conceptions of the *common good*. It is argued that the underpinning values that should direct Community action need to be guided by a *common good* that seeks to bring about the interdependent and harmonious flourishing or fulfilment of each individual in the community possible through cooperation and coordination in communities.

4.1 Introduction

One of the most contentious issues appertaining to Community law concerns the provision and financing of public services commonly referred to in European Commission terminology as, *Services of General Interest*.¹ Although, Community law does not define the term *Services of General Interest* this was first introduced by the European Commission in 1996.² Accordingly, “[T]his term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.”³ The Commission elevated the notion of *Services of General Interest* by placing it at the heart of the European model of society.⁴ It claimed that services of general interest reflected core European values such as cohesion, solidarity and equal treatment within an open and dynamic market. But in an era of globalisation, constant evolving technological changes, and ever increasing consumer demands, serious concerns on securing the future of these services were expressed.⁵ As such the Commission argued for modernisation at the European level notwithstanding the fact that, “[t]he

¹ On various occasions in its plethora of Communications relating to Services of General Interest the Commission makes a distinction between *Services of General Interest* and *Public service* and notes upon the latter’s ambiguity. (See for an example, COM(2011) 900 final. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Quality Framework for Services of General Interest in Europe*, 20.12.2011, European Commission, Brussels. pg. 4).

The author contends to the contrary in that the ambiguity is specifically located with the term *services of general interest* rather than with the term *public service* as the discussion in this chapter hopes to reveal. Indeed, it is understood that usage of the term *public service* can potentially tighten manoeuvring space at the supranational level with far reaching implications on the liberalisation process. However, for the sake of clarity the discussion in this chapter will maintain usage of the term *services of general interest* and the sub-categories related to this term as referred to by the Commission and which will be further elaborated upon as we proceed with the discussion.

² See, COM(1996) 443 final. *Communication from the Commission - Services of General Interest in Europe*, 11.09.1996, European Commission, Brussels.

³ Ibid. pg. 2. Over the years various definitions to the term *Services of General Interest* underwent various modifications. In one of its more recent Communications the European Commission has defined the term as follows:

Services of General Interest (SGI) are services that public authorities of the member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activitiesand non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organised may be subject to other general Treaty rules, such as the principle of non-discrimination.

See, COM(2011) 900 final. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Quality Framework for Services of General Interest in Europe*, 20.12.2011, European Commission, Brussels. pg. 3.

⁴ See, COM(1996) 443 final. *Communication from the Commission - Services of General Interest in Europe*, 11.09.1996, European Commission, Brussels. section 1, pg. 3.

⁵ Ibid. pg. 1.

economic integration of Europe based on the single market and the cohesion policy **has had** to take on board the issue of general interest at European level.”⁶

Services of General Interest cover a wide spectrum of services and include the multitude of activities associated with the delivery of health care services, education, social services and services within the so called big network industries such as, energy, electricity, gas, postal services, rail transport, air transport, telecommunications and public service broadcasting. Other services include waste management and water supply.

The debate on services of general interest that was initiated through the Green Paper⁷ strongly confirmed the importance of such services as pillars of the European model of society. Indeed, the European Commission issued a multitude of communications in this respect a matter which in itself should not be underestimated. The discussion in the forthcoming section, section 4.2 on, “The European Commission and its plethora of soft law” attempts to highlight such. There have been various moves within the EU in an attempt to configure and elevate Europe’s social dimension. Section 4.3 enquires upon, “Services of General Economic Interest: Forging a bond between European economic efficiency and social cohesion?” This section presents a review of the early 1990s European Court of Justice Cases. Section 4.3.1 delves further into the matter and focuses, “On internal market tensions and concerns.” The discussion then proceeds to bring to the fore various issues which appear to be most problematic when discussing the notion of services of general interest and adopts a multidisciplinary approach. Thus, section 4.4 is on, “Services of General Interest: an endeavour in untangling chaos in the free thinking zone.” Two major focal points are put into perspective. First, the claimed distinction between services of an economic nature vis-à-vis those of a non-economic nature are explored by examining the concept of services through a review of the marketing literature, thus section 4.4.1 is, “On economic versus non-economic services.” The discussion will further focus on the following areas by, “Gaining marketing insights on the nature of services” - section 4.4.1.1, “Gaining marketing insights on the characteristics of services” - section 4.4.1.2 and “Cross cultural behaviour and attitudes on service quality” - section 4.4.1.3. Second, the literature concerning the notion of general interest

⁶ Ibid. pg. 6 (emphasis added).

⁷ See, COM(2003) 270 final. *Green Paper on Services of General Interest*, 21 May 2003, COM(2003) 270final. *Green Paper on Services of General Interest*, 21.5.2003, European Commission, Brussels.

is examined through a review of the public interest literature. Thus, section 4.4.2 discusses, “The public interest: fiction or fact?” Section 4.4.2.1 looks into the, “Public interest – some theoretical reflections.” In an attempt to deepen further and add vision to the understandings relating to the public interest, section 4.4.2.2 is, “On the requirement of the common good-expressing the natural law method” and adopts a philosophical view point based on natural law theory. In its, “Concluding remarks” section 4.5, attempts to consolidate the various issues explored and come up with rational understandings in order to reflect better upon key elements that make up the so claimed ‘European model of society’.

4.2 The European Commission and its plethora of soft law

The European Commission’s first Communication on services of general interest was published way back in 1996.⁸ Since then on a number of occasions various communications⁹ relating to services of general interest were published.¹⁰ Before delving further into the notion of services of

⁸ See, COM(1996) 443 final. *Communication from the Commission - Services of General Interest in Europe*, 11.09.1996, European Commission, Brussels.

⁹ This term is used interchangeably to capture the various forms of communications by the European Commission including, opinions, reports, guidelines, working documents, green papers and white papers. It has been observed that for the various forms of documentation, be it for example, communications, notices, guidelines, the Commission does not necessarily identify with a different type of document but uses them interchangeably. See, Cosma, H. and Whish, R. 2003, "Soft Law in the Field of EU Competition Policy", *European Business*, 14, in Ștefan, O.A. 2008, "European Competition Soft Law in European Courts: A Matter of Hard Principles", *European Law Journal*, 14, 6, 753-772.

¹⁰ See, COM(2000) 580final. *Communication from the Commission - Services of General Interest in Europe*, 20.9.2000, European Commission, Brussels.; Communication from the Commission, Services of general interest in Europe, 2001/C 17/04. 19.1.2001, Official Journal of the European Communities.; COM(2001) 598 final. *Report to the Laeken European Council - Services of General Interest*, 17.10.2001, European Commission, Brussels.; COM(2002) 280 final. *Report from the Commission on the status of work on the guidelines for state aid and services of general economic interest*, 5.6.2002, European Commission, Brussels.; COM(2002) 636 final. *Report from the Commission on the state of play in the work on the guidelines for state aid and services of general economic interest (SGEIs)*, 27.11.2002, European Commission, Brussels.; COM(2003) 270final. *Green Paper on Services of General Interest*, 21.5.2003, European Commission, Brussels.; COM(2004) 374 final. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - White Paper on Services of General Interest*, 12.5.2004, European Commission, Brussels.; COM(2006) 177 final. *Communication from the Commission - Implementing the Community Lisbon Programme: Social services of general interest in the European Union*, 26.4.2006, European Commission, Brussels.; COM(2007) 725 final. *Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Accompanying the Communication on "A single market for 21st century Europe" Services of general interest, including social services of general interest: a new European commitment*, 20.11.2007, European Commission, Brussels.; SEC(2008) 2179. *Commission Staff Working Document - Biennial Report on social services of general interest*, 2.7.2008, European Commission, Brussels.; SEC(2010) 1284 final. *Commission Staff Working Document – Second Biennial Report on social services of general interest*, 22.10.2010, European Commission, Brussels.; COM(2011) 146 final. *Communication from the Commission to the*

general interest the significance of *Commission communications* commonly referred to by the academia as ‘soft law’ bears noting and thus merits some elaboration.

Article 288 TFEU on the legal acts of the Union clearly states that, “[R]ecommendations and opinions shall have no binding force.” However, this is not to be interpreted as being deprived of legal effects. In the *Dansk Rørindustri* case that was brought as an appeal in front of the European Courts of Justice (hereinafter referred to as ECJ) requesting to set aside several Court of First Instance¹¹ decisions for the annulment of a Commission decision it was noted that,

The Court has already held in a judgment concerning internal measures adopted by the administration, that although those measures may not be regarded as rules of law which the administration is always **bound** to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the **principle of equal treatment**. Such measures therefore constitute a general act.¹²

Further,

In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the [Commission] imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the **general principles of law**, such as **equal treatment or the protection of legitimate expectations**. It cannot therefore be excluded that on certain conditions and depending on their conduct, such rules of conduct, which are of general application, **may produce legal effects**.¹³

In the *Grimaldi* case it was held that:

[N]ational courts are **bound** to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national

European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Reform of the EU State Aid Rules on Services of General Economic Interest, 23.3.2011, European Commission, Brussels.; COM(2011) 900 final. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Quality Framework for Services of General Interest in Europe*, 20.12.2011, European Commission, Brussels.; 2012/21/EU. *Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest*, 11.01.2012, Official Journal of the European Union.

¹¹ On 1 December 2009 the Court of First Instance was renamed the General Court.

¹² See, Joined Cases C-189, 202, 205, 208 and 213/02. *Dansk Rørindustri and others v Commission* [2005] ECR I-05425 paragraph 209 with reference to C-171/00. *P Libéros v. Commission* [2002] ECR I-451C-171/00, paragraph 35 (emphasis added).

¹³ See, Joined Cases C-189, 202, 205, 208 and 213/02. *Dansk Rørindustri and others v Commission* [2005] ECR I-05425 paragraph 211 (emphasis added).

measures adopted in order to implement them or where they are designed to supplement binding Community provisions.¹⁴

Thus, these “soft”¹⁵ guiding and non binding instruments produce substantial indirect external effects and derive their validity through the recognition of general EU legal principles, namely, equal treatment, the protection of legitimate expectations¹⁶ and the principle of legal certainty.¹⁷ During the last two decades it has been noted that these instruments are featuring in European case law at an increasing rate.¹⁸

4.3 Services of General Economic Interest: Forging a bond between European economic efficiency and social cohesion?

The term services of general economic interest originated with the Treaty of Rome in 1957 finding its place under Article 90(2) EEC.¹⁹ Article 90 EEC, now article 106 TFEU is a key provision that takes into account the intersection between the public sphere and the economic sphere. In essence Article 106 TFEU provides a special regime in respect of both the free movement and competition rules for public monopolies and undertakings that have been granted ‘special and exclusive rights’.²⁰ In order to ensure that such rules and in particular the rules on

¹⁴ See, Hofmann, H.C.H. 2006, "Negotiated and Non-Negotiated Administrative Rule-Making: The Example Of EC Competition Policy", *Common Market Law Review*, 43, paragraph 18 (emphasis added).

¹⁵ Hoffman argues that the term “soft law” is not precise in view of the substantial indirect legal effects of such communications which the author refers to as administrative guidelines. See, Hofmann, H.C.H. 2006, "Negotiated and Non-Negotiated Administrative Rule-Making: The Example Of EC Competition Policy", *Common Market Law Review*, 43, 153-178.

¹⁶ See citations above, op. cit (n. 13) paragraphs 209 and 211.

¹⁷ See, Hofmann, H.C.H. 2006, "Negotiated and Non-Negotiated Administrative Rule-Making: The Example Of EC Competition Policy", *Common Market Law Review*, 43, paragraph 18, in particular section 3.1.3. *Legal effect*. Hofmann notes that the principle of legal certainty is a more general legal principle cited in cases and as a fundamental expression of the rule of law it is strongly protected by the ECJ.

¹⁸ Following a quantitative analysis on the use of soft law instruments in ECJ and CFI competition case law covering the period 2000 – 2006, it transpired that the European Courts were making increasing use of such instruments. See, Ștefan, O.A. 2008, "European Competition Soft Law in European Courts: A Matter of Hard Principles", *European Law Journal*, 14, 6, 753-772.

¹⁹ Article 90(2) EEC has now become Article 106(2) TFEU.

²⁰ For an in depth examination of Article 106 TFEU see example, Sauter, W. and Schepel, H. 2009, *State and Market in the European Union Law: The Public and Private Spheres of the Internal Market before the EU courts*, Cambridge University Press, Cambridge. pgs. 142 – 192; Gareth, D. 2009, "What does Article 86 actually do?" in *The Changing Legal Framework for Services of General Interest* T.M.C Asser Press, The Netherlands.pgs. 51-67;

competition do not obstruct the performance of particular tasks in the pursuit of public interest goals, Article 106(2) TFEU provides a derogation. This Article reads as follows:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

It is up to the Commission to, “ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.”²¹

Before the 1990s no friction emanated between the application of Competition rules to activities conducted by the State.²² But the scenario since then changed. The early 1990s was characterised by the process of liberalisation in the network industries²³ and gave way to crucial European Court of Justice Rulings referred under Article 267 TFEU. The following attempts to put into context the most salient issues deriving from these early 1990 cases.

In order for EU Competition law to apply an entity needs to be engaged in an economic activity. Thus, in the Klaus Höfner and Fritz Elser (1991) case²⁴ at paragraph 21 the Court held that, “.....in the context of competition law.....the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.....”. In principle the Competition rules as provided for by articles 101 TFEU and 102 TFEU apply to undertakings. Therefore, as soon as an entity is classified as an undertaking the Competition rules come immediately into force. When it comes to services of general economic interest, Sauter succinctly notes, “[S]ervices of general economic interest (SGEI) are an EU legal category that provides an exception to the competition rules for the proportionate

Jones, A. and Sufrin, B. 2010, *EU Competition Law: Text, Cases & Materials*, Fourth, Oxford University Press, Oxford. pgs. 572-620.

²¹ Article 106(3) TFEU refers.

²² See, Jones, A. and Sufrin, B. 2010, *EU Competition Law: Text, Cases & Materials*, Fourth, Oxford University Press, Oxford. pgs. 563-564.

²³ To this effect see discussion in chapter 1, section 1.2, “*The liberalisation of the Network Industries as an illustration of the European Union’s dogmatic approach to economic integration*”.

²⁴ See, Case C-41/90. Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECR I-01979.

pursuit of legitimate public interest goals by private undertakings.”²⁵ Such an exception is made possible through the application of Article 106(2) TFEU.

Nevertheless, measures undertaken by Member States are not to violate the anti discrimination provisions, the competition rules and the rules on state aid. In this respect article 106(1) TFEU holds that,

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

The European Court of Justice’s interpretation of this article as arrived to through the early 1990 Cases suggest that Member States need to tread with caution when granting monopoly rights by way of special or exclusive rights as this may result in a violation of the competition rules. In the Telecommunications terminal equipment case (1991)²⁶ France challenged Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (Official Journal 1988 L 131, p. 73). It alleged that the Commission lacked the powers to adopt the directive on the basis of Article 106(3) TFEU. Further, as part of its plea the French government requested that Article 2 of Directive 88/301/EEC be annulled. In this respect this Article held that Member States which have granted special or exclusive rights to undertakings for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment were to ensure that such rights were withdrawn.

In its analysis the Court interpreted the notion of exclusive rights in the light of Articles 2 and 3 EEC²⁷ which, “set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted”.²⁸ Accordingly, the holding of exclusive rights in the

²⁵ See, Sauter, W. 2008, "Services of general economic interest and universal service in EU law", *European Law Review*, 33, 2, 167-193. pg. 167.

²⁶ See, Case C-202/88. French Republic v Commission of the European Communities [1991]ECR I-01223

²⁷ Articles 2 and 3 EEC were replaced by Articles 2 and 3 EC. Article 2 EC has now been repealed and replaced, in substance, by Article 3 TEU. Article 3 EC paragraph 1 has now been repealed and replaced, in substance, by Articles 3 to 6 TFEU.

²⁸ See paragraph 41 of the Judgment, Case C-202/88. French Republic v Commission of the European Communities [1991]ECR I-01223.

telecommunications sector was determined by the Court as capable of restricting intra-Community trade and thus upheld Article 2 of Commission Directive 88/301/EEC of 16 May 1988 on the withdrawal of such exclusive rights.²⁹ However, the Court declared as void the Commission's decision for the withdrawal of special rights given that the Commission failed to produce justifications for such an obligation as it did not elaborate on the type of special rights involved or in what respect such special rights infringed upon Treaty provisions.³⁰

In a similar case Spain, Belgium and Italy challenged Directive 90/388/EEC of 28 June 1990 (OJ 1990L 192, p.10) on competition in the markets for telecommunication services and requested its annulment.³¹ The Court rejected appellants claim for the holding of exclusive rights.³² In the *Régie des Télégraphes et des Téléphones (RTT)* (1991) case³³ the Court held that an abuse of Article 102 TFEU is committed when an undertaking holding a dominant position extends the monopoly by its own conduct without any objective necessity by way of reserving for itself ancillary activity that could be carried out by other undertakings.³⁴ The Court also pointed out that where the extension of the monopoly results from a State measure without any objective justification this constitutes an infringement of Article 106 TFEU in conjunction with Article 102 TFEU.³⁵

In the *Klaus Höfner and Fritz Elser* (1991) case³⁶ the Court acknowledged that the holding of an exclusive right created a dominant position and that this was not incompatible with the Treaty but in the case at issue it led to an *unavoidable abuse*.³⁷ The mere fact that the entity enjoying the

²⁹ Ibid. Case C-202/88, see paragraphs 31 – 44.

³⁰ Ibid. Case C-202/88, see paragraphs 45-47.

³¹ See, Joined cases C-271/90, C-281/90 and C-289/90. Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities [1992] ECR I-05833.

³² Ibid. See paragraphs 36-38.

³³ See, Case C-18/88. *Régie des télégraphes et des téléphones v GB-Inno-BM SA*. [1991] ECR I-05941

³⁴ Ibid. Case C-18/88, paragraphs 18 and 19.

³⁵ Ibid. Case C-18/88, paragraphs 21 and 24.

³⁶ See, Case C-41/90. *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979.

³⁷ See, Case C-41/90. *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979 paragraphs 27-29.

exclusive right was incapable of satisfying the demand appertaining to the exclusivity resulted into an automatic abuse of its dominant position and thus incompatible with Article 102 TFEU. In the ERT (1991) case³⁸ the Greek government granted ERT, a public undertaking, exclusive rights in the matter of television and radio broadcasting.

Following an assessment of the case at issue in its judgment the Court held as follows:

37..... it should be observed that Article 90(1)³⁹ of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86⁴⁰ of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes.

38 The reply to the national court must therefore be that Article 90(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it.⁴¹

In the *Merci* Case (1991)⁴² the Court elaborated further on this issue when it noted that, “such rights are liable to create a situation in which that undertaking is *induced* to commit such abuses.”⁴³ Given such rationale it could be argued that in effect any dominant position naturally induces an undertaking liable to behaviour that is not conducive in competitive markets.⁴⁴

As it transpires from the jurisprudence of the early 1990s discussed above it could be observed that there were two major issues at play. On one hand, one finds in force vigorous EU policies

³⁸ See, Case C-260/89. *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-02925.

³⁹ Article 90(1) EEC has now become Article 106(1) TFEU.

⁴⁰ Article 86 EEC has now become Article 102 TFEU.

⁴¹ See, Case C-260/89. *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-02925 paragraphs 37 and 38.

⁴² See, Case C-179/90. *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-05889

⁴³ See, Case C-179/90. *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-05889 paragraph 17 wherein the Court is referring to judgment in Case C-260/89 ERT at paragraph 37 (emphasis added).

⁴⁴ See, Jones, A. and Sufrin, B. 2010, *EU Competition Law: Text, Cases & Materials*, Fourth, Oxford University Press, Oxford.pg. 583.

focused on increasing competitiveness and the breaking down of trade barriers. Such policies generally found backing by the Court. On the other, tensions arising amongst Member States as the forceful efforts towards liberalisation meant the partial loss of their sovereignty when creating legal monopolies.⁴⁵ It has been observed that despite the Commission's legitimate right to enact directives or decisions such powers have rarely been used since then.⁴⁶ The European Parliament and Council have strongly objected to the use of such instruments as they basically allowed the Commission to legislate single-handedly depriving democratic legitimacy.⁴⁷

4.3.1 On internal market tensions and concerns

It has been argued that the concept of services of general economic interest has come largely as a result of,

.....negative integration processes. In particular the use of Article [106(1) TFEU] to attack public monopolies through the national courts and the use of Article [106(2) TFEU] to defend services of general interest from the full rigour of the competition and free market rules.⁴⁸

In effect, political tensions arising between those who favour a social solidarity based approach associated in particular with France manifest in the notion of 'service public' and those who favour a market based approach, regarded as 'Anglo-Saxon' commonly associated with the United Kingdom have played a major influential role when it comes to broadening the internal market dimension.

Thirty years following the introduction of Article 90 EEC (now Article 106 TFEU) the Treaty of Amsterdam in 1997 introduced a new Article 16 to the EC treaty (now Article 14 TFEU). This

⁴⁵ That Member States have not retained complete sovereignty in relation to the creation of legal monopolies was also noted by Edward, D. and Hoskins, S. 1995, "Art. 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference 1995 32 CML Review 157, 160 ", *Common Market Law Review*, 157, 160, in Jones, A. and Sufrin, B. 2010, *EU Competition Law: Text, Cases & Materials*, Fourth, Oxford University Press, Oxford. pg. 578.

⁴⁶ See, Sauter, W. 2008, "Services of general economic interest and universal service in EU law", *European Law Review*, 33, 2, 167-193. pg. 168.

⁴⁷ Ibid.

⁴⁸ See, Szyszczak, E. 2007, *The Regulation of the State in Competitive Markets in the EU*, Hart Publishing Hart Publishing, Oxford. in Jones, A. and Sufrin, B. 2010, *EU Competition Law: Text, Cases & Materials*, Fourth, Oxford University Press, Oxford.pg. 626.

article attempted to instil a sound legal basis to the notion of *service public* but was characterised by the French senate as a mere “consolation prize”.⁴⁹

Pursuant to Article 14 TFEU⁵⁰ services of general economic interest occupy a place in the shared values of the Union as well as a role in promoting social and territorial cohesion. Protocol (No 26) elaborates further on the shared values of the Union with respect to services of general economic interest within the meaning of Article 14 TFEU. Further, in line with Article 14 TFEU, the notion of *service public* is also reflected in Article 36 of the Charter on Fundamental Rights which is headed under Title IV, Solidarity.⁵¹ This article does not create a new right but sets out the principle of respect by the Union for the access to services of general economic interest as provided for by national laws and practices.

The ratification of the Lisbon Treaty 2009, which has been looked upon by some as pro-solidarity in contrast to its previous pro-economic focus of European integration,⁵² included a

⁴⁹ See, Hubert Haenel, *Rapport d'information fait au nom de la délégation pour l'Union européenne sur les services d'intérêt général en Europe*, No.82 (November 2000), p.20, cited in Baquero Cruz, “Beyond Competition: Services of General Interest and European Community Law” in G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity*(Oxford : OUP, 2005), pp.169 *et seq.* , p.177. in Sauter, W. 2008, “Services of general economic interest and universal service in EU law”, *European Law Review*, 33, 2, 167-193. pg.171.

⁵⁰ Article 14 TFEU headed under Part One – Principles, Title II - Provisions having general application of the Treaty on the Functioning of the European Union states as follows:

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

⁵¹ Article 36 of the Charter of Fundamental Rights of the European Union on “Access to services of general economic interest” reads as follows:

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

⁵² See, Spiegel Online. *A Less ‘Anglo-Saxon’ EU: Sarkozy Scraps Competition Clause from New Treaty*, <http://www.spiegel.de/international/europe/0,1518,490136,00.html>; Ross, M. 2009, “A healthy approach to services of general economic interest? The BUPA judgement of the Court of First Instance (2009) 34 E.L. Rev. 134”, *European Law Review*, 34, 134, in Barton, R. 2012, “Social services of general interest: the case for greater harmonisation of the competition and public procurement rules”, *European Law Review*, 584.

new legal basis for legislation that was added to Article 14 TFEU. This new addition reads as follows:

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of the Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Therefore, in addition to article 106(3) TFEU which empowers the Commission to adopt directives with respect to services of general economic interest concurrently article 14 TFEU provides a further legal bases for legislation based on co-decision of the European Parliament and the Council, a matter which has been regarded by Sauter (2008) as increasing article 14 TFEU's ambiguity.⁵³ Further, the dropping of reference to undistorted competition previously found in article 3(1)(g) EC⁵⁴ and relocated to Protocol (No.27) on the Internal Market and Competition has been interpreted as France's attempts in giving the European Treaty a less "Anglo-Saxon" flavour.⁵⁵ France's rejection of the constitution in 2005 was for reasons that included a perceived lack of democratic accountability and the threat they considered it posed to the European social model.⁵⁶

4.4 Services of General Interest: an endeavour in untangling chaos in the free thinking zone

This section endeavours to capture a much broader and explanatory map by seeking further understandings through the conceptual lens as posited by other disciplines. In doing so it is hoped that by letting go bounded ways of thinking and tread through terrain that perhaps may not always be so familiar one would be in a better position to engage into practical reasonableness⁵⁷ and hence distinguish sound from unsound practical thinking.

⁵³ See, Sauter, W. 2008, "Services of general economic interest and universal service in EU law", *European Law Review*, 33, 2, 167-193.

⁵⁴ Article 3 EC paragraph 1 has now been repealed and replaced, in substance, by Articles 3 to 6 TFEU.

⁵⁵ See, Spiegel Online. *A Less 'Anglo-Saxon' EU: Sarkozy Scraps Competition Clause from New Treaty* <http://www.spiegel.de/international/europe/0,1518,490136,00.html>

⁵⁶ See, Civitas, E.F. *The Treaty of Lisbon (2007)*, <http://www.civitas.org.uk/eufacts/FSTREAT/TR6.htm>

⁵⁷ On practical reasonableness refer to discussion in chapter 3, more specifically section 3.4.1. "Morality in Natural Law Theory" and section 3.4.2, "Practical Reasonableness: distinguishing sound from unsound practical thinking."

4.4.1 On economic versus non-economic services

The term *services of general interest* attempts to cover both economic and non-economic services.⁵⁸ Whilst, Community law does not define the term it is up to the Member States to define and fulfil missions of services of general interest, Community rules are applicable only in cases where the activities are economic and trade between Member States is affected. It is argued herein that the notion of services of general interest encompasses two major interrelated difficulties.

The first difficulty revolves around the derivation of the definition. Where in effect is the competence to define services of general economic interest actually placed? Because if on one hand we have public authorities' deciding upon their nature and scope and on the other the Community frames the principles and conditions for their operation, it therefore follows that,

the definition created by Member States has to be in accordance with Community law. Thus, it seems that the two principles are in conflict with one another and it may be questioned where the competence to define actually is situated, at the Community level or at the Member State level – or somewhere in between.⁵⁹

And matters become even more compounded by the fact that a distinction needs to be drawn between economic and non-economic services in view of them being subject to different provisions of the Treaty. This is where the second major difficulty lies and which the author contends is the grass root to the problem. Indeed, whilst the quest for legal clarity has and continues to accrue along the years⁶⁰ “the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance.”⁶¹ Sure, they even now extend into the remit of social services as “a growing proportion of social services in the European Union now fall under the Community rules on competition and the internal market, insofar as they can be considered economic

⁵⁸ See, COM(2011) 900 final. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Quality Framework for Services of General Interest in Europe*, 20.12.2011, European Commission, Brussels. pg. 3-4.

⁵⁹ Neergaard, U. 2009, "Services of general economic interest: the nature of the beast" in *The changing legal framework for services of general interest in Europe*, T.M.C Asser Press, The Netherlands. pg. 37.

⁶⁰ To this effect see op. cit. (n.10).

⁶¹ See, COM(2003) 270 final. *Green Paper on Services of General Interest*, 21 May 2003, pg. 14.

activities.”⁶² However, as the Commission highlights, this is not to be interpreted as a consequence of EU policies. Member States themselves opened up social services to the market in response to the evolving needs or as the Commission puts it in response to *national modernisation processes*.⁶³

Do we really believe we can demarcate services of general interest on a simple dichotomy based on economic v. non-economic characteristics? Even the Commission argued that whilst in practice, “..... in most cases of services of general interest this distinction does not create any problems. *However, the abstract definition of “non economic” service has proven to be very difficult.*”⁶⁴ So when the Commission was asked to produce a priori list of non-economic activities they argued that in view of the fact that the range of services on a market evolve over time and are subject to technological, economic and societal change, this makes the production of a definitive list unfeasible, although, “a list of examples can of course be drawn up....”⁶⁵ and that we should take as our measure of comfort!!

In essence all this exposes the depth if any of the “*concept*” we are dealing with. In actual fact concepts cannot be construed as is the case with services of general interest in such a way so as to accommodate Community wide agendas. For what we are confronted with appears to be nothing but a label which the Commission has attempted to insert depth to by making an arbitrary dichotomous distinction by way of economic v. non-economic services, and which the jurisprudence further took up at great lengths for its refinement even though the General Court was quite clear on the fact that there is no clear and precise regulatory definition of the concept of services of general economic interest.⁶⁶ This perhaps may explain in part the inconsistencies and

⁶² See, SEC(2008) 2179. *Commission Staff Working Document - Biennial Report on social services of general interest*, 2.7.2008, European Commission, Brussels. pg. 70.

⁶³ See, COM(2006) 177 final. *Communication from the Commission - Implementing the Community Lisbon Programme: Social services of general interest in the European Union*, 26.4.2006, European Commission, Brussels., and SEC(2008) 2179. *Commission Staff Working Document - Biennial Report on social services of general interest*, 2.7.2008, European Commission, Brussels.

⁶⁴ See, COM(2001) 598 final. *Report to the Laeken European Council - Services of General Interest*, 17.10.2001, European Commission, Brussels. pg. 11. (Emphasis added).

⁶⁵ See, COM(2001) 598 final. *Report to the Laeken European Council - Services of General Interest*, 17.10.2001, European Commission, Brussels. pg. 11.

⁶⁶ See, Case T-289/03. *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities* [2008] ECR II-00081.

lack of clarity that delude this label. For if concepts are to be of any significance they must have clear operational definitions. In the absence of such, we have opted to get lost in intense deliberations that attempt to demarcate the lines of an illusionary concept, construe arbitrary doctrinal categories and act as if such classifications bore significance. It is a *label* that we confront that is devoid of true meaning.

In order to derive with better understandings the following discussion draws upon the knowledge gained by others.....we need not re-invent the wheel. In this respect the concept of services will be examined from the marketing perspective for it is an area that has been profoundly researched by the marketing academia. At no point in the marketing literature do we come across such a thing that categorises the concept of services on the basis of an economic v. non-economic distinction.⁶⁷ The following attempts to discuss the nature of services, their characterising features and their impact on service quality from the marketing perspective with a view that attempts to enrich and enlighten further our understandings.

4.4.1.1 Gaining marketing insights on the nature of services

Marketing is a “pervasive societal activity that goes considerably beyond the selling of toothpaste, soap and steel.”⁶⁸ For some marketing may bear negative connotations and may think of it as an immoral activity. Indeed, Plato, Aristotle, Thomas Aquinas and other philosophers have thought of merchants as unproductive and acquisitive. But marketing goes far beyond such reasoning – “it is the concept of sensitively serving and satisfying human needs.”⁶⁹ It offers great opportunities to expand our thinking and to apply its knowledge that ties economic activity to a higher social purpose.

⁶⁷ It bears acknowledging the fact that the notion of ‘*public services*’ in French public law provides a clear distinction between, “*public services fulfilling sovereign functions* and *public services providing public goods* or *market public services* or between *constitutional public services* and the others.....That notion, following a French tradition that dates back well before the Revolution, although it now operates by different means and in a different context, very definitely helps to reinforce the role and the legitimacy of central authority and the State as compared with those of private initiative and freedom.” See, Picard, E. 1998, “Citizenship, Fundamental Rights, and Public Services” in *Public Services and Citizenship in European Law*, Clarendon Press, Oxford.pg. 92.

⁶⁸ See, Kotler, P. and Levy, S.J. 1969, “Broadening the Concept of Marketing”, *J.Market.*, 33, 1, 10-15. pg. 10.

⁶⁹ Ibid. pg. 52.

Marketing has been defined as, “the effective management by an organisation of its exchange relations with its various markets and publics.”⁷⁰ The *exchange* paradigm sits at the very heart of the marketing discipline.⁷¹ *Exchange* can be viewed as a process and when successful all parties involved are better off. In general three types of *exchange* have been identified,⁷² *restricted exchange*, *generalised exchange* and *complex exchange*. The following is based on the discussion presented by Bagozzi.⁷³

Restricted exchange involves the reciprocal exchange between two parties and encompasses two main characteristics. It is first concerned with maintaining equality in that no attempt in gaining advantage at the expense of the other is made. Secondly, it must involve a *quid pro quo* notion that is, acquiring something of value in exchange for something of value.⁷⁴

Generalized exchange is characterised by univocal reciprocal relationships involving at least three actors wherein, “the actors do not benefit each other directly but only indirectly.”⁷⁵ In such

⁷⁰ See, Kotler, P. and Clarke, R.N. 1987, *Marketing for Health Care Organisations* Prentice-Hall, Englewood Cliffs, New Jersey. pg. ix.

⁷¹ See, Alderson, W. 1957, *Marketing Behaviour and Executive Action*, Irwin, Homewood, IL.; Anonymous 1965;., "A Statement of Marketing Philosophy", *Journal of Marketing (pre-1986)*, 29, 000001, 43-43.; Kotler, P. 1972, "A generic concept of marketing", *Journal of Marketing*, 36, April, 46-54.; Kotler, P. 1972, *Marketing Management* 2nd, Prentice-Hall, Englewood Cliffs, N.J. pg. 12; Enis, B.M. 1974, *Marketing Principles*, Good Year Publishing Co., Pacific Palisades, Calif.pg. 21; McCarthy, E.J. 1975, *Basic marketing*, 5th, Richard D. Irwin, Homewood, Ill.; Houston, F.S. 1987, "Marketing and Exchange", *Journal of Marketing*, 51, October, 3-18.; Eggert, A. and Ulaga, W. 2002, "Customer-perceived value: a substitute for satisfaction in business markets? ", *Journal of Business and Industrial Marketing*, 17, 2/3, 107.pg. 107; Keith, J.E., Lee, D.J. and Lee, R.G. 2004, "The effect of relational exchange between the service provider and the customer on the customer's perception of value ", *Journal of Relationship Marketing*, 3, 1, 3-33.

⁷² See, Bagozzi, R.P. 1975, "Marketing as Exchange", *J.Market.*, 39, 4, 32-39.

⁷³ Ibid.

⁷⁴ It is worth noting the similarities of the logic contained in the *Restricted Exchange* approach and that adopted by the Court in cases involving the financing of services of general economic interest. For example, the notion of maintaining equality was adopted in Case T-46/97. SIC - Sociedade Independente de Comunicação SA v Commission of the European Communities [2000] ECR II-02125 where in its analysis the Court examined whether a private operator of comparable size to the public body would have carried out the operation in question under the same conditions. The *quid pro quo* logic was adopted by Mr Advocate General Jacobs in Case C-126/01. Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA [2003] ECR I-13769.

“The distinction between restricted and generalized exchange was first made by anthropologist Levi-Strauss, C. 1969, *The Elementary Structure of Kinship* Beacon Press, Boston.. An extended critical analysis of restricted and generalised exchange may be found in Ekeh, P.P. 1974, *Social Exchange Theory: The Two Traditions* Harvard University Press, Cambridge, Mass. Chapter 3 in Bagozzi, R. op.cit. (n.74) pg. 32.

⁷⁵ See, Ekeh, P.P. 1974, *Social Exchange Theory: The Two Traditions* Harvard University Press, Cambridge, Mass. Chapter 3, pgs 48, 50, in Bagozzi, R. op.cit. (n. 74) pg.33.

an exchange each actor gives to another but receives from someone other than to whom they gave.

Complex exchange involves at least three parties organised in an interconnecting web of relationships with at least one social actor involved in a direct exchange. Such exchanges involve for the most part conscious systems of social and economic relationships.

It has been argued that covert coordination of generalised and complex exchanges may also manifest in relatively unconscious systems of social and economic relationships. This is akin to what Adam Smith referred to as the “invisible hand”⁷⁶ wherein such exchanges are driven in the pursuit of self-interest. However, this presents a departure from the exchange tradition developed by Levi-Strauss who does not encompass an individualistic approach but one that is “built on social, collectivist assumptions associated with generalised exchange”.⁷⁷

Various media of exchange such as power, money and persuasion serve as vehicles that control the link in the exchange process.⁷⁸ Products and services are also considered as media of exchange. Given the multivariate nature of the media in the exchange process an intricate social system of behavioural relationships which go well beyond the visible exchange of products and money are involved. For exchanges hold meanings. “Human behaviour is a conjunction of meaning with action and reaction.”⁷⁹ Behaviour is not arbitrary but purposeful and intentional. And the explanation for such behaviour lies “in the social and psychological significance of the experiences, feelings and meanings of the parties in the exchange.”⁸⁰ Bagozzi identifies three main classes of meanings, *utilitarian*, *symbolic* and *mixed*.

⁷⁶ See, Nord, W. 1974, "Adam Smith and Contemporary Social Exchange Theory ", *The American Journal of Economics and Sociology*, 32, October, 421-436.in Bagozzi, R. op. cit. (n.74) pg.34.

⁷⁷ See, Levi-Strauss, C. 1969, *The Elementary Structure of Kinship* Beacon Press, Boston.and Ekeh, P.P. 1974, *Social Exchange Theory: The Two Traditions* Harvard University Press, Cambridge, Mass.Chapters 3 and 4, in Bagozzi, R. op.cit. (n.74) pg.35.

⁷⁸ In effect public procurement may be considered as another example acting as one of media in the exchange process.

⁷⁹ Op.cit. (n.74) pg. 35.

⁸⁰ Ibid. pg. 36

The **utilitarian** meaning of exchange also referred to as *economic* exchange assumes that:

1. Human behaviour is driven by rational motives,
2. Individuals are driven to achieve maximum satisfaction in the exchange,
3. Individuals have access to complete information on the alternatives available in the exchange,
4. Exchanges are relatively free from external influences.

In essence human behaviour is guided by that action which is perceived to lead to the most beneficial consequences.

The **symbolic** meaning of exchange acknowledges that "...[p]eople buy things not only for what they can do, but also for what they mean."⁸¹ The **mixed** exchange process incorporates both utilitarian and symbolic meanings of exchanges and thus may include the following assumptions:

1. Behaviour is not always rational,
2. Behaviour is motivated by tangible and intangible rewards, internal and external forces,
3. Individuals engage in utilitarian and symbolic exchanges involving psychological and social aspects,
4. Access to information may not always be complete but one proceeds in the best manner possible and at times makes unconscious calculations of the costs and benefits that are linked to the exchange,
5. Although striving for maximisation of profits individuals often resort to less than optimum gains in the exchange,
6. Exchanges are subject to a host of individual and social constraints.

When it comes to social relationships as in the case with individuals receiving '*free*' services the question as to whether *exchanges* of the type mentioned above occur may arise. One may argue that the recipient of the service is not a buyer and that there is no exchange of values with the service provider. However, Bagozzi strongly asserts that *exchanges* in social relationships do indeed occur,

⁸¹ See, Levy, S.J. 1959, "Symbols for sale ", *Harvard Business Review*, 37, July-August, 117-119.in Bagozzi R. op.cit. (n. 74) pg.36.

.....but the exchange is not the simple *quid pro quo* notion characteristic of most economic exchanges. Rather, social marketing⁸² relationships exhibit what may be called generalised or complex exchanges. They involve the symbolic transfer of both tangible and intangible entities, and they invoke various media to influence such exchanges.⁸³

Hence, as Bagozzi contends there is “a mutual exchange between society and the needy separated, in part, by the passage of time.”⁸⁴ Further, it is noted that there are other tangible exchanges and forces that come into play and “depending on their balance, give it stability or promote change.”⁸⁵

4.4.1.2 Gaining marketing insights on the characteristics of services

The distinction between services and goods appear to be clear cut in everyday parlance. However, the apparent disagreement that is found in the marketing literature on the characteristics that distinguish this core concept leaves it undefined. From the 1980s onwards four distinctive characteristics were widely observable and used by marketers when designing marketing strategies: intangibility, heterogeneity, inseparability and perishability.

⁸² On the notion of social marketing Bagozzi notes that this does not refer to the mere use or application of marketing techniques or skills but its meaning is to be found in the unique problems that it confronts and which may cut right through any subject matter or discipline. In this respect Bagozzi proceeds from the observations made by Popper, the philosopher of science.

The belief that there is such a thing as physics, or biology, or archaeology, and that these “studies” or “disciplines” are distinguishable by the subject matter which they investigate, appears to me to be a residue from the time when one believed that a theory had to proceed from a definition of its own subject matter. But subject matter, or kinds of things, do not, I hold, constitute a basis for distinguishing disciplines. Disciplines are distinguished partly for historical reasons and reasons of administrative convenience (such as the organisation of teaching and of appointments), and partly because the theories which we construct to solve our problems have a tendency to grow into unified systems. But all this classification and distinction is a comparatively unimportant and superficial affair. We are not students of some subject matter but students of problems. And problems may cut right across the borders of any subject matter or discipline.

See, Popper, K.R. 1963, *Conjectures and Refutations*, Harper & Row, New York. pg. 67 in op. cit. (n.74) pg. 37.

⁸³ See, Op.cit. (n.74) pg. 38.

⁸⁴ See, op.cit. (n.74) pg. 39.

⁸⁵ Ibid.

Services are **intangible**.⁸⁶ Though they can be purchased and sold they cannot drop on your foot.⁸⁷ In essence, services cannot be seen, tasted, felt, heard or smelled before they are produced.⁸⁸ In view of the intangible character of services consumers are susceptible to relatively higher levels of uncertainty in buying decisions and hence their overall perception forms an important aspect of the service experience. In effect, services have been viewed as processes the outcome of which forms a critical part that is experienced by the consumer.⁸⁹ With physical goods evaluative judgments are generally easier to make given their visible attributes. Consumers consume the outcome of the production process, "the use of a service can be characterised as **process** consumption as opposed to **outcome** consumption."⁹⁰ As such marketers have been highly concerned with the issue of how consumers perceive services and evaluate service quality.⁹¹

Services, in particular those with a high labour content have been claimed to be **heterogeneous**. The provision of a service can be highly variable depending on who is providing the service, when it is provided and who is involved in the service experience.⁹² Given the difficulty in obtaining a certain level of standardisation because consistency of behaviour from service personnel is difficult to assure⁹³ what a service organisation may intend to deliver may be entirely

⁸⁶ See for example, Bateson, J.E.G. 1977, "Do we need service marketing?" in *Marketing Consumer Services: New insights, Report no. 77-114*, Marketing Science Institute, Cambridge, MA.; McDougall, G.H.G. and Snetsinger, D.W. 1990, "The intangibility of services: measurement and competitive perspectives", *Journal of Services Marketing*, 4, 4, 27-40.; Edgett, S. and Parkinson, S. 1993, "Marketing for Service Industries", *The Services Industries Journal*, 13, 3, 19-39.; Wright, L.K. 1995, "Avoiding services marketing myopia" in *Understanding Service Management: Integrating Marketing, Organizational Behavior, Operations and Human Resource Management*, Wiley, Chichester.; Vargo, S. and Lusch, R.F. 2004, "The four service marketing myths: remnants of a goods-based, manufacturing model", *Journal of Service Research*, 6, May, 324.

⁸⁷ See, Gummeson, E. 1987, "Lip service - a neglected area in service marketing", *Journal of Services Marketing*, 1, 1, 19-23.

⁸⁸ See, op. cit. (n.74) pg.318.

⁸⁹ See, Gronroos, C. 1998, "Marketing services: the case of a missing product", *The Journal of Business & Industrial Marketing*, 13, 4, 322-338.; Padgett, D. and Allen, D. 1997, "Communicating experiences: a narrative approach to creating service brand image", *Journal of Advertising*, 26, 4, 49-62.

⁹⁰ See, Gronroos, C. 1998, "Marketing services: the case of a missing product", *The Journal of Business & Industrial Marketing*, 13, 4, 322-338.pg. 322, emphasis added.

⁹¹ The notion of Service quality will be discussed in the forthcoming section, Section 4.4.2.

⁹² See, op.cit. (no.74) pg. 320.

⁹³ See for example, Booms, B.H. and Bitner, M.J. 1981, "Marketing Strategies and Organization Structures for Services Firms" in *Marketing of Services*, American Marketing, Chicago.; Palmer, A. and Cole, C. 1995, *Service*

different from what in effect the consumer ultimately receives.⁹⁴ In an effort to reduce as much as possible the risk associated with the heterogeneous character of services, prospective consumers may actively engage in inquiring on the level of service quality whilst on the other hand service organisations may adopt various measures so as to ensure a consistent service quality offering.

Production and consumption of many services are **inseparable**.⁹⁵ Consequently, "simultaneous production and consumption means that the service provider is often physically present when consumption takes place."⁹⁶ Hence, when it comes to service quality in contrast to the production of goods this cannot be engineered at the manufacturing plant but takes place during the interaction between the client and the service provider.⁹⁷ As such, the consumer's input becomes a critical element in the quality of the service performance.⁹⁸

The **perishability** of services is linked to the difficulty associated with the issue of storage.⁹⁹ In effect the perishable character of services does not present much of a problem when there is a high demand for services. However, when the demand fluctuates a minimum service capacity still needs to be maintained even when during certain periods there is no demand.

Marketing: Principles and Practice, Prentice-Hall, Englewood Cliffs, NJ.; Lovelock, C. and Gummesson, E. 2004, "Whither service marketing? In search of a new paradigm and fresh perspective", *Journal of Service Research*, 7, 1, 20-41.

⁹⁴ See, Parasuraman, A., Zeithaml, A. and Berry, L.L. 1985, "A Conceptual Model of Service Quality and Its Implications for Future Research", *Journal of Marketing*, 49, Fall, 41-50.

⁹⁵ See for example, Carmen, J.M. and Langeard, E. 1980, "Growth Strategies of Service Firms", *Strategic Management Journal*, 1, January-March, 7-22.; Upah, G.D. 1980, "Mass Marketing in Service Retailing: A Review and Synthesis of Major Methods", *Journal of Retailing*, 56, Fall, 59-76.; Edgett, S. and Parkinson, S. 1993, "Marketing for Service Industries", *The Services Industries Journal*, 13, 3, 19-39.

⁹⁶ See, Berry, L.L. 1980, "Service marketing is different", *Business*, 30, 3, 25.

⁹⁷ See, Lehtinen, U. and Lehtinen, J.R. 1982, (1982), "*Service Quality: A Study of Quality Dimensions*", unpublished working paper, Helsinki: Service Management Institute, Finland OY. in op.cit. (n.96).

⁹⁸ See, op.cit. (n.96).

⁹⁹ See for example, Beaven, M.H. and Scotti, D.J. 1990, "Service-oriented thinking and its implications for the marketing mix", *Journal of Services Marketing*, 4, 4, 5-19.; Edgett, S. and Parkinson, S. 1993, "Marketing for Service Industries", *The Services Industries Journal*, 13, 3, 19-39.; Vargo, S. and Lusch, R.F. 2004, "The four service marketing myths: remnants of a goods-based, manufacturing model", *Journal of Service Research*, 6, May, 324.

Although, the intangible, heterogeneous, inseparable and perishable characteristics of services have been widely acknowledged following a review by Moeller¹⁰⁰ several criticisms have also been raised.¹⁰¹ Technology appears to have changed the scenario and hence the generic attributes characterising services may not always be applicable. For instance, it has been argued that the inseparability of production and consumption and their perishability can be overcome by technology-based communications as occurs with interactive distance learning.¹⁰² On the intangible character of services it has been argued that many services include a combination of various tangible items and thus waters down the claim attached to their intangible nature. On the issue of heterogeneity it has been argued that various opportunities for standardisation exist as for instance when banks provide an ATM service.¹⁰³ However, rather than eliminating altogether the suitability of the widely held service characteristics, Moeller maintains and discusses their continued applicability in particular when viewed in relation to the various stages of service provision.¹⁰⁴

Hill¹⁰⁵ views services from a different angle as he puts an emphasis on the notion of change which he contends is a crucial element when conceptualising the notion of services. In seeking to identify the characteristics that distinguish services he first proceeds by establishing the importance of transactions. Indeed, as previously discussed,¹⁰⁶ as a necessary condition, in the case of both services and goods these need to be involved in a transaction whether this manifests itself in a direct or indirect exchange. The very fact that they can be transacted constitutes an

¹⁰⁰ See, Moeller, S. 2010, "Characteristics of services - a new approach uncovers their value", *The Journal of Services Marketing*, 24, 5, 359-368.

¹⁰¹ See for example, Lovelock, C. and Wright, L. 2001, *Principles of Service Marketing and Management*, Prentice-Hall, Upper Saddle River, NJ.; Lovelock, C. and Gummesson, E. 2004, "Whither service marketing? In search of a new paradigm and fresh perspective", *Journal of Service Research*, 7, 1, 20-41.; Vargo, S. and Lusch, R.F. 2004, "The four service marketing myths: remnants of a goods-based, manufacturing model", *Journal of Service Research*, 6, May, 324. in op.cit. (n.102).

¹⁰² See op.cit. (n.102).

¹⁰³ Ibid.

¹⁰⁴ See, Moeller, S. 2010, "Characteristics of services - a new approach uncovers their value", *The Journal of Services Marketing*, 24, 5, 359-368.

¹⁰⁵ See, Hill, T.P. 1977, "On goods and services", *Review of Income and Wealth*, 23, 4, 315.

¹⁰⁶ See, section 4.4, "Gaining marketing insights on the nature of services".

important element identifying such. Thus, for instance the midwife who would like to become a musician cannot just barter her knowledge and skills with a musician who fancies practicing the profession of a midwife. Such 'services' are not transactable and therefore cannot qualify as services in the sense that is hereby being discussed. According to Hill the conceptualisation of services call for two crucial elements. First, some change needs to be brought about and secondly, the change is derived as a result of the activity of another economic unit. On the basis of these two key elements he defines services as, "a change in the condition of a person, or of a good belonging to some economic unit, which is brought about as the result of the activity of some other economic unit, with the prior agreement of the former person or economic unit."¹⁰⁷ Hill argues that,

Whatever the producer of the service does must impinge directly on the consumer in such a way as to change the condition of the latter. Otherwise, no service is actually provided. The mere performance of some activity is not enough if the consumer unit is not affected in some way.¹⁰⁸

Levitt¹⁰⁹ provides another most interesting view point on how services could be differentiated by identifying four levels in a product's offering. Rather than elaborating on the distinctive characteristics that demarcate between goods and services he discusses how both can stand out in the commercial world, be differentiated and hence distinguishable. According to Levitt, "[t]here is no such thing as a commodity. All goods and services are differentiable."¹¹⁰ This he claims also holds true even in the case where commodities are extremely price sensitive for, "nothing is exempt from other considerations, even when price competition rages."¹¹¹

In essence, standing at the core of any service or good is the generic product.¹¹² However, it is the offered product that gets differentiated. The offered product is a complex cluster of value satisfactions which customers perceive are capable of solving their problems or fulfilling their

¹⁰⁷ See, op.cit. (n.107) pg. 318.

¹⁰⁸ Ibid.

¹⁰⁹ See, Levitt, T. 1980, "Marketing success through differentiation-of anything", *Harvard Business Review*, January-February,

¹¹⁰ Ibid. pg. 83.

¹¹¹ Ibid. pg. 84.

¹¹² The term product denotes both services and goods.

needs. Products are a combination of tangibles and intangibles. For instance, in a contract the product not only resides in its substantive and carefully packaged physical content but also in the proposer's reputation or image.

Thus, whilst the **generic** product represents the most basic elements that constitute the product, customers never just buy the generic product. The minimal purchase conditions incorporate both the generic product and the **expected** product. The latter for instance reflects customers' expectations on price, delivery time, stock, terms and conditions and so on. Therefore, failure to meet the minimal expectations of customers may reflect negatively on the generic product. It therefore follows that the generic product can only be sold if customers' wider expectations are met.

The product offering can go beyond customers' expectations by offering things customers have never thought about. By providing such enhancements the product is augmented. Indeed, not all customers may prefer an augmented product. Opting for instance for lower prices may be preferred. Beyond the augmented product lies the potential product. This reflects all that can be done in order to attract and maintain customer loyalty – budget and imagination being the limit. How products are perceived depends on customers, thus for instance, what may be perceived by one customer as an augmented product may by another customer be perceived as expected. Levitt notes that differentiation does not only reside with the product itself but the whole process that is involved in its delivery can be differentiated.

4.4.1.3 Cross cultural behaviour and attitudes on service quality

The ongoing trend towards the globalisation and internationalisation of services has stimulated research to examine the notion of service quality within the international context. A review of the literature exposes the complexities of this construct in particular the challenges of measuring a consistent service across countries.¹¹³ Culture has been identified as a significant determinant

¹¹³ See, Caruana, A., Ramaseshan, B., Ewing, M.T. and Rouhani, F. 1998, "Expectations about management consultancy services: testing the assumption of equivalence across Australian and Singaporean firms", *Journal of Professional Services Marketing*, 18, 1, 1-10.; Ueltschy, L.C., Laroche, M., Eggert, A. and Bindl, U. 2007, "Service quality and satisfaction: an international comparison of professional services perceptions", *Journal of Services Marketing*, 21, 6, 410-423.; Zhang, J., Beatty, S.E. and Walsh, G. 2008, "Review and future directions of cross-cultural consumer services research", *Journal of Business Research*, 61, 211-224.; Morales, M. and Ladhari, R. 2010,

that impact individual attitudes, behavioural norms and value orientations.¹¹⁴ Consequently, different cultures may lead to significant differences across customers and the exchange partner's expectations on how service quality is perceived.¹¹⁵ Moreover, the impact of culture on perceived service quality appears to be even greater when providing services than with the provision of goods in view of their intangible nature requiring greater personal interaction between the service provider and customers.¹¹⁶

One of the major issues when conducting cross-cultural research is contained within the "abstract, ubiquitous, and complex character of the notion of *culture*".¹¹⁷ Nationality defined in terms of national borders have been claimed to be no longer relevant in view of the complex influences operating at the global, regional, cross-national or sub national (e.g. urban/rural) levels.¹¹⁸

"Comparative cross-cultural service quality: an assessment of research methodology", *Journal of Service Management*, 22, 2, 241-265.

¹¹⁴ See, Trompenaars, F. and Hampden-Turner, C. 1997, *Riding the Waves of Culture: Understanding Cultural Diversity in Business*, 2nd, Nicholas Brealey Publishing, London.; McCarthy, J.A. and Hattwick, P.M. 1992, "Cultural value orientations: a comparison of magazine advertisements from the US and Mexico ", *Advances in Consumer Research*, 19, 34-38.; Cleveland, M. and Laroche, M. 2007, "Acculturation to the global consumer culture: scale development and research paradigm", *Journal of Business Research*, 60, 249-259.

¹¹⁵ See, Herbig, P. and Genestre, A. 1996, "An examination of the cross cultural differences in service quality: the example of Mexico and the USA", *Journal of Consumer Marketing*, 13, 3, 43-53.; Caruana, A., Ramaseshan, B., Ewing, M.T. and Rouhani, F. 1998, "Expectations about management consultancy services: testing the assumption of equivalence across Australian and Singaporean firms", *Journal of Professional Services Marketing*, 18, 1, 1-10.; Berthon, P., Pitt, L., Katikeas, C.S. and Berthon, J.P. 1999, "Executive insights: virtual services go international: international service in the marketspace", *Journal of International Marketing*, 7, 3, 84-105.; Smith, A.M. and Reynolds, N.L. 2001, "Measuring cross-cultural service quality –a framework for assessment", *International Marketing Review*, 19, 5, 450-481.

¹¹⁶ See, Mattila, A.S. 1999, "The role of culture and purchase motivation in service encounter motivations", *Journal of Services Marketing*, 13, 4/5, 376-389.; Smith, A.M. and Reynolds, N.L. 2001, "Measuring cross-cultural service quality –a framework for assessment", *International Marketing Review*, 19, 5, 450-481.;

¹¹⁷ See, Morales, M. and Ladhari, R. 2010, "Comparative cross-cultural service quality: an assessment of research methodology", *Journal of Service Management*, 22, 2, 241-265.

¹¹⁸ See, Craig, C.S. and Douglas, S.P. 2006, "Beyond national culture: implications of cultural dynamics for consumer research", *International Marketing Review*, 23, 3, 322-342. in Morales, M. and Ladhari, R. 2010, "Comparative cross-cultural service quality: an assessment of research methodology", *Journal of Service Management*, 22, 2, 241-265.

Given that service quality is a dynamic and multidimensional construct encompassing various factors¹¹⁹ one of the fundamental concerns when conducting cross-national research is that of establishing equivalence, that is, whether the constructs being measured across nations/cultures are comparable in the sense that one can confirm their equivalence by way of their internal meaning, function and grouping and in relation to other constructs.¹²⁰ It has been argued that even when consumers may appear to share similar expectations of a service, quality evaluations may differ.¹²¹ Some researchers have indeed questioned the universal applicability of measurement instruments and in particular service quality measures.¹²² There have been various studies that demonstrated that the dimensionality of service quality and their relative importance differs across countries.¹²³ Differences in the number of dimensions may also relate to the nature of the service.¹²⁴ In a study¹²⁵ examining the service quality dimensions in the telecommunications industry in the USA and Germany the five dimensional determinants as established by the SERVQUAL instrument, that is,

¹¹⁹ See, Gabbott, M. and Hogg, G. 1996, "The glory of stories: using critical incidents to understand service evaluation in the primary healthcare context", *Journal of Marketing Management*, 12, 6, 493-503.

¹²⁰ See, Caruana, A., Ramaseshan, B., Ewing, M.T. and Rouhani, F. 1998, "Expectations about management consultancy services: testing the assumption of equivalence across Australian and Singaporean firms", *Journal of Professional Services Marketing*, 18, 1, 1-10.; Van der Vijver, F. and Leung, K. 1997, *Methods and Data Analysis for Cross-cultural Research*, Sage, London.; Singh, J. 1995, "Measurement issues in cross-national research", *Journal of International Business Studies*, 26, 3, 597-619.; Smith, A.M. and Reynolds, N.L. 2001, "Measuring cross-cultural service quality –a framework for assessment", *International Marketing Review*, 19, 5, 450-481.

¹²¹ See, Winsted, K.F. 1997, "The service experience in two cultures: a behavioural perspective", *Journal of Retailing*, 73, 3, 337-360.

¹²² See, Smith, A.M. and Reynolds, N.L. 2001, "Measuring cross-cultural service quality –a framework for assessment", *International Marketing Review*, 19, 5, 450-481.; Douglas, S.P. and Nijssen, E.J. 2003, "On the use of borrowed scales in cross-national research: a cautionary note", *International Marketing Review*, 20, 6, 621-642.; Wong, N., Rindfleisch, A. and Burroughs, J.E. 2003, "Do reverse-worded items confound measures in cross-cultural consumer research? The case of the material values scale", *Journal of Consumer Research*, 30, 1, 72-91.; Ueltschy, L.C., Laroche, M., Tamlia, R.D. and Yannopoulos, P. 2004, "Cross-cultural invariance of measures of satisfaction and service quality", *Journal of Business Research*, 57, 8, 901-912.

¹²³ See, Kettinger, W.J., Lee, C.C. and Lee, S. 1995, "Global measures of information service quality: a cross-national study", *Decision Sciences*, 26, 5, September-October, 569-588.; Yavas, U. 1998, "Further evidence on the psychometric properties of SERVQUAL in Turkey: a replication and extension", *Journal of International Marketing and Marketing Research*, 23, 2, 59-70.

¹²⁴ See, Smith, A.M. 2000, "The impact of scale characteristics on the dimensionality of the service quality construct", *The Service Industries Journal*, 20, 3, July, 167-190.; Smith, A.M. and Reynolds, N.L. 2001, "Measuring cross-cultural service quality –a framework for assessment", *International Marketing Review*, 19, 5, 450-481.

¹²⁵ See, Leison, B. and Vance, C. 2001, "Cross-national assessment of service quality in telecommunications", *Managing Service Quality*, 11, 5, 307-317.

- *reliability* (ability to perform the promised service dependably and accurately),
- *responsiveness* (willingness to help customers and provide a prompt service),
- *empathy* (providing customers with individualised attention),
- *assurance* (ability of employees to inspire trust and confidence) and
- *tangibles* (appearance of service personnel, physical facilities, equipment and written material)

were found to be applicable in both the USA and German sample. However, the study also revealed significant differences between the two countries when it came to assessing the relative importance of the service quality dimensions. Whilst in the US sample reliability was identified as the only important dimension on the other hand, reliability, responsiveness and empathy constituted important dimensions for the German sample. The authors contend that the findings have two major implications. First, that there needs to be a clear understanding of the culturally-based differing definitions on service quality and second, any design and delivery of a service must focus on the dimensions perceived as being important in order to avoid costly wasted activities thus ensuring lower prices and improved quality.

4.4.2 The public interest: fiction or fact?

Year 2009, the Lisbon Treaty comes into force. For the first time the European Union incorporates and acknowledges into European Union primary law the right to regional and local self-government.¹²⁶ The right to local self-government have on several occasions been emphasised in various judgments by the European Courts of Justice. Thus, in its case law concerning the ‘in-house’ doctrine it is not appropriate to apply Community law on public procurement contracts in cases “...where a public authority performs tasks in the public interest for which it is responsible by its own administrative, technical and other means, without calling upon external entities.”¹²⁷

¹²⁶ See, Article 4(2) TEU.

¹²⁷ See, Case C-458/03. *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, [2005] ECR I-08585 paragraph 61.

When contracting authorities conclude a contract with a third party that is only formally but not substantially independent from it EU public procurement law is not applicable.¹²⁸ However, two conditions need to be met. The first condition is that of '*Control*' and necessitates that the contracting authority exercises a control that is similar to that which it exercises over its own departments. The second condition relates to '*the essential part of its activities*' which necessitates that these be carried out with the controlling contracting authority or authorities. For the European Court of Justice,

.....the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind.¹²⁹

Thus, in the Stadt Halle Case the Court held that a contracting authority could not exercise in-house control over an entity in whose capital it has a holding even as a minority, with one or more private undertakings.¹³⁰ Whether, there actually exists a private holding in the capital of the company needs to be determined at the time of the award.¹³¹ The fact that the company's capital may be opened to private investors is not enough to support the conclusion that the condition relating to control by the public authority is not satisfied, that is, unless there exists at the time of the award a real prospect that in the short term this will ensue.¹³² However, when the in-house exception is applied and if during the course of the contract private shareholders were to be permitted to hold capital in the company, this in effect would constitute the alteration of a fundamental condition of the contract and would therefore require the contract to be put out for competitive tender.¹³³

In order to determine whether the contracting authority exercises a control similar to that which it exercise over its own departments there must be a case of a power of decisive influence over both

¹²⁸ See, Case C-107/98. Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, [1999] ECR I-08121 paragraph 50.

¹²⁹ See, Case C-26/03. Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, [2005] ECR I-00001 paragraph 50.

¹³⁰ Ibid. Case C-26/03 paragraph 49.

¹³¹ Ibid. Case C-26/03 paragraphs 15 and 52.

¹³² See, Case C-573/07. Sea Srl v Comune di Ponte Nossola, [2009] ECR 00000 paragraphs 50 and 51.

¹³³ Ibid. paragraph 53.

strategic objectives and significant decisions.¹³⁴ When a company enjoys a degree of independence it is not possible for the contracting authority to exercise a control similar to that which it exercises over its own departments.¹³⁵ Therefore, in order to examine whether or not the control condition satisfies the in-house doctrine, all legislative provisions and relevant circumstances need to be taken into account.¹³⁶ As such in the Coditel case the Court reaffirmed that the “possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities”¹³⁷ and thus found that the decision-making bodies of the Concessionaire in question were under the control of the public authorities and therefore strongly pointing into the direction of an in-house control. Both in the Coditel case and in the Sea case, the Court considered that when the controlled company becomes market-oriented and gains a degree of independence it would render tenuous the control exercised by the contracting authority affiliated to it and hence incompatible to the in-house doctrine.¹³⁸ Thus, for example in Sea the court held that when the geographical scope does not extend beyond the territory of the shareholding public authorities and the activities are limited to the performance of the tasks of the controlling public authorities, these factors signify a lack of market orientation and therefore denoting the existence of an in-house control.¹³⁹

It is worth noting that the second condition as laid down in the in-house doctrine necessitates that the contracting company should carry out the essential part of its activities with the contracting authority. However, this does not refrain such companies from engaging with operators other than the contracting authority as long as such relationships remain incidental to the contracting

¹³⁴ See, Case C-324/07. Coditel Brabant SA v Commune d’Uccle and Région de Bruxelles-Capitale, [2008] ECR I-08457 paragraph 28, paraphrasing Case C-458/03. Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG, [2005] ECR I-08585 paragraph 36.

¹³⁵ See, Case C-458/03. Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG, [2005] ECR I-08585 paragraphs 67 – 70.

¹³⁶ Ibid. Case C-458/03. Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG, [2005] ECR I-08585 paragraphs 37 and 69.

¹³⁷ See, Case C-324/07. Coditel Brabant SA v Commune d’Uccle and Région de Bruxelles-Capitale, [2008] ECR I-08457 paragraph 49.

¹³⁸ See, Case C-324/07. Coditel Brabant SA v Commune d’Uccle and Région de Bruxelles-Capitale, [2008] ECR I-08457 paragraph 36 and Case C-573/07. Sea Srl v Comune di Ponte Nossola, [2009] ECR 00000 paragraph 73.

¹³⁹ See, Case C-573/07. Sea Srl v Comune di Ponte Nossola, [2009] ECR 00000 paragraph 76.

authority's core services that is the provision of public services.¹⁴⁰ As such, this ensures that EU public procurement law remains applicable if the company becomes active in the market and therefore likely to be in competition with other undertakings.¹⁴¹ Further, Community law does not require public authorities to use any particular legal form in order to carry out their public service tasks on a joint basis.¹⁴² As the Court held:

.....such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.¹⁴³

Year 1876, the United States Supreme Court in the famous case of *Munn v. Illinois*¹⁴⁴ marks its first sanction to the doctrine where an enterprise may become “affected with a public interest”¹⁴⁵ thus justifying that it be subject to public regulation. In *Munn* the regulation by the State of Illinois of rates charged by grain storage elevators in Chicago was found by the Supreme Court of the United States to be a reasonable regulation of enterprise “affected with a public interest”¹⁴⁶ because the Chicago elevators occupied a strategic position holding or seriously threatening to hold a monopoly in an important volume of agricultural commerce. Sixty years later (1936), the number of enterprises held to be *affected with a public interest* was noted to be on the increase. The following observations were made:

¹⁴⁰ See, Case C-573/07. *Sea Srl v Comune di Ponte Nossa*, [2009] ECR 00000 paragraph 80 paraphrasing Case C-340/04. *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA*, [2006] ECR I-04137 paragraph 63.

¹⁴¹ See, Case C-340/04. *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA*, [2006] ECR I-04137 paragraph 60.

¹⁴² See, Case C-480/06. *Commission of the European Communities v Federal Republic of Germany* [2009] ECR I-04747 paragraph 47.

¹⁴³ *Ibid.* paragraph 47. The Court also made reference to the following case law: Case C-26/03. *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-00001 paragraphs 50 and 51.

¹⁴⁴ See, 94 U.S. 113, 126 (1876).

¹⁴⁵ See, Keezer, D.M. 1935-1936, "Some questions involved in the application of the “Public Interest” Doctrine - Bar Briefs", *Michigan Law Review*, 12, pg. 200.

¹⁴⁶ *Ibid.*

It is practically impossible to generalize about characteristics of “public interest” enterprises. **In determining what constitutes a public use, legislation cannot be depended upon.** Precedents are of little avail for what is today a public use may not be tomorrow, but each case must be decided upon its facts.¹⁴⁷

In a study concerning enterprises *affected with a public interest* no meaning could be identified to the phrase *affected with a public interest* although it was observed that the term was utilised simply as a way of saying “that, balancing all factors – economic, ethical, practical convenience, etc. – the business ought to be regulated.”¹⁴⁸

The notion of *the public interest* has been extensively employed and invoked in various situations. At times *the public interest* became *the national interest*. For when President Eisenhower in 1954 ordered the Department of Defence not to testify before Congress on internal matters this was *in the public interest*. And when in 1958 President Eisenhower ordered Marine troops in Lebanon this was *in the national interest*.¹⁴⁹

Year 2009, UK’s Information Commissioner publishes its report to Parliament in connection with the Ministerial veto on the disclosure of cabinet minutes concerning military action against Iraq.¹⁵⁰ Following the issuance of a Decision Notice on 19 February 2008 the Information Commissioner ordered Cabinet Office to disclose copies of minutes during which the Attorney General’s legal advice concerning military action against Iraq was considered and discussed. The government did not agree with this decision and was the subject of an appeal to the Information Tribunal. The Tribunal, on a majority decision upheld the Commissioner’s Decision Notice. On 23 February 2009, Secretary of State for Justice issued a “veto” certificate overruling the Information Tribunal’s decision and in effect the Minutes remained undisclosed.

¹⁴⁷ Ibid. pg.201, (emphasis added).

¹⁴⁸ See, Leys and Perry. 1959, "Philosophy and the Public interest", 49-50 in Miller, A.S. 1961, "Fundamental Concepts of Public Law Symposium, No.1, "Foreword: The Public Interest Undefined" ", *Journal of Public Law*, 10,pg.188.

¹⁴⁹ See, Miller, A.S. 1961, "Fundamental Concepts of Public Law Symposium, No.1, "Foreword: The Public Interest Undefined" ", *Journal of Public Law*, 10, 184-202.

¹⁵⁰ See, Information Commissioner’s Office, Freedom of Information Act 2000. *Ministerial veto on disclosure of Cabinet minutes concerning military action against Iraq – Information Commissioner’s report to Parliament, 10 June, 2009*
/~/media/documents/library/Freedom_of_Information/Research_and_reports/ICO_REPORT_ON%20IRAQ_MINUTE... [19 September 2011].

7.3 The certificate confirmed that the Justice Secretary took the view that **the public interest** favoured the continued non-disclosure of the Minutes and therefore that there was no failure by the Cabinet Office to comply with its duty to disclose information on request.¹⁵¹

Year 1961, Professor Miller from George Washington University, reports during a public law symposium¹⁵² on the absence and hence failure to develop acceptable and workable criteria by which the public interest could be judged and evaluated. He quotes Dimock,

In the modern world even more than in the time of Adam Smith and John Stuart Mill our ship is rudderless unless we are able to attach workable meanings to such key concepts as.....the public interest.¹⁵³

Miller contends that unless content is put into such concepts, it is evident that an inquiry is long overdue.

That ship remains rudderless to date. The notion that revolves around the term *the public interest* appears to be overly used and abused. The distinction between private interests and what makes up collective or public interests has been described as difficult and perhaps impossible to arrive to.¹⁵⁴ For some, public interest theory has been described as, “so ill as to be beyond resuscitation.”¹⁵⁵

4.4.2.1 Public interest - some theoretical reflections

Popular usage of terms such as, *the public interest*, *the general interest*, *the common interest*, *the common good*, and *the national interest* all incorporate the idea of a *public interest* and all share the fact that they derive from an abstract notion. Their usage makes it possible that they be employed as the criterion validating or otherwise certain actions. The result is a high level of operational ambiguity meaning that, “...those who have the power – the administrators, but also

¹⁵¹ Ibid. pg. 12, emphasis added.

¹⁵² See, Miller, A.S. 1961, "Fundamental Concepts of Public Law Symposium, No.1, "Foreword: The Public Interest Undefined" ", *Journal of Public Law*, 10, 184-202.

¹⁵³ See, Dimock, A. 1958, "Philosophy of Administration", 51, in op.cit. (n.482) pg. 184.

¹⁵⁴ See, Heywood, A. 2004, *Political Theory: An Introduction* third edition, Palgrave Macmillan, Houndmills.pgs. 240-251.

¹⁵⁵ See, Schubert, G. 1962, "Is there a Public Interest Theory?" in *Nomos V: The Public Interest*, Atherton Press, New York,N.Y.in Feintuck, M. 2004, *The Public Interest' in Regulation* Oxford University Press, Oxford. pg.4.

the judges and legislators – may act with a high degree of discretion when making decisions.”¹⁵⁶ In this thesis the application of such terms will be interpreted and used interchangeably with *the public interest* as discussed herein.¹⁵⁷

When a particular decision or action is decided upon on the basis of somebody’s interest, what in effect is such interest meant to be and how does one determine that it be regarded important? The Greek word use for interest “συμφέρον” means the benefit accruing to someone who pursues something, especially at an individual level. Thus, in general terms the *public interest* connotes some public benefit or good. But we still remain ignorant of what this good is comprised of and who is in a position to define it? Sociologists have identified two sets of *interests*.¹⁵⁸ There are those who suggest that interests are ‘*felt*’, in which case such interests are subjective and can only be revealed by the individual claiming that they are the best judges of what is good for them. On the other hand there are those who suggest that interests are ‘*real*’ thus incorporating some objective element and argue that the public is not capable of identifying its own best interests because it is ignorant, deluded or have been manipulated in some way.

The problem of defining interests appears to run through the discussions that attempt to conceptualise the *public interest*. Three major explications have been identified by Held¹⁵⁹ – preponderance, common interest and unitary conceptions which will be outlined hereunder.

¹⁵⁶ Op.cit. (n.155) pg. 196.

¹⁵⁷ To this effect it is worth highlighting the following:

The General Court in Case T-289/03 at paragraph 178 noted, ‘.....services of general economic interest **are distinguished from services in the private interest**, even though that interest may be more or less collective or be recognised by the State as legitimate or beneficial. **the general or public interest** on which the Member State relies must not be reduced to the need to subject the market concerned to certain rules or the commercial activity of the operators concerned to authorisation by the State.’ See, Case T-289/03. British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities [2008] ECR II-00081 (emphasis added).

Further, Neergaard contends that, “[t]he element ‘general’ may be considered to indicate the public’s interest that the service in question is provided. Page finds that the terms ‘general interest’ and ‘public interest’ are identical.” See, Page, A.C. 1982, "Public Undertakings and Article 90", *European Law Review*, 28. in Neergaard, U. 2009, "Services of general economic interest: the nature of the beast" in *The changing legal framework for services of general interest in Europe*, T.M.C Asser Press, The Netherlands.

¹⁵⁸ See, Heywood, A. 2004, *Political Theory: An Introduction* third edition, Palgrave Macmillan, Houndmills. pg. 240.

¹⁵⁹ See, Held, V. 1970, *The Public Interest and Individual Interests*, Basic Books, New York.

Preponderance accounts of the general interest represent the predominating interest in the community and thus attempts to put into effect policies that aim to satisfy the majority of individuals or increase aggregate individual satisfaction. That interest however, may not be representative of the interest of all the participants in the community. Preponderance accounts may be the result of a preponderance of force, opinion, utility or preference of members.¹⁶⁰ In essence, this theory is based on Bentham's utilitarian school of thought who holds that the formula for deriving with the right decisions in any situation is to avoid pain and maximise happiness for the greatest number of people. This is a formula that we find in use to date by economists who use arguments based on interpersonal comparison of utilities in order to solve problems of welfare economics.¹⁶¹ A logic that can go under the label of *cost-benefit analysis* where an attempt to explicate all the costs and benefits in a particular situation are enumerated and summed up in order to provide the basis for decision-making. It can also manifest itself in techniques labelled *cost-effectiveness analysis* utilised in cases where it is difficult to measure benefits in order to determine the public welfare. The preponderance approach can also manifest itself when public opinion is sought directly through the ballot box. Others argue that the public interest is equivalent to the preponderance of actual and potential interest groups in society.¹⁶²

Such aggregate views of public interest do not stand above criticisms. Preponderance accounts of public interest have the potential to render individual and minority groups extremely vulnerable.¹⁶³ This approach is unlikely to engage citizens in a process of dialogue to assist in bringing about a polity.¹⁶⁴ For instance, under the utilitarian logic potentially harmful clinical trials could be conducted without the consent of patients on the grounds that the data obtained could bring about the greatest happiness of the greatest number through the development of more

¹⁶⁰ See, Kim, Y.H. 2006, "The Anglo-American Concept of Public interest and Its Legal Argumentation : Paradigm Shift and Confrontation of Administrative Law", *Seoul Law Journal*, 55, in Seong Wook Heo. 2006-2007, "The concept of "public interest" demonstrated in Korean Court Precedents", *Journal of Korean Law*, 6, 91-109.

¹⁶¹ See, Musgrave, R. 1966, "The public interest: efficiency in the creation and maintenance of material welfare " in *The Formation of Professions*, Sage, London.; Hill, M. and Bramley, G. 1986, *Analysing Social Policy*, Basil, Blackwell, Oxford. in Saks, M. 1995, *Professions and the Public Interest – Medical Power, Altruism and Alternative Medicine* Routledge, London.

¹⁶² See, Dearlove, J. and Saunders, P. 1984, *Introduction to British Politics*, Polity Press, Cambridge in Saks, M. 1995, *Professions and the Public Interest – Medical Power, Altruism and Alternative Medicine* Routledge, London.

¹⁶³ See, Feintuck, M. 2004, *'The Public Interest' in Regulation* Oxford University Press, Oxford.

¹⁶⁴ Ibid.

effective medical products.¹⁶⁵ Attempts that conceptualise the public interest under the utilitarian logic face ethical problems –

namely that it is logically impossible to derive a normative judgement from a set of empirical statements. To the extent that the public interest is a normative notion, therefore, it cannot be based on empirical data about the capacity of the interests of some individuals or groups to outnumber, outweigh or overpower those of some other individuals or groups.¹⁶⁶

The *public interest* as **Common interest** bases judgments of the *public interest* on non-conflicting interests. This more radical notion of the public interest portrays the public as a collective entity with distinct common interests. Instead of viewing the public as a collection of individuals wherein decisions would ultimately need to be taken from amongst conflicting interests or preference scales on the basis of aggregation accounts, we have the notion of the ‘general will’ being advanced.¹⁶⁷ Jean-Jacques Rousseau is the leading figure that advanced this view in *The Social Contract* wherein the *general will* was that “which tends always to the preservation and welfare of the whole.”¹⁶⁸ He proposed that government be based on the *general will* so as to reflect the collective good of the community, benefitting all citizens as opposed to the particular and selfish will of each citizen. According to Rousseau a clear distinction is drawn between general will and the selfish private will of each citizen thus acknowledging that what is in the interests of an individual or group may not always be in the public interest and that individual interests may conflict.

The Pareto criterion of Optimality could be viewed as fitting in with the *common interest* approach. Under this criterion “the welfare of a group of individuals can only be considered to increase if at least one individual in the group is made better off without anyone being made worse off.”¹⁶⁹ Indeed, under this type of logic it would not for instance be permissible to

¹⁶⁵ See, Campbell, A.V. 1975, *Moral Dilemmas in Medicine*, Second edition, Churchill Livingstone, Edinburgh. in Saks, M. 1995, *Professions and the Public Interest – Medical Power, Altruism and Alternative Medicine* Routledge, London.

¹⁶⁶ See, Held, V. 1970, *The Public Interest and Individual Interests*, Basic Books, New York. in Saks, M. 1995, *Professions and the Public Interest – Medical Power, Altruism and Alternative Medicine* Routledge, London.pg. 42.

¹⁶⁷ See, Heywood, A. 2004, *Political Theory: An Introduction* third edition, Palgrave Macmillan, Houndmills.

¹⁶⁸ Ibid. pg 242.

¹⁶⁹ See, Sugden, R. 1981, *The Political Economy of Public Choice: An Introduction to Welfare Economics*, Martin Robertson, Oxford in Saks, M. 1995, *Professions and the Public Interest – Medical Power, Altruism and Alternative Medicine* Routledge, London.pg.43.

ameliorate the disadvantaged position of women pursuing careers in the medical sector as this would likely mean a reduction in the number of males occupying more prestigious and highly rewarding medical roles.¹⁷⁰ There are those who argue that even in the case of a truly *common good* the argument that therefore this should override all other claims does not always hold.¹⁷¹

....For instance, the common good of defence might not be a good enough reason for uprooting a hundred families to make a rocket range. It might be better to compromise for the benefit of the few, and make do with a somewhat less efficient range elsewhere.¹⁷²

It appears that one of the main problems with the *common interest* approach is that the notion of the *general will* represents the will of the people were they to act selflessly. But in so far as selfishness continues to persist the *common interest* can never be revealed.¹⁷³

Unitary conceptions of the public interest assert a frank normative position for the public interest. Claims under this scheme are perceived as moral claims enabling moral judgments to be made in terms of a unitary, coherent system of values that guide decision making in society. Definitions falling within this scheme include those provided by Plato, Aristotle, Augustine, Aquinas and Hegel. Despite the distinctions that can be drawn from their work it has been noted that all share the belief that what is good for the individual/group is compatible with the good of all.¹⁷⁴ According to Saks it is important to note that “arrangements which serve the public interest in these terms cannot validly conflict with individual claims of interest”¹⁷⁵ and contends that the communist system as explicated by Marx brings out clearly this normative unitary view. As such, Saks appears to find the collateral resting on the basis that “the real interests of both individuals and the public as a whole coalesced, albeit in a communist system in which the free development of each would be the condition for the free development of all.”¹⁷⁶ He therefore expresses grave

¹⁷⁰ See, Saks, M. 1995, *Professions and the Public Interest – Medical Power, Altruism and Alternative Medicine* Routledge, London. pg. 45.

¹⁷¹ See, Benn, S. and Peters, R. 1959, *Social Principles and the Democratic State*, Allen & Urwin, London.in *ibid*.

¹⁷² See, Benn, S. and Peters, R. 1959, *Social Principles and the Democratic State*, Allen & Urwin, London.pg. 272 in *op.cit.* (n.171) pg.45.

¹⁷³ See, Heywood, A. 2004, *Political Theory: An Introduction* third edition, Palgrave Macmillan, Houndmills.

¹⁷⁴ See, Held, V. 1970, *The Public Interest and Individual Interests*, Basic Books, New York.in *op.cit.* (n.171).

¹⁷⁵ See *op.cit.* (n. 171) pg. 37.

¹⁷⁶ *Ibid.* pg. 37.

doubts on the relevance of such conceptions of the public interest in particular the idea that validly conflicting interests are unjustified under this scheme.¹⁷⁷ Such a situation he describes as alien to liberal-democratic countries. On a different wave length there are others who argue that a unitary model of the public interest can maintain validity only if based on democratic and constitutional claims.¹⁷⁸ It is thus argued that there is significant scope for such a normative conception in particular when the public interest is linked to the notion of citizenship ascribing it with the potential of “imposing limits on the power of society’s dominant groups.”¹⁷⁹ And in doing so it acts as a force that reaffirms the overall liberal-democratic settlement.¹⁸⁰

It has been argued that both *preponderance* and *common interest* accounts of the *public interest* appear to be more concerned with where the public interest resides rather than explicating the process that exposes which values are to be protected in the *public interest*.¹⁸¹ It has also been noted that they fail to take into consideration the interests of future generations.¹⁸² On the other hand, despite the various criticisms there appears to be a general consensus that *unitary* conceptions of the *public interest* have the virtue of underlining the normative content.¹⁸³ Thus, there is no reason why we should abstain from exploring further the force of the arguments contained in this unitary approach by appealing to natural law as explicated by John Finnis.¹⁸⁴

¹⁷⁷ See, Hague, R. and Harrop, M. 1987, *Comparative Government: An Introduction* Second edition, Macmillan, London.in op.cit. (n. 171).

¹⁷⁸ See, Feintuck, M. 2004, *The Public Interest in Regulation* Oxford University Press, Oxford.

¹⁷⁹ Ibid. pg. 30.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² See, Held, V. 1970, *The Public Interest and Individual Interests*, Basic Books, New York.in op.cit. (n.179).

¹⁸³ See, Held, V. 1970, *The Public Interest and Individual Interests*, Basic Books, New York.; Saks, M. 1995, *Professions and the Public Interest – Medical Power, Altruism and Alternative Medicine* Routledge, London.; Feintuck, M. 2004, *The Public Interest in Regulation* Oxford University Press, Oxford.

¹⁸⁴ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford.

4.4.2.2 On the requirement of the common good – expressing the natural law method

To *favour and foster the common good in one's community* has been identified as one of the basic requirements as postulated by Finnis.¹⁸⁵ Its reach is complex and manifold. But before we can proceed in our discussion as Finnis argues we need first obtain an understanding of some of the complexities that community or society entails.¹⁸⁶ For what in effect does *community* involve?

Community is about relationships and interactions. It is an ongoing state of affairs. According to Finnis there are four basic ways or orders that unify such human relationships/interactions. The orders have no hierarchy or value of importance and are only a convenient way of assembling the complexity of human community. These are as follows:

- First order – appertains to the physical and biological order and comprises the unity of order as studied by the 'natural sciences'. The example given is that of the listener hearing the sounds made by the lecturer.
- Second order – appertains to the unity of intelligence, a unity of order as studied for instance in logic and epistemology. The example given is when the listener's understanding is in line with that of the lecturer even if this were only to lead to disagreement.
- Third order – appertains to the unity of culture – shared language, common technology, techniques etc.
- Fourth order – appertains to the unity of common action. The example given is that of the lecturer who devotes part of his/her life in trying to communicate knowledge. Likewise the listener is committed in devoting part of his/her life in acquiring knowledge from another person. Consequently, part of the unity in human community hence becomes the unity of common action.

The unity of common action in the fourth order is what we are here concerned with as it finds its place with the matter subject that relates to our discussion on the *public interest*. For the unity of

¹⁸⁵ To this effect see discussion in chapter 3, section 3.4.2, "*Practical Reasonableness: distinguishing sound from unsound practical thinking*".

¹⁸⁶ According to Finnis what could be said of a *community* could equally be said of *society*. Op.cit. (n.185) pg. 135.

common action further explicates the *common good* in three senses. In one sense this is explicated by way of the '*basic goods*'¹⁸⁷ which Finnis identified as, life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion as goods which are common to each and every person and therefore are in themselves a 'common good' and common in so far as they can be participated upon in an infinite number of ways, by an infinite number of persons and in an infinite variety of occasions. In another sense according to Finnis there is the *common good* of the political community.¹⁸⁸ And in the third sense the *common good* is defined as,

a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realise reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.¹⁸⁹

It is in this third sense that Finnis contends that the *common good*, "is a justified meaning of the phrases, 'the general welfare' or '**the public interest**'." ¹⁹⁰ And the *common good* of the political community, "thus explains the availability and relevance of a common good in the third sense."¹⁹¹ The set of conditions that need to be obtained if each and every member of the community is to attain his/her own objectives relate to justice, authority and law. Justice, authority and law comprise the content of the common good of the political community, "that ought to (but in practice cannot yet) assume some though not all of the present justified functions and aspects of the political communities."¹⁹²

¹⁸⁷ To this effect see discussion in chapter 3, section 3.4.4, "*Dignity as the basic moral premise*".

¹⁸⁸ The political community refers to the complete community, "an all-round association in which would be co-ordinated the initiatives and activities of individuals, of families, and of the vast network of intermediate associations." op.cit. (n. 185) pg. 147. Such a community need not necessarily be confined to the State. According to Finnis, "[t]here is no reason to deny the good of international community in the fourth order." Ibid. pg.150. For integral to the personal development is "both individual self-direction and community with others in family, friendship, work and play." Op.cit. (n. 185). pg. 147.

¹⁸⁹ See, Op.cit. (n.185) pg. 155.

¹⁹⁰ See, Op.cit. (n.185) pg. 156, (emphasis added).

¹⁹¹ Ibid. pg. 156.

¹⁹² Ibid. pg. 156.

Thus, the *common good* under discussion should not be misinterpreted as an aggregative conception, for example as that conceived by Utilitarianism.¹⁹³ Utilitarian logic assigns the principles of autonomy, freedom, right and justice with secondary importance. The *common good* that we are concerned with here refers to the interdependent and harmonious flourishing or fulfilment of each individual in the community which can only be made possible through cooperation and coordination in communities. Given the nature and conditions of human existence human nature alone cannot be self-sufficient and it is precisely due to this fact that the human flourishing can only be brought about through coordination and cooperation in communities. It is only in a very limited sense that the State comes prior to the individual. The State is seen as being comprised of pluralism, of free and equal citizens. Indeed, the chief end of both the Individual and the State is the attainment of each person's flourishing through the community.

4.5 Concluding remarks

The message that one imparts from the in-house doctrine is loud and clear.¹⁹⁴ It assumes and draws a clear cut demarcation line between what constitutes “public interest” tasks from those that are classified as “private interest” tasks. Accordingly, public authorities perform tasks in the public interest till the point that private interests become involved. As soon as private interests become involved the notion of *the public interest* becomes deprived of meaning and fades into insignificance.....that is, unless it passes from the scrutinising test and becomes henceforth subject to the conditions set out in Article 106(2) TFEU in order to ensure that the effective performance of the general interest task prevails.

But on what grounds does this *public interest*, this *common stock*¹⁹⁵ once available to all gets cut short. On what grounds does it lose the very core of its nature and becomes subject to the dictating forces of the market? From what force do these principles derive so as to dictate and circumscribe the range of this common stock? Is it on the basis of the utilitarian logic? Indeed,

¹⁹³ To this effect see discussion in chapter 3, section 3.6.1 “*Utilitarianism*”.

¹⁹⁴ For a review of the in-house doctrine see discussion in section 4.4.2, “*The public interest: fiction or fact?*”

¹⁹⁵ See also discussion in section 4.4.2.1, “*Public interest-some theoretical reflections*” and in particular section 4.4.2.2 entitled, “*On the requirement of the common good – expressing the natural law method*”.

Europe appears to hold on to aggregative conceptions of the *common good* with which the *public interest* function becomes infused. Given that, “the authority of rulers derives from their opportunity to foster the common good, and a fair balance of benefits and burdens within a community is an important aspect of that common good”¹⁹⁶ maybe than.....is it because we can perhaps argue that market forces are fostering a better *common good*?? And when we speak of values and the sharing of values, what values are we in effect sharing when it comes to services of general economic interest? Are these not the values that are grounded in the economic belief of the efficacy of competitive market forces? A more or less illusionary belief for it is worth recalling that the theories on which the market economy emanates leaves much unsaid and thus renders it fundamentally defective.¹⁹⁷ What values do we share when Community actions are grounded on illusionary dichotomous beliefs based on economic v. non-economic services of general interest? Indeed, we cherish the values that embrace the status quo, values that reinforce existing inequalities in power relationships. We need only look at the figures to see how poverty and other inequalities feature across Europe.¹⁹⁸ These are the signs and symptoms that chink and tear away into Europe’s economic fabric consolidating into one big gap that thwarts European integration aims.

Europe’s attempts in closing the gap by way of injecting the notion of services of general interest have been mainly unresponsive. For if we were to agree on a fundamental and basic aspect concerning the very notion of what constitutes a service, in that as a necessary condition it must be the subject of a transaction in order to ascertain its presence, than we can bring to light other fundamental issues.¹⁹⁹ “The mere performance of some activity is not enough if the consumer unit is not affected in some way”²⁰⁰ and that, “whatever the producer of the service does must impinge directly on the consumer in such a way as to change the condition of the latter.

¹⁹⁶ See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford.pg. 263.

¹⁹⁷ In this respect see discussion in chapter 2 in particular section 2.4, “*The Theory of Comparative Advantage – A General Idea*”.

¹⁹⁸ Nearly 1 in 7 people in the EU are at risk of poverty .To this effect see discussion in chapter 3 in particular section 3.2, “*Poverty across the EU – A snapshot*”.

¹⁹⁹ See, section 4.4, ‘*Gaining marketing insights on the nature of services*’.

²⁰⁰ See, Hill, T.P. 1977, "On Goods and Services", *Review of Income & Wealth*, 23, 4, 315-338.pg. 318. See also, Bagozzi, R.P. 1975, "Marketing as Exchange", *J.Market.*, 39, 4, 32-39.; Kotler, P. and Clarke, R.N. 1987, *Marketing for Health Care Organisations* Prentice-Hall, Englewood Cliffs, New Jersey.

Otherwise, no service is actually provided.”²⁰¹ It is from this point onwards that we can now proceed further with the argument.

When it comes to assessing the impact of services of general economic interest across the EU on the basis of empirical research concerning the network industries and Commission statements²⁰² we cannot derive with any conclusive evidence that puts us in a position so as to comfortably ascertain that services of general economic interest are making, “an important contribution to the overall competitiveness of the European industry and to economic, social and territorial cohesion”²⁰³ and that, “[a]s users of these services, European citizens **have come to expect high quality services** at affordable prices.”²⁰⁴ The process of production cannot be mistaken as the de facto *exchange*. For the actual impact that services of general economic interest are exerting in the exchange process²⁰⁵ is not straightforward and is unclear. When it comes to service quality as has been revealed through the marketing literature perceptions vary across cultures. Moreover, measuring service quality across cultures has proved to be a major difficulty in view of the failure to come up with measures that are capable of establishing equivalence across cultures. Further, we need also bear in mind that as Bagozzi²⁰⁶ contends social relationships do not simply unfold in a quid pro quo approach as occurs in the *restricted* exchange paradigm which involves the reciprocal exchange between **two parties**. For the process of exchange that occurs in social relationships is much more complex. It involves more than two social actors and invokes various media. Indeed, public procurement can act as one of the media and therefore, when embarking upon public policy, public procurement needs to be perceived within this complex social exchange paradigm. Such logic makes it possible to define public procurement contracts as,

²⁰¹ See, Hill, T.P. 1977, "On Goods and Services", *Review of Income & Wealth*, 23, 4, 315-338. pg.318.

²⁰² See, SEC(2007) 1024 final. *Commission Staff Working Document - Evaluation of the Performance of Network Industries Providing Services of General Economic Interest 2006 Report*, 12.07.2007, European Commission, Brussels. pg.6. See also chapter 1, section 1.2, “*The liberalisation of the network industries as an illustration of the European Union’s overriding and unconditional attitude towards the single market project*”.

²⁰³ See, 2001/C 17/04. *Communication from the Commission, Services of general interest in Europe*, Official Journal of the European Communities, paragraph 8.

²⁰⁴ Ibid. (emphasis added).

²⁰⁵ On the process of exchange see discussion in section 4.4.1.1, “*Gaining marketing insights on the nature of services*”.

²⁰⁶ See, Bagozzi, R.P. 1975, "Marketing as Exchange", *J.Market.*, 39, 4, 32-39.

A special category of contracts wherein one of the parties represents the public interest and is manifest through complex exchanges that occur in social relationships and which in the process are separated in part by the passage of time.²⁰⁷

Thus, in social exchanges a mixture of forces come into play and depending on their balance can either favour and promote change or embrace the status quo. In so far as Community action remains solely guided by values that are grounded upon the economic belief of the efficacy of competitive market forces the status quo will be maintained. Should we not rather be directed by values that are rooted in the community²⁰⁸ such as those that foster the common good of the community wherein the participation of all, the flourishing of all becomes the primary and superseding objective?

Services of general interest reflect values that convey special meanings for each and every Member State. They reflect the evolution of the country's identity construction through the passage of time thus translating the role and manner by which the country needs to operate. They provide Member States with distinctive features that define Europe.²⁰⁹ It is a known fact that complete reliance on the market to ensure the delivery of socially desirable objectives is not sufficient.²¹⁰ When for instance poverty strikes, health problems emerge, unemployment props up, substance addiction creeps in and family and housing problems arise, the inherent structural nature of market forces are not directed to deal with such matters. This is why Member States have a vital task in the delivery of high quality services of general interest and the public sector plays a major role in this respect through regulation and government spending. Services of general interest bear a direct impact on the life of each and every individual citizen. They,

²⁰⁷ This definition is based on the understandings captured in this thesis in particular those gathered through the marketing insights.

²⁰⁸ According to Finnis what could be said of a *community* could equally be said of *society*. See, Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford University Press, Oxford.pg. 135. The same position is adopted herein.

²⁰⁹ In the Cannes European Council, of 1995, the Heads of State and Government acknowledged that services of general interest form part of the set of values shared by all countries that help define Europe. See SN 211/95. *Cannes European Council, Conclusions of the Presidency*, 26-27 June 1995, Brussels. point A.I. 1.7

²¹⁰ "Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price. However, these mechanisms sometimes have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion may not be attained." See, COM(96) 443 final. *Services of General Interest in Europe*, 11.09.1996, European Commission, Brussels. pg. 5.

"The market, left to itself, does a good job of supplying many services of general interest for many people. However, sometimes markets fail to deliver socially desirable objectives and, as a result, services are underprovided by the market." See, COM (2001) 598 final. *Report to the Laeken European Council - Services of General Interest*, 17.10.2001, European Commission, Brussels. pg. 3.

....underpin human dignity and guarantee the universal right to social justice and to full respect of fundamental rights, as set out in the Charter of Fundamental Rights and in international commitments such as the revised European Social Charter and the Universal Declaration of Human rights. They help to ensure the effective exercise of citizenship.²¹¹

Picard argues that the fundamental right to freedom is losing its meaning and its inherent content is being gradually removed.²¹² Indeed, services of general economic interest serve to define and meet the ends of Europe's economic constitution.²¹³ In doing so it deflects the Community's freedom which according to *service public* served to constitute and institute the State in order to guarantee that very fundamental right to freedom for the purpose of serving **its** members. "Once freedom is on the way to losing its initial (and true) meaning, there is no longer any principle of an intellectual, moral, or political nature left to contain the public sphere."²¹⁴

Now, we need only adopt a macro-perspective and observe what is actually happening on the ground.....take a look around you and look at the actual outcomes. For outcomes constitute a crucial aspect of the whole service process and it is their consumed outcome that stares us straight in the face.

²¹¹ See, 2007/C 161/22. *Opinion of the European Economic and Social Committee on the Communication from the Commission Implementing the Community Lisbon programme: Social services of general interest in the European Union, COM(2006) 177 final*, 13.07.2007, Official Journal of the European Union, Brussels. para. 2.1.

²¹² See, Picard, E. 1998, "Citizenship, Fundamental Rights, and Public Services" in *Public Services and Citizenship in European Law*, Clarendon Press, Oxford.pg. 94.

²¹³ See also discussions in sections 3.7, "On Europe's Social Model" and section 3.7.1, "Ordoliberalism".

²¹⁴ See, Picard, E. 1998, "Citizenship, Fundamental Rights, and Public Services" in *Public Services and Citizenship in European Law*, Clarendon Press, Oxford.pg. 94.

5.0 Public Procurement as the EU's safety valve

Chapter Summary

The commercialisation of the EU citizen's everyday life comes as a result of the ever increasing subordination of public policies to market forces. As the challenges posed by globalisation impinge upon government's ability to produce independent policies the situation is further exacerbated within the EU. An assessment of Europe's modus operandi reveals two major conflicting forces - one at the conceptual level and the other at the operational level. At the conceptual level a binary distinction is attached to the function of the State. Concurrently at the operational level the ever increasing growth of supranational state intervention is seen to encroach upon Member States' freedom in particular to the provision of services of general interest. Consequently, when it comes to creating public policy the state becomes 'de-centred' and no longer the primary unit of analysis. By way of inserting some element of equilibrium EU public procurement is conceived as being utilised to a certain extent as a stabilising force. Notwithstanding the fact that the robustness of the rationale underpinning its application remains highly questionable it is nonetheless serving as the EU's safety valve. However, it is argued that EU public procurement deprives Member State's purchasing autonomy as it comes at the expense of its potential use capable of accommodating the particular and diverse socio-economic needs of Member States whilst concurrently fulfilling European Integration aims. In this respect the utilisation of a flexible public procurement regime that serves as the Member States' safety valve in contrast to the EU's safety valve presents the case for potentially better harmonisation and synchronisation of socio-economic policies at EU level and Member States' level. The hallmark of European economic development relies heavily on the diverse socio-political building capacities of Member States. In this respect flexibility mechanisms can be afforded to Member States through better incorporation of the EU public procurement regime, one that needs to be driven by a politics of cooperation and coordination guided by a *public interest* function that recognizes the full dignity of the human person as an end in itself.

5.1 Introduction

Since the end of the Second World War the construction and operation of infrastructure in Europe has been principally achieved by the public sector while the involvement of private investors and operators in this area has been relatively limited. Corporatist regimes have typically promoted large governmental projects. Organised labour movements controlled such public enterprises and eventually turned them into overstaffed and inefficient drains on the public budget.¹ However, the situation in the majority of EU Member States including a number of countries around the world has been one of increasing private participation. The EU region has seen major shifts towards privatisation. Public enterprises operating in traditional sectors such as water, transport, energy and telecommunications have been transferred under the charge of private missions.

It is argued that this change in attitude does not reflect a mere swing in political trends nor does it emerge as the only means for increasing extra-budgetary resources to improve investment flows into infrastructure for increasing public efficiency or for expanding the private sector. Privatisation emerges as a direct consequence of globalisation.² The global economy that started to take shape from the 1970s onwards obliged states to adapt to the needs of global market forces. Indeed, globalisation as a significant driving force has prompted various changes in society. The relationship between business and society is inherently relational. Businesses cannot exist in isolation from society and society is what it is in relation to its constituting institutions.³ No absolute line can be drawn between business and society for the origin and foundation of business is social in nature.

As businesses respond to global forces they create new operational modes and a global infrastructure that seeks to maintain cost effectiveness and competitiveness. Likewise, the state

¹ See, Watkins, T. *The economic system of Corporatism*, <http://www.sjsu.edu/faculty/watkins/corporatism.htm> [25 March, 2010].

² See, Aman, A.C.J. "Globalization, Democracy, and the Need for a New Administrative Law", *Indiana Journal of Global Legal Studies*, 10, 1 (Winter 2003), 125-156. According to Scholte (2000) globalisation is simultaneously regarded as an effect and a cause. See, Scholte, J.A. 2000, *Globalisation: a critical introduction*, Macmillan Press Ltd., London.

³ See, Buchholz, A.R. and Rosenthal, S.B. 2004, "Stakeholder Theory and Public Policy: How Governments Matter", *Journal of Business Ethics*, 51, 143-153.

is not only faced with domestic pressures but is also placed under intense pressure to harmonise its regulatory processes so as to better deal with economic and environmental issues which are of global concern. The state is not a passive victim of globalising forces but an active participant in the process.⁴ The end result is an ever increasing blurring divide between the public and private spheres.

It is argued that whilst globalisation encroaches to a greater or lesser extent upon government's ability to produce independent policies the situation becomes further exacerbated within the EU. The notion of, "The EU as a de-centred State" (section 5.2) comprises the discussion in the forthcoming section wherein the ever increasing subordination of public policies to market forces is put under focus. Within a scenario of ever changing relationships between the market and the state the creation of *marchés publics* as *sui generis* markets is seen to play a highly valid and crucial societal role for the attainment of *public interest* goals for it is argued that such goals cannot be left to the whims of market forces. This is the subject matter under discussion in section 5.3, entitled "Marchés Public as Sui Generis Markets". Notwithstanding the fact that the regulation of EU public procurement operates within such *sui generis* markets and that it exposes an economic and legal approach to the integration of public markets, EU public procurement is also used as a policy instrument in an attempt to add extra leverage in the drive for achieving other European aims such as, sustainable consumption, production and sustainable industry policy, to increase the demand for innovative goods and services and for the pre-commercial procurement of innovation. And, adding on to the EU's public procurement's task list it could also be claimed that public procurement is very well serving as the EU's safety valve. The following sections proceed to explain such whilst putting into context the two research questions that this thesis has set off to explore through this journey of *Verstehen*. Section 5.4, addresses, "To what extent is the EU public procurement regime serving the public interest?" whilst section 5.5 discusses, "To what extent should the EU harness Member States' potential of utilising public purchasing as a tool capable of promoting social policies?" Section 5.6, "Concluding Remarks" presents the case for public procurement's potential within a re-ordered State that operates in a

⁴ See, Williams, M. 1996, "Rethinking Sovereignty" in *Globalisation: Theory and Practice*, Continuum International Publishing Group, London.

less rigid regime to serve as the Member States' safety valve thus allowing better harmonisation and synchronisation of socio-economic policies at EU level and Member States' level.

5.2 The EU as a de-centred State

The process of globalisation encroaches upon governments' domestic power and capacity as it undermines to a greater or lesser extent their ability to implement independent policies. The changing relationships between the market and the state translate into a range of hybrid forms of governance that are characterised by a fusion of public and private values, rhetoric and approaches. Consequently, when it comes to creating public policy the state becomes 'de-centred' and no longer the primary unit of analysis.⁵

The notion of a 'de-centred' state and the subordination of public policies to market forces are further accentuated within the EU. Two major conflicting forces in the EU legal order come into play – one at the conceptual level and the other at the operational level. The following attempts to explain such.

At the conceptual level in the EU legal order both the liberal and social democratic theories of the state are considered as fundamentally legitimate. It could be noted that in both liberal and social democratic theories the state is actively involved in dealing with socio, political and economic problems. On one hand for instance if we consider *Ordoliberalism*⁶ this is primarily concerned with the protection of the free market economy and accordingly the role of law is to deal with the inequities that may arise in the distribution of power. On the other hand *Service Public* is concerned with social redistribution and its protection from market pressures through legal means. Both schools of thought construe a clear demarcation line between the public and private spheres. This is clearly reflected in EU case law. Figure 1 attempts to capture in illustrative terms this binary distinction including the underpinning logic with reference to related case-law.

⁵ See, Aman, A.C.J. "Globalization, Democracy, and the Need for a New Administrative Law", *Indiana Journal of Global Legal Studies*, 10, 1 (Winter 2003), 125-156.

⁶ For a discussion on *Ordoliberalism* see chapter 3, section 3.7.1 entitled, "*Ordoliberalism*".

Overview to the binary schematic diagram at Figure 1

** The first point of departure and central to the whole schematic diagram in Figure 1 features The State and the manner in how it is conceptualised at the supranational level. “The State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market.”⁷ The distinction herein comprises the fulcrum that eventually determines the specific path to the binary route. At one end, activities that fall under the classification of a non-industrial or non-commercial nature fall within the competence and sovereign powers of Member States. At the other end, activities which are of an industrial or commercial nature fall within the scope of the EU’s *shared values*⁸ and within the remit of *services of general economic interest*.

** Restrictions on the fundamental freedoms enshrined in the Treaty may be justified but, “reasons of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom.....”⁹ Here, *the underlying rationale behind the nature of the activity in question determines the specific path to be adopted along the binary route and hence the ultimate destination with its consequent effects*.

** The three conditions defining the nature of a body governed by public law are cumulative.¹⁰ To this effect the Court draws a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.¹¹ Here, *the underlying rationale behind the nature of the activity in question determines the specific path to be adopted along the binary route and hence the ultimate destination with its consequent effects*.

⁷ See, Case 118/85. Commission of the European Communities v Italian Republic [1987] ECR 02599 paragraph 7.

⁸ “...given the place occupied by services of general economic interest in the shared values of the Union....” Article 14 TFEU.

⁹ See, Case C-384/08. Attanasio Group Srl v Comune di Carbognano ECR 00000, paragraph 55.

¹⁰ See, Case C-44/96. Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH [1998] ECR I-00073 paragraph 21 refers.

¹¹ See, Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 36.

*** When it comes to defining an undertaking, “in the context of competition law, first that concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.....”¹² Alternatively, when “that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings within the meaning of Article 85 and 96 of the Treaty.”¹³ An economic activity refers to “any activity consisting in offering goods and services on a given market...”¹⁴ Here, *the underlying rationale behind the nature of the activity in question determines the specific path to be adopted along the binary route and hence the ultimate destination with its consequent effects.*

*** The recognition of activities classified as services of general economic interest do not necessarily presume that special or exclusive rights have been granted. “The grant of a special or exclusive right to an operator is merely the instrument, possibly justified, which allows that operator to perform as SGEI mission.”¹⁵ On the other hand, the compulsory nature of services of general economic interest is recognised as an essential condition for the existence of services of general economic interest within the meaning of Community law.¹⁶ Here, *the underlying rationale behind the nature of the activity in question determines the specific path to be adopted along the binary route and hence the ultimate destination with its consequent effects.*

*** On the basis of established case-law concerning Article 106(2) TFEU ¹⁷ the Court observed that Member States are to give reasons when a service of general economic interest is identified

¹² See, Case C-41/90. Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECR I-01979 paragraph, 21.

¹³ See, Joined cases C-159/91 and C-160/91. Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon, [1993] ECR I-00637, paragraph 19.

¹⁴ See, Joined cases C-180/98 to C-184/98. Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-06451, paragraph 75.

¹⁵ See, Case T-289/03. British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities [2008] ECR II-00081 paragraph 179.

¹⁶ See, Case T-289/03. British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities [2008] ECR II-00081, paragraphs 188-190.

¹⁷ In its judgment Case T-289/03, paragraph 172, the Court referred to the following case-law: Case C-179/90. *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-05889 paragraph 27, and

and must indicate what makes such a service distinct from other economic activities. Here, *the underlying rationale behind the nature of the activity in question determines the specific path to be adopted along the binary route and hence the ultimate destination with its consequent effects.*

*** When it comes to the classification of State Aid the Court held in the Altmark Trans¹⁸ case that on the basis of established case-law all the conditions as set out in Article 107(1) TFEU need to be fulfilled in order to classify compensation as state aid.¹⁹ Here, *the underlying rationale behind the nature of the activity in question determines the specific path to be adopted along the binary route and hence the ultimate destination with its consequent effects.*

***State Aid is not applicable when the financing measures are intended as a *quid pro quo*. In such cases public procurement procedures provide the clearest example of a direct and manifest link between State financing and clearly defined obligations.²⁰

***State Aid may not be applicable when the state aid approach is adopted which necessitates the procedure under Article 108(3) TFEU.²¹

*** State Aid may not be applicable when the *compensation* view point is adopted. This approach regards state measures as falling within the classification of state aid only to the extent that the remunerations exceeds market price.²²

C-34/01 to C-38/01. Enirisorse SpA v Ministero delle Finanze [2003] ECR I-14243; Joined Cases C-115/97, C-116/97 and C-117/97. Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen [1999] ECR I-6025 paragraphs 33 and 34.

¹⁸ See, Case C-280/00. Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht [2003] ECR 07747, paragraph 74.

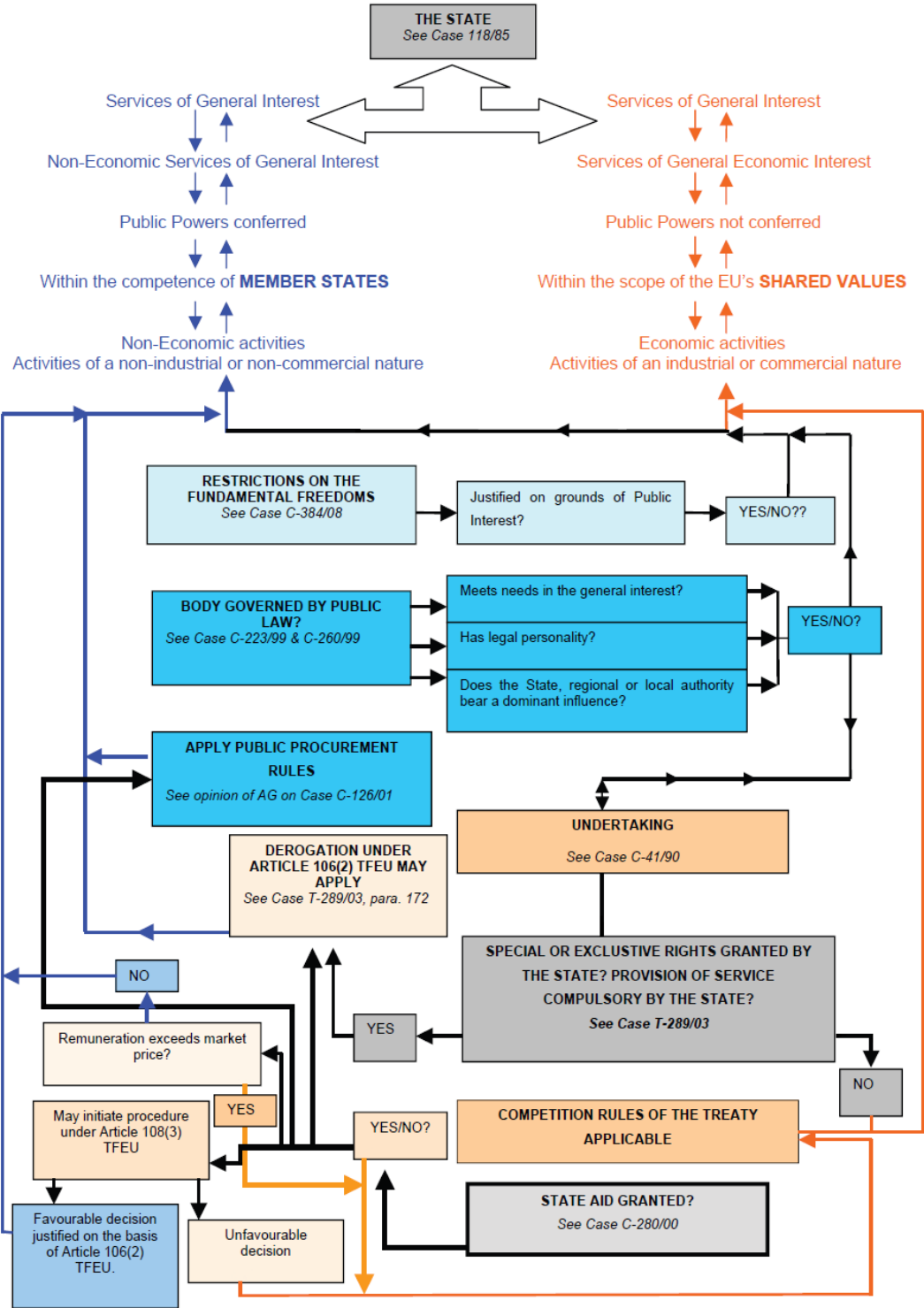
¹⁹ “First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.”¹⁹ Case C-280/00, paragraph 75.

²⁰ See, Opinion of Mr Advocate General Jacobs in Case C-126/01. Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA [2003] ECR I-13769, delivered on 30 April 2002, paragraph 119.

²¹ See, Case T-46/97. SIC - Sociedade Independente de Comunicação SA v Commission of the European Communities [2000] ECR II-02125.

²² See, Case C-53/00. Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS) [2001] ECR I-09067.

Figure 1: Conceptual forces underpinning the EU legal order: A binary distinction on the Conduct of the State.



As it transpires, concurrently, at the **operational level** EU competition rules are steadfastly penetrating the regulatory boundaries that have once insulated Services of General Interest (SGI).²³ Such services now become increasingly exposed to market forces under the pretext of *services of general economic interest* - an illusory concept that could be referred to as a *label* and which is devoid of true meaning.²⁴ What was once historically attached by way of definition, organisation and management and deeply ingrained into the Member States' culture now becomes commercialised. The commercialisation of the EU citizen's everyday life is made to appear as a natural and inevitable outcome of market forces. Meanwhile, the obligation by the political class to fulfil democratically determined public interest needs that reflect collective values gnaw away as market-driven policies supersede. Politics sheds on a new shade as market forces dictate its role – a role that seeks nothing other than to serve the perceived needs of capital accumulation. This new game that politics has become engaged in commands a highly skilled balancing act. Failure to maintain this balancing act threatens the legitimacy of the government of the day as the gradual destruction of services of general interest on which social solidarity and active democracy have always depended are put under pressure.²⁵ Services of general interest favour and foster the common good. And the sole purpose of the state and thus that of politics and the law is the attainment of the common good. The gradual marginalisation of the common good seriously puts into question the authenticity of the political elite.

Thus, these two conflicting forces, one which originates at the *conceptual level* and the other at the *operational level* further exacerbate the pressures exerted by the globalising market forces and explain why the notion of a 'de-centred' state and the subordination of public policies to market forces become further accentuated within the EU. The demarcation lines between the public and private spheres within the EU become even fuzzier and more confusing. Whilst on one hand at the conceptual level a clear cut demarcation line as construed by the EU legal order

²³ To this effect see discussion in chapter 4, "On the mission of serving the Public: Services of General Interest and Community Law."

²⁴ To this effect see discussion in chapter 4.

²⁵ See discussion in chapter 3 in particular section 3.7.3 entitled, "*Social Europe on the move*".

For a more or less similar argument but one that is based on the effects of the global economy, see also discussion put forth by, Leys, C. 2001, *Market-Driven Politics : Neoliberal Democracy and the Public Interest*, Verso, UK.

between the market and the state is drawn up concurrently we have major opposing forces at the operational level at work that are steadfastly crushing down such barriers. This lack of coherence leads to an incompatible state of affairs that goes beyond practical reasonableness. It is unjust. It explains the lack of clarity and legal uncertainties that have persistently hounded the performance of services of general “*economic*” interest tasks. According to Sauter and Schepel maintaining a clear cut demarcation line between the market and the state is where the problem lies.²⁶ For Bovis the roles and the responsibilities of the state are in the process of being redefined.²⁷

5.3 Marchés Publics as Sui Generis Markets

Indeed, the changing relationship between the market and the state has brought about new forms of governance. Privatisation has been described as a first step that departs from traditional corporatism. Other forms of governance namely those falling under the category of contracting out²⁸ suggests yet another form of departure from traditional Corporatism. Corporatism it is argued has emerged as a vital instrument for the state to promote its industrial policy.²⁹ As a consequence this has led to the creation of marchés publics. Marchés publics or public markets as commonly referred to are sui generis markets wherein the attainment of goals in the public interest features as their major thrust. Such a profound feature is what places the public market distinct from the private market. In the case of the latter the maximisation of profits dominates the private market’s drive. Therefore, on one hand public markets are driven by actions that primarily seek the fulfilment of *public interest* goals, on the other, private markets are primarily motivated to fulfil *private interest* goals. That the wider needs of society can be met by individuals pursuing their own interests, that is *private interest* goals in a market-based economy

²⁶ See, Sauter, W. and Schepel, H. 2009, *State and Market in the European Union Law: The Public and Private Spheres of the Internal Market before the EU courts*, Cambridge University Press, Cambridge.

²⁷ See, Bovis, C. 2005, "Financing services of general interest, public procurement and state aids: The delineation between market forces and protection", *European Law Journal*, 11, 1, 79-109.

²⁸ Whilst privatisation denotes a transfer of ownership, contracting out represents a transfer of undertaking only. It is worth noting that in the case of privatisation the control of operations that fall within the public interest domain remain under the control of the state in the form of the regulatory regime, see, Bovis, C. 2006, *EC Public Procurement Case Law and Regulation*, Oxford University Press, Oxford.

²⁹ See, Bovis, C. 1998, "The Regulation of Public Procurement as a Key Element of European Economic Law", *European Law Journal*, 4, 2, 220.

needs to be understood in the light of what Adam Smith also recognised way back in 1776, “[I]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from the regard to their own interest.”³⁰ Therefore, as long as there is money available to pay out for desirable products, irrespective as to whether or not such products may be socially desirable, for example in the case of procuring ‘addictive drugs’ the market mechanism cannot differentiate between ‘right’ and ‘wrong’. Thus, the attainment of *public interest* goals which operate within *sui generis* markets play a highly valid and crucial societal role that cannot be left to the whims of market forces.

Distinctive features that mark off the public from the private market indicate the boundaries within which the institutionalised nature of public procurement operates. As previously noted, pursuing public interest goals as opposed to profits is one of the major thrusts motivating the public sector vis-à-vis the private sector. Public markets tend to have monopsony/oligopsony structures where the state and its organs control a large proportion of the market with one or a few buyers and many sellers. Alternatively competition in private markets can vary from monopoly to oligopoly to high levels of competition. Demand in public markets is institutionalised and tends to be cyclical whereas in the private sector demand tends to be target oriented driven in pursuit of satisfying customer needs. Purchasing decisions within public markets are predominantly influenced by policy decisions, budgetary and bureaucratic constraints whilst the notion of value for money tends to come into play at a later stage that is, during the actual procurement process. In private markets purchasing decisions tend to be predominantly influenced and hence motivated by price-quality, value for money relations. The establishment of prices in public markets are usually determined following calls for tender or negotiations. “In consequence, the application of the public procurement regime reinforces the character of services of general interest as non-commercial or industrial and the existence of *marchés publics*.”³¹ In such markets competitive tendering procedures attempt to fulfil public law norms

³⁰ See, Pike, R. and Neale, B. 1999, *Corporate Finance and Investment – Decisions and Strategies* 3rd edition, Prentice Hall, Great Britain., pg. 15

³¹ See, Bovis, C.H. 2009, "State Aid and Public Procurement in the Financing of Services of General Economic Interest " in *The Changing Legal Framework for Services of General Interest in Europe*, T-M-C-Asser Press, The Hague. pg. 166, cross referencing, Bazex, M. *Le droit public de la concurrence* 1998, RFDA.; Arcelin, L. *L'entreprise en droit interne et communautaire de la concurrence*, 2003, Litec, Paris.; Guézou, O. *Droit de la concurrence et droit des marchés publics: vers une notion transversale de mise en libre concurrence*, Mars 2003, Contrats Publics,

whilst mimicking the supply/demand regime in private markets.³² However, unlike the private market the distinctive features within which the public procurement market operates deprives it from the invigorating stimuli found in the private market and instils what Bovis refers to as a static effect to the Value For Money (hereinafter referred to as VFM) process. Although openness in public procurement through the principle of transparency is used as leverage for VFM and is claimed to stimulate price competition with the consequent benefits being enjoyed by public authorities, when it comes to traditional public procurement it has been argued that this process can become counterproductive.³³ In effect, the actual impact that the public procurement directives bear on public procurement prices remains highly inconclusive.³⁴

As noted on various occasions, the regulation of EU public procurement exposes an economic and a legal approach to the integration of public markets in the EU with the main objective being to enhance competition and unobstructed market access. In other words it attempts to promulgate the EU's internal market. EU public procurement is also used as a policy instrument in an attempt to add extra leverage, in the drive for sustainable consumption and production and sustainable industry policy,³⁵ to increase the demand for innovative goods and services³⁶ and for the pre-commercial procurement of innovation.³⁷ And, adding on to the EU's public

³² See, Bovis, C. 2006, *EC Public Procurement Case Law and Regulation*, Oxford University Press, Oxford. pg. 15.

³³ Ibid.

³⁴ To this effect see discussion in Chapter 2 and in particular section 2.8.2 entitled, "Impact on Transparency".

³⁵ See, European Commission. *Communication to the European Council and the European Parliament, the European and Economic and Social Committee and the Committee of Regions on Sustainable Consumption and Production and Sustainable Industry Policy Action Plan*, (2008) 397/3. Brussels.

See, COM(2008) 400 final. *Communication to the European Council and the European Parliament, the European and Economic and Social Committee and the Committee of Regions of 16 July 2008, Public Procurement for a Better Environment*. European Commission, Brussels.

³⁶ See, COM (2011) 572 final. *Communication to the European Council and the European Parliament, the European and Economic and Social Committee and the Committee of Regions – Partnering in Research and Innovation*. European Commission, Brussels.

See, Aho Group. *Creating an innovative Europe: Report of the independent expert group on R&D and innovation appointed following the Hampton Court Summit* January 2006,

³⁷ See, COM(2007) 799 final. *Communication to the European Council and the European Parliament, the European and Economic and Social Committee and the Committee of Regions – Pre-commercial procurement: Driving innovation to ensure sustainable high quality public services in Europe* European Commission, Brussels.

procurement's task list it could also be claimed that public procurement is very well serving as the EU's safety valve. The following proceeds to explain such. Moreover, it endeavours to put into context and discuss the two research questions that this thesis has set off to explore through this journey of *Verstehen*.

5.4 To what extent is the EU public procurement regime serving the public interest?

As the EU becomes increasingly shaped in ways that serve the perceived needs of capital accumulation with the benefit of hindsight through the understandings deciphered in this thesis it could be argued that the prevailing legal uncertainty in the application of the law on state aid to services of general interest should not come as a surprise. As long as the EU's modus operandi remains focused and content in keeping up with its juggling act wherein diametrically opposing forces at the *conceptual* and *operational* levels remain in concert, the intersection between the public and private sectors is most likely to remain a highly fragile and unstable one.....unless some sort of equilibrium is found. Advocate General Jacobs appears to have made an attempt towards this end. However, its robustness is seriously questioned - a matter that will be discussed in due course.

In the GEMO case in his opinion advocate General Jacobs has offered an alternative approach for the applicability of financing of services of general interest³⁸ - the *quid pro quo* approach. The analysis is based on whether or not there exists a direct and manifest link between state financing and clearly defined public service obligations. The conduct of public procurement procedures are identified as ideal in this respect. It has been argued that the public service obligations imposed through public procurement are so direct and manifest that the financing and the obligation could be regarded as a single measure. Accordingly, this approach is claimed to bring about a number of advantages. It gives due weight to the importance of services of general interest, strikes a balance between potentially conflicting policies and is consistent with the general case law on State-Aid.

³⁸ To this effect see "Opinion of Advocate General Jacobs on Case C-126/01", op. cit. (n.20).

In effect, it does much more. It is through the *quid pro quo* approach that public procurement serves as the most vital tool in order for public services to escape from under the clutches of State aid control. As such public procurement acts as a modifier because to a certain extent it provides release from the overwhelming pressures that market forces would otherwise exert on the provision of public services. Public procurement as a stabilising force helps equalise the balance of competing and opposing forces concurrently at work at the *conceptual* and *operational* levels. It thus helps introduce some element of stability. It is in this sense that public procurement could be described as the EUs safety valve.

Nevertheless, the applicability of Community rules to the financing of public services remains the subject of controversy.³⁹ In particular the counter arguments as put forth by Advocate General Léger in his opinion on the Altmark case are noteworthy.⁴⁰ Moreover, when his arguments are connected to the understandings as derived to in this thesis we come closer to more sense making. In his arguments Advocate General Léger focuses essentially on four main areas, the criterion of the private investor in a market economy, the concept of ‘advantage’ in Article 92(1)⁴¹ of the Treaty, the procedural obligations laid down in Article 93(3)⁴² of the Treaty and the *quid pro quo* approach. What follows is a brief exposition of three of his main arguments namely, the *quid pro quo* approach, the criterion of the private investor in a market economy and the concept of ‘advantage’ in Article 92(1)⁴³ of the Treaty and which are henceforth put into context in the light of the understandings captured by this thesis.

i. On the *quid pro quo* approach Advocate General Léger highlights two difficulties. The first is in stark contrast to what Advocate General Jacobs claims as the number one advantage with the latter stating that, “[T]he proposed distinction has a number of advantages. First it is consistent

³⁹ See opinion of Mr. Advocate General Léger in Case C-280/00, delivered on 14 January 2003, paragraph 4.

⁴⁰ Ibid.

⁴¹ Article 92(1) EC has been replaced by Article 107 (1) TFEU.

⁴² Article 93(3) EC has been replaced by Article 108 (3) TFEU.

⁴³ Article 92(1) EC has been replaced by Article 107 (1) TFEU.

with the general case-law on the interpretation of Article 87(1) EC.”⁴⁴ On the other hand, Advocate General Léger states as follows, “[F]irst, the *quid pro quo* approach appears difficult to reconcile with the Court's case-law on State aid.”⁴⁵

At paragraphs 122 and 123 Advocate General Jacobs opines as follows:

122. Under that case-law, bilateral arrangements or more complex transactions involving mutual rights and obligations are to be analysed as a whole. Where for example the State purchases goods or services from an undertaking, there will be aid only if and to the extent that the price paid exceeds the market price.⁴⁶ Where the State lends money to an undertaking there will be aid only if and to the extent that it does not ask for an appropriate return as would a private investor.⁴⁷ The same global analysis must in my view prevail where the link between State funding and the clearly defined general interest obligations imposed is so direct and manifest that financing and obligation must be regarded as a single measure.

123. Under the general case-law on Article 87(1) EC the causes and aims of a unilateral measure are by contrast not to be taken into account for the classification of the measure as State aid but only for the assessment of its compatibility under Article 87(2) and (3) EC. Where it is not clear from the outset that State funding is granted as a *quid pro quo* for clearly defined general interest obligations, a State's contention that the funding is in fact intended to offset the additional cost of the general interest tasks assumed by certain undertakings must be viewed as referring merely to the causes and aims of the measure. Whilst many instances of that second type of funding measure may be justified under Article 86(2) EC, I consider that they should not fall outside the scope of the State aid rules.

However, Advocate General Léger remains unconvinced and at paragraphs 83 and 84 of his opinion he argues as follows:

83. The first criterion suggested consists in examining whether there is a 'direct and manifest link' between the State funding and the public service obligations. In practice, this amounts to requiring the existence of a public service contract awarded after a public procurement procedure.⁴⁸ Similarly, the second criterion suggested consists in examining whether the public service

⁴⁴ See, opinion of Mr. Advocate General Jacobs, op.cit. (n. 20) paragraph 121. Article 87(1) EC has been replaced by Article 107(1) TFEU.

⁴⁵ See opinion of Mr Advocate General Léger in Case C-280/00. *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR 07747 delivered on 14 January 2003, paragraph 79.

⁴⁶ To this effect Advocate General Jacobs cites the following: Opinion of Advocate General Fennelly in Case C-251/97. *French Republic v Commission of the European Communities*, [1999] ECR I-06639, delivered on 26 November 1998, paragraph 19 with further references.

⁴⁷ To this effect Advocate General Jacobs cites the following: Case C-301/87. *French Republic v Commission of the European Communities*, [1990] ECR I-00307, paragraphs 39 to 41 of the judgment.

⁴⁸ To this effect Mr. Advocate General Léger refers to the Opinion of Mr. Advocate General Jacobs in *GEMO*, paragraph 120.

obligations are 'clearly defined'. In practice, this amounts to verifying that there are laws, regulations or contractual provisions which specify the nature and content of the undertaking's obligations.⁴⁹

84. In those circumstances, the *quid pro quo* approach departs from the Court's case-law on State aid. It amounts to defining aid no longer by reference solely to the effects of the measure, but by reference to criteria of a purely formal or procedural nature. At theoretical level, it means that the same measure may be classified as aid or 'non-aid' depending on whether a contract (of public service) or a legal instrument (defining the public service obligations) exists, although it produces identical effects on competition.

The second difficulty that Advocate General Léger finds in the application of this approach is that, “the *quid pro quo* approach does not appear to be capable of guaranteeing a sufficient degree of legal certainty.”⁵⁰ At paragraphs 86 and 87 of his opinion he contends as follows:

86. The principal criterion underlying this approach is defined in a vague and imprecise fashion. It is clear that this is deliberate and is intended to provide the flexibility needed to comprehend a wide range of situations.⁵¹ Nevertheless, it is extremely difficult to know what is covered by the expression 'direct and manifest link'. Moreover, apart from the case of a public service contract concluded after an award procedure, none of the parties was able to provide a single specific example of this kind of link between State financing and public service obligations.⁵²

87. In those circumstances, the expression 'direct and manifest link' — and hence the very concept of State aid — will be likely to receive widely differing interpretations. These interpretations may also vary according to the cultural (or even personal) attitudes of the various bodies responsible for applying the Treaty rules on State aid.

⁴⁹ To this effect Mr. Advocate General Léger refers again to the Opinion of Mr. Advocate General Jacobs in *GEMO*, paragraph 120.

⁵⁰ See, opinion of Mr. Advocate General Léger in Case C-280/00 op. cit. (n. 45) paragraph 85.

⁵¹ To this effect Mr. Advocate General Léger refers to the Opinion of Advocate General Jacobs in Case C-126/01. *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [2003] ECR I-13769, delivered on 30 April, 2002, point 129, and the Opinion of Advocate General Stix-Hackl Joined cases C-34/01 to C-38/01. *Enirisorse SpA v Ministero delle Finanze*, [2003] ECR I-14243, delivered on 7 November 2002, point 157.

⁵² To this effect Mr. Advocate General Léger in footnote 97 of his opinion remarks as follows: “In fact, the sole concrete and 'operational' criterion which can be set in the context of the *quid pro quo* approach is the requirement of a public service contract concluded after an award procedure. The various parties concur, however, in admitting that such a requirement is disproportionate (see also the Opinion of Advocate General Jacobs in *GEMO*, point 129, and the Opinion of Advocate General Stix-Hackl in *Enirisorse* point 157). Furthermore, it must be noted that, in its present state, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) does not apply to public service concessions. It is therefore difficult to lay down such a judge-made requirement in the context of the Treaty provisions concerning State aid.”

As observed by Advocate General Léger the flexibility inherent in the *quid pro quo* approach in essence provides some manoeuvring space including that for differing cultural interpretations. It bears noting that culture is not a static phenomenon and European social models are deeply ingrained in their cultures. In effect, this flexibility plays a vital role as it allows for the attainment of equilibrium between the opposing forces that are at work at the *conceptual* and *operational* levels. It helps further explain why this approach allows EU public procurement to serve as a safety valve as it protects to a certain extent the provision of public services as it enables culture to act as a device protecting Member States from the overwhelming pressures of market forces. And in doing so it reasserts to a certain extent their social rights.

Further, we need also reflect upon Advocate General Léger's difficulty with the term 'direct and manifest link' which when connected with the marketing insights derived on the nature of services⁵³ we can draw further understandings. As has been revealed through the marketing literature the *quid pro quo* approach holds that only two parties are involved in the exchange process. In such exchanges utilitarian or economic meanings are attached wherein, human behaviour is seen to be driven by rational motives in order to achieve maximum satisfaction and that the individuals involved in the exchange process have access to complete information on all the available alternatives and that they are relatively free from external influences. But, as has been argued, in social exchanges as is the case with public procurement the exchange involved cannot be reduced to a simple *quid pro quo* notion for much more complexities are involved which include various tangible and intangible transfers, various media that influence the exchange and which in the process are separated in part by the passage of time. Nothing is so 'direct and manifest' with public procurement.

ii. According to EU case law **the criterion of the private investor in a market economy** is applicable only in cases where the intervention by the State is categorised as an economic one.⁵⁴ In such cases the Court thus proceeds to examine whether a private operator of comparable size

⁵³ To this effect see discussion in chapter 4, in particular, section 4.4.1.1 entitled, "*Gaining marketing insights on the nature of services*".

⁵⁴ See, opinion of Mr. Advocate General Léger in Case C-280/00 op. cit. (n. 45) paragraph 21. See also, Case T-46/97 *SIC - Sociedade Independente de Comunicação SA v Commission of the European Communities* [2000] ECR II-02125.

to the public body would have carried out the operation in question under the same conditions. State aid exists only if and to the extent that the remuneration paid by the State exceeds the market price. The justification for the use of this criterion is based on the principal of equal treatment between the public and private sectors. The rationale being that the State should not be subject to stricter rules than those applicable to the private sector.⁵⁵ On the other hand, in cases where the intervention by the State is categorised as non- economic the principal of equal treatment between the public and private sectors is not applicable and therefore renders the private operator criterion immaterial.⁵⁶

In his counter-arguments Advocate General Léger notes that such rationale is based on wrong comparisons.⁵⁷ At paragraphs 25 and 26 of his opinion he contends as follows:

25. It is common ground that the financing of public services is an activity which typically falls within the exercise of public powers. It is for the public authorities to define the services which are to be made available to the collectivity. It is also for them to take[n] (*sic*) the necessary measures to ensure the functioning and financing of those services. It is, moreover, hard to imagine a private operator embarking on his own initiative on such financing activity.

26. Consequently, I consider that the private operator criterion cannot validly be applied to the financing of public services.

Advocate General Léger's counter arguments finds further support in this thesis. First, the strict dividing line that the EU demarcates between the public and private sectors at the *conceptual* level in reality and for reasons as explained above is very much blurred. This in itself distorts the principal of equality, that is, **if** the application of this principal was to be considered as applicably valid. But, this does not seem to be the case either. Second, the application of the principal of equality necessitates that one compares like with like. Given that the public sector operates in a *sui generis* market this collapses the notion of comparability and therefore invalidates the application of the principal of equality. Third, as noted above by Advocate General Léger at paragraph 24, "...the financing of public services is an activity which typically falls within the exercise of public powers. It is for the public authorities to define the services which are to be

⁵⁵ See, opinion of Mr. Advocate General Léger in Case C-280/00 op. cit. (n. 45) paragraph 21.

⁵⁶ Ibid. paragraphs 22, 23 and 24.

⁵⁷ Ibid. paragraph 27.

made available to the collectivity.” Worth recalling that public services delivered under the pretext of *services of general economic interest* – fall under an illusory concept that is devoid of true meaning.⁵⁸

iii. On **the concept of ‘advantage’ in Article 92(1)⁵⁹ of the Treaty** Advocate General Léger challenges the argument revolving around the compensation approach. According to this approach it is argued that State measures fall within the classification of state aid only to the extent that the advantage exceeds the additional costs for discharging the imposed public service obligations. As long as State measures are offsetting the costs of the public service obligations this has the effect of bringing the recipient undertaking into a position comparable with that of its competitors. Advocate General Léger refers to the rationale underpinning the compensation approach as based on a ‘net’ definition of aid or the ‘real’ advantage theory⁶⁰ wherein the financing and the public service obligations are regarded as a single measure. However, in his counter arguments at paragraphs 33, 34 and 35 of his opinion he notes as follows:

33. That does not, however, correspond to the approach adopted by the authors of the Treaty in the field of State aid. The relevant provisions of the Treaty are based on a 'gross' theory of aid or the 'apparent' advantage theory.

34. Using this approach, the advantages given by the public authorities and what the recipient has to contribute in return must be examined separately. The existence of the contribution is of no relevance for determining whether the State measure constitutes aid within the meaning of Article 92(1). It comes into consideration only at a later stage of the analysis, for assessing whether the aid is compatible with the common market.

35. The 'gross' theory of aid thus occurs in several provisions of the Treaty, in particular in Article 92(2) and (3), and in Article 77 of the EC Treaty (now Article 73 EC).⁶¹

In essence Advocate General Léger contends that the State aid approach is the appropriate approach for analysing State financing because it ensures coherence with the Treaty provisions.

⁵⁸ To this effect see also the discussions in sections 4.4.1.2, “*Gaining marketing insights on the characteristics of services*”.

⁵⁹ Article 92(1) EC has been replaced by Article 107 (1) TFEU.

⁶⁰ See, opinion of Mr. Advocate General Léger in Case C-280/00 op. cit. (n.45) paragraphs 31 and 32.

⁶¹ Articles 92(2), 92(3) and 77 of the EC Treaty have now been replaced by Articles 107(2), 107(3) and 93 TFEU.

On the other hand he opines that the compensation approach deprives the derogating provisions of the Treaty on State aid (namely, article 93 TFEU, Article 106(2) TFEU and Articles 107(2) and (3) TFEU) from their effect.⁶²

The compensation approach is discernible through the application of public procurement procedures.⁶³ The acceptable market/cut off price becomes established through competitive public tendering. Consequently, EU public procurement serves as a very important gateway that allows the provision of public services to escape from under the clutches of State aid control. The notion of EU public procurement acting as the EUs safety valve here again comes into play.

Despite the highly valid and concrete arguments as put forth by Advocate General Léger as in the compensation approach reflecting its apparent failure to cohere with general Treaty provisions such argumentation has not in the least detracted the continued application of the compensation approach to the financing of public services. The same could be said to the application of the *quid pro quo* approach. Such an attitude is consistent with the EUs overriding and unconditional attitude towards the single market project.⁶⁴ In so far as EU public procurement is serving Europe's internal market aims all else appears to be of secondary importance. The *public interest* function that the EU actively puts into motion draws heavily on aggregative conceptions of the *common good*. In this respect individual freedom, autonomy, rights, quality of life are only valuable in so far as they increase aggregate utility. For in deriving with aggregate utility the individual is used as its means. This the author finds as problematic as it conflicts with Europe's founding and fundamental value wherein the respect for human dignity necessitates that we treat individuals as an end in themselves and not be used as a means towards the achievement of ulterior goals. EU public procurement is being utilised to promote an abstract concept as is the market economy whilst at the very conceptual level dislocates Europe's fundamental right concerning the respect for human dignity which in itself constitutes the real basis of fundamental rights.

⁶² See, opinion of Mr. Advocate General Léger in Case C-280/00 op. cit. (n.45) paragraphs 46 and 52.

⁶³ See, opinion of Mr. Advocate General Jacobs op. cit. (n.20) at paragraph 119.

⁶⁴ Such an attitude constantly surfaces up and threads through the previous discussions in chapters 1, 2, 3 and 4.

Whilst the European Union adopts an overriding and unconditional attitude towards the role of EU public procurement in the single market project, in exchange to the dismantling of the so called non-tariff trade barriers social barriers are concurrently erected by way of restricting Member States' public purchasing autonomy when it comes to pursuing domestic social policies.⁶⁵ Further, such an overriding and unconditional attitude prevails notwithstanding the fact that the benefits deriving from the EU's public procurement regime are highly questionable.⁶⁶ Nonetheless, this has not in the least quenched the thirst for the capture of even more purchasing power at the supranational level.⁶⁷

These in reality are the tangible ideals that constitute in part Europe today, the Europe that we experience in our everyday lives when drained off from all forms of rhetoric. These are the ideals

⁶⁵ To this effect see discussion in chapter 3 in particular section 3.9, *"The Quest for Justice in Poverty Reduction: Putting EU Public Procurement into Perspective"*.

⁶⁶ To this effect see discussion in chapter 2 in particular section 2.8, *"The impact of EU Public Procurement legislation vis-à-vis the EU's Free Trade Agenda"*.

⁶⁷ **GPP is now seen as an integral part of the New Action Plan on Sustainable Consumption and Production and Sustainable Industry Policy (See, European Commission, Communication to the European Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on Sustainable Consumption and Production and Sustainable Industry Policy Action Plan, (2008) 397/3). Indeed, one of the greatest challenges facing the EU today is the integration of environmental sustainability and economic growth and welfare. With a view to moving towards an energy and resource efficient economy the EU has put forth a range of legislation to foster resource efficient and eco-friendly products and raise consumer awareness. However, it is argued that the introduction of such mandatory obligations on Member States may bear an impact on public procurement markets by way of restricting considerably the public procurers' choice and competition in procurement markets whilst simultaneously limiting the effect of other potential considerations in the award decision. Although, the public procurement directives provide a common framework for public purchasers on procedural rules on **how** to buy the following legislation mandates the public procurer on **what** to buy:

- ❑ Energy End Use Efficiency and End Services - Directive 2006/32/EC
- ❑ EU Regulation 106/2008, Community energy efficiency labelling programme for office equipment so called (Energy Star)
- ❑ Directive 2009/33/EC on promotion of clean and energy-efficient vehicles
- ❑ Energy Labelling Directive – Directive 92/75/EEC
- ❑ Energy Performance of Buildings – Directive 2002/91/EC

**In the proposal for a directive of the European Parliament and of the Council on public procurement,

"[t]he traditional distinction between so-called priority and non-priority services ('A' and 'B' services) will be abolished. The results of the evaluation have shown that it is no longer justified to restrict the full application of procurement law to a limited group of services. However, it became also clear that the regular procurement regime is not adapted to social services which need a specific set of rules...." See, COM(2011) 896 final. Proposal for a Directive of the European Parliament and of the Council on public procurement, 20.12.2011, European Commission, Brussels. Pg. 8. To this effect refer to discussion in chapter 2, section 2.8.3. *"Impact on Cross-Border Procurement."*

that are contributing towards Europe's social justice. Thus, on one hand EU public procurement is serving as a tool that helps dislocate Europe's founding values by way of assigning subordinate status to the respect for the human dignity. On the other, EU public procurement is very well serving as the EU's safety valve, modifying and hence protecting to a certain extent the provision of public services from the overwhelming effects of market forces. The situation is untenable in so far as we distance ourselves from our founding values and opt to tread on shaky ground. For the acceptance of Europe's founding values press for the re-ordering of Europe's economic and social dimensions.

And what truly constitutes permissible European ideals? The European constitution centres on the human person. Does not the respect for human dignity,⁶⁸ equality⁶⁹ and freedom for participatory action⁷⁰ identify with the social conscience of the people of Europe? Do you not agree that these are the values that can translate into a better European theory of social justice rather than founding our actions upon illusionary concepts? For the whole point of this journey, of *Verstehen*, is trying to come to grips with our understandings in the hope that eventually we can come up with a better revelation, one that hinges on practical reasonableness.

⁶⁸ On the value of respect for Human Dignity - Each and every person as a rational human being has a dignity. Human Dignity is inviolable. It is "superior to human rights and fundamental freedoms who owe their origin and existence to the dignity of the human person." Aquilina, K. *Respect for Human Dignity and the Law* <http://www.statecareandmore.eu/index.php/blogs/respect-for-human-dignity-and-the-law-by-prof-kevin-aquilina-.html> [23 November 2010]. See also, discussion in chapter 3 in particular section 3.4.3 "*Dignity as the basic moral premise*" and section 3.5 "*Respect for Human Dignity – A legally enforceable fundamental right.*"

⁶⁹ On the value of Equality – what we are herein concerned with is an equality vis-à-vis the person in its totality. A totality that recognizes the individual not just as a physical being but also as a social being where at its very core lies its human dignity. It calls for the recognition of the human being as an end in oneself and not as a means to an end. More specifically, we need to refer to an equality that takes into account the *capability to function*. *Capabilities to function* assert freedom. The notion of *capability to function* refers to that conceived by Professor Amartya Sen as discussed in chapter 3, section 3.3, "*The Nature of Poverty: Definitions Abound*".

⁷⁰ On the value of Freedom for participatory action – What we are herein concerned with is a freedom that enables the full participation of the individual into society. A freedom that defines and serves the ends of its citizens, liberates the individual and provides space for initiative and action. Such space for initiative and action unleashes the individuals' capability to function which in itself asserts freedom. This is the freedom that finds its epitome when expressed through the flourishing of the individual.

5.5 To what extent should the EU harness Member States' potential of utilising public purchasing as a tool capable of promoting social policies?

Should this be at all costs?

Arguments for regulating EU public procurement posited protectionist public procurement behaviour as a major obstacle to attaining the European vision of full Integration that is, both from the political and economic aspects. Such protectionist behaviour was considered as threatening transparency and fairness of public procurement procedures thus delaying the achievement of the Single European Market. As such, neo-liberalism has had a profound impact on the development and interpretation of EU public procurement, “.....the Commission’s actions were, from the latter part of the 1980s and during much of the 1990s, hostile to the incorporation of social aspects into procurement. The demise of the social use of procurement was widely predicted.....”⁷¹

Brussels, 20 December 2011 presented its proposal for a Directive of the European Parliament and of the Council on public procurement.⁷² It is claimed that it builds on the Europe 2020 strategy for smart, sustainable and inclusive growth [COM(2010) 2020]. The proposal sets out two complimentary objectives which are worth noting:

Increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders.

Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.⁷³

⁷¹ See, McCrudden, C. 2007, *Buying Social Justice, Equality, Government Procurement and Legal Change*, Oxford University Press, Oxford, pg. 361.

⁷² See, COM(2011) 896 final. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20.12.2011, European Commission, Brussels.

⁷³ See, COM(2011) 896 final. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20.12.2011, European Commission, Brussels. pg. 2

According to the Commission, the Subsidiarity principle applies because,

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason:

The coordination of procedures for public procurement above certain thresholds has proven an important tool for the achievement of the Internal Market in the field of public purchasing by ensuring effective and equal access to public contracts for economic operators across the Single Market. Experience with Directives 2004/17/EC and 2004/18/EC and the earlier generations of public procurement Directives has shown that European-wide procurement procedures provide transparency and objectivity in public procurement resulting in considerable savings and improved procurement outcomes that benefit Member States' authorities and, ultimately, the European taxpayer.⁷⁴

On the basis of the understandings deciphered in this thesis such argumentation does not hold ground. EU public procurement regulation falls short of moral ideals.⁷⁵ This thesis has exposed the ineffectiveness of the public procurement regulations and hence its consequent failure in creating an integrated and efficient EU public procurement market.⁷⁶ When it comes to the issue of transparency albeit lack of it when implementing EU public procurement this becomes evident when one takes into consideration the following: i) Over the past 20 years cross-border public procurement remained relatively low - over 98% of contracts awarded according to EU rules are won by national bidders; ii) the repeated reservations made by Director General (DG) Regional Policy in its declaration of assurance concerning the regularity and legality of the applicable EU budget in view of serious deficiencies in compliance with the public procurement rules; (iii) Failure of Member States in providing reliable statistical public procurement reports as to date the European Commission has consistently presented estimates in lieu of actual data reports given that a large proportion of public procurement data remains unavailable.⁷⁷

⁷⁴ Ibid. pg. 6

⁷⁵ See discussion in chapter 3 and in particular section 3.8, "The Quest for Justice in Poverty Reduction: Putting EU Public Procurement into Perspective".

⁷⁶ To this effect see discussion in chapter 2 in particular section 2.8 et seq. *"The impact of EU Public Procurement legislation vis-à-vis the EU's Free Trade Agenda."*

⁷⁷ Ibid. See also discussion in chapter 1.

Public procurement has the potential to directly accommodate and serve the particular and diverse socio-economic needs of Member States whilst concurrently fulfilling European Integration aims. It is capable of providing the so much needed breathing space at the domestic level, one that allows Member States space to manoeuvre, to innovate and to cooperate. Nonetheless, this need not come at the expense of inhibiting the multi-dynamic uses of public procurement as a policy tool which could also serve at EU level in support of common EU goals by way of reinforcing transparency, objectivity and non-discrimination between competing participants in tenders, increase efficiency in public procurement, support common goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, etc. The main argument herein is that the EU should seek to capitalize and make utmost use of public procurement's potential as a policy instrument that is capable of acting as a highly powerful and dynamic socio-economic lever for the benefit of the EU citizen. Hence, the ultimate motivations underpinning EU actions need to be guided by a *public interest* function that recognizes the full dignity of the human person as an end in itself and that its flourishing can only be brought about through interdependent cooperation and coordination within the community. Indeed, deriving a balance between social and economic uses of public procurement at EU level and at Member State level is possible through a politics of cooperation and coordination.

The hallmark of European economic development relies heavily on the diverse socio-political building capacities of EU Member States. Why should the European citizen serve as the means for the “achievement of the *internal market*”⁷⁸ by way of sacrificing its public purchasing autonomy? The contribution of the EU public procurement regime towards the internal market and its subsequent contribution towards European integration aims are highly obscure. It will remain so as long as the EU chooses to maintain an overriding and unconditional attitude that treads on illusionary concepts. Public procurement as a highly powerful and dynamic policy instrument has the power of steering a Country's socio-economic policies. Given the different socio-economic scenarios that Member States continuously experience, not only during times of crises, there will always be Member States with relatively more advanced economies, others

⁷⁸ See, COM(2011) 896 final. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20.12.2011, European Commission, Brussels. pg 6, emphasis added.

almost standing at par, others slightly backwards and others even more backwards. Thus, in such a scenario, one that is never fixed but in a state of continues flux, “how could there ever be a set of universal trade rules that would serve the interests of all?”⁷⁹ Free trade it is argued may at times be more conducive for some whilst less so for others as completely different scenarios prevail at different points in time. It is within this context that public procurement as a highly dynamic and powerful socio-economic lever needs to be regarded. It presents and justifies the case for its flexible use, one that has the potential to realise a social model of integration in the European Union wherein the European citizen is the key actor in the integration process. The chapters that follow will elaborate further on this thesis’ vision for the realisation of a social model of integration in the European Union.

5.6 Concluding remarks

The ever increasing commercialisation of the EU citizen’s everyday life which press for the subordination of public policies to market forces poses as a major obstacle when it comes to reaching European integration aims. In so far as economic efficiency logic, which essentially draws on utilitarianism, continues to drive and pre-dominate EU public discourse this will fail to take cognizance of any other co-existing model including any claims purporting to exemplify a European social model (whatever this may mean). The discussion in this chapter concerning the notion of Europe as a de-centred state has revealed that the ever increased growth of supranational state intervention encroaches upon Member States’ freedom in particular when it comes to the provision of services of general interest. As a consequence, public procurement has been identified as a stabilising force that helps equalise the balance of competing and opposing forces concurrently at work at the *conceptual* and *operational* levels. It thus helps introduce to a certain extent some element of stability. It is in this sense that public procurement has been described as the EUs safety valve. However as argued, its robustness has been seriously questioned as it fails to cohere to general treaty provisions.

⁷⁹ See, Unger, M.R. 2007, *Free trade reimagined : the world division of labor and the method of economics*, Princeton University Press, Princeton, New Jersey. pg. 118.

What is now needed is a shift in the emphasis..... a re-ordering of Europe's economic and social dimensions, a re-ordered State, in line with permissible European moral ideals. For economic activity is all about social activity.⁸⁰ Such logic mandates practical reasonableness. That is practical thinking that acknowledges the need for Europe's economic logic to dovetail harmoniously with its social logic. In this respect the flexible application of public procurement that serves as the Member States' safety valve in contrast to the EU's safety valve presents the case for potentially better harmonisation and synchronisation of Europe's socio-economic policies in conjunction with Member State's socio-economic policies. Through a politics of cooperation and coordination the flexible application of public procurement has the potential to realise a social model of integration in the European Union wherein the European citizen is the key actor in the integration process.

⁸⁰ See, Unger, M.R. 2007, *Free trade reimagined : the world division of labor and the method of economics*, Princeton University Press, Princeton, New Jersey. pg. 142.

Part 3

The Solution

6.0 On Public-Private Partnerships: For a European Theory of a Social Just Alternative

Chapter Summary

On a plane of practical reasonableness a social model of integration in the European Union institutionalised through the public-private partnership regime is presented. This social model is based on principals derived by John Rawls, in *Justice as Fairness*. The theory finds philosophical underpinnings grounded on natural law theory that in effect puts content into the notion of the *public interest* function thus rendering it into workable meanings. As the theory seeks to define and meet the ends of its citizens and capitalises on Member States' diversity it operates on the basis of principles and conditions that enables the flourishing of its citizens by incorporating key values - the respect for human dignity, equality and freedom for participatory action.

PPPs conceptualised within this social model mark a fundamental departure from the manner by which PPPs are currently construed via the EU public procurement regime. The intellectual rationale underpinning such a social model puts into effect a public procurement contract that takes into consideration the distributive objectives of societal welfare as an *ex ante* mechanism albeit in a limited manner in so far PPPs are concerned. It is argued that with the application of a flexible regime the social model institutionalised and exemplified through PPPs may extend its remit to public procurement in general. Such flexibility needs to take into account social concerns that are guided by a *public interest* function that fulfil the values of human dignity, equality and freedom for participatory action. However, all this necessitates a departure from how the current EU public procurement regime is conceived. It primarily calls for a change in attitude that moves away from an overriding and unconditional approach that embraces European economic efficiency logic to a social just alternative that calls for a reordering of the economic and social dimensions.

6.1 Introduction

It is hoped that during this journey of *Verstehen* we have to a greater or lesser degree been enlightened and in the process configured our beliefs. Beliefs that confer justifications which now make it possible to proceed a step further in attempting to move towards a theory that is based upon practical reasonableness. For it is on the basis of practical reasonableness that we can work our way towards a theory of justice.....more specifically, we aim towards a European theory of social justice. By such a theory it is meant that due account is given to various specific features that the European Union ought to be highly concerned with when regulating or promoting a European agenda and which henceforth in effect manifests in some way or other, directly or indirectly, in Europe's theory of social justice.

Our concern here is with a theory that seeks to define and meet the ends of its citizens, that capitalises on Member States' diversity and operates on the basis of principles and conditions that enable the flourishing of its citizens by incorporating key values as discussed and understood in this thesis, that is, the respect for human dignity,¹ equality² and freedom for participatory action.³ These three values are tightly enmeshed and cannot be disentangled. Any attempt to treat separately means to deprive the very essence of their integrity. A European theory of social justice can be realised through various institutional formats and public-private partnerships (hereinafter referred to as PPPs) present this opportunity. Indeed, PPPs provide the framework of argument that can give way to this European theory of Social Justice.

¹ On the value of respect for Human Dignity - Each and every person as a rational human being has a dignity. Human Dignity is inviolable. It is "superior to human rights and fundamental freedoms who owe their origin and existence to the dignity of the human person." Aquilina, K. *Respect for Human Dignity and the Law* <http://www.statecareandmore.eu/index.php/blogs/respect-for-human-dignity-and-the-law-by-prof-kevin-aquilina-.html> [23 November 2010]. See also, discussion in chapter 3 in particular section 3.4.3 "*Dignity as the basic moral premise*" and section 3.5 "*Respect for Human Dignity – A legally enforceable fundamental right.*"

² On the value of Equality – what we are herein concerned with is an equality vis-à-vis the person in its totality. A totality that recognizes the individual not just as a physical being but also as a social being where at its very core lies its human dignity. It calls for the recognition of the human being as an end in oneself and not as a means to an end. More specifically, we need to refer to an equality that takes into account the *capability to function*. *Capabilities to function* assert freedom. The notion of *capability to function* refers to that conceived by Professor Amartya Sen as discussed in chapter 3, section 3.3, "*The Nature of Poverty: Definitions Abound*".

³ On the value of Freedom for participatory action – What we are herein concerned with is a freedom that enables the full participation of the individual into society. A freedom that defines and serves the ends of its citizens, liberates the individual and provides space for initiative and action. Such space for initiative and action unleashes the individuals' capability to function which in itself asserts freedom. This is the freedom that finds its epitome when expressed through the flourishing of the individual.

The discussion in the forthcoming section – section 6.2, *“On Public-Private Partnerships”* attempts to put into perspective the ever increasing trends towards PPPs across the globe and not in the least across Europe. Section 6.3, *“UK-London: Thameslink rolling stock procurement programme – the case in a nut shell”* narrows the discussion by focussing on a particular UK Public-Private Partnership project that managed to generate controversy and debate. The UK case brings to the fore two central issues which are discussed in section 6.3.2, on, *“Best value for money.....long term best value?”* and section 6.3.3, *“On the meaning and content to the fundamental right to equality.”* Section 6.4 then proceeds to, *“Arguing for a European Theory of Social Justice”* whilst section 6.4.1 is about, *“Advancing a European theory of a social just alternative.”* Section 6.5 sets out, *“Concluding Remarks”*.

6.2 On Public-Private Partnerships

The subject of PPPs has managed to generate debate and controversy from various spheres and not in the least attract media attention. For some, it is thought of as a procurement approach that disguises private financing whilst making use of creative accounting in order to cover up for government budget deficits. For others, it is regarded as an important tool for improving economic competitiveness, increase efficiencies, expand innovation opportunities, mitigate risks and deliver value for money.

PPPs are fast becoming a global phenomenon. They refer to a wide variety of contractual formats that involve complex legal and financial arrangements between public authorities and private sector undertakings. In essence such contractual relations translate into a method for the acquisition of public services wherein undertakings are engaged to take the risks they are best equipped to manage – relative to investment and operations. Concurrently, the public sector relinquishes its former role of service provider to concentrate on determining levels of public services and to ensure their timely delivery under contractual conditions that generate efficiency gains.

At Community level the term Public-Private Partnership is not defined as this remains an evolving concept but in general terms is referred to as,

.....forms of cooperation between the public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.⁴

The Green Paper on Community Law on Public-Private Partnerships and Community Law on Public Contracts and Concessions⁵ classifies the set-ups generally termed as PPPs under two major models. One model refers to PPPs by way of its purely contractual nature wherein the partnership between the public and private sector is based solely on contractual links. This includes contractual relationships classified as Concessions and those that are commonly referred to as Private Finance Initiative (PFI) projects. The other model refers to PPPs by way of its institutional nature and involves cooperation between the public and the private sector within a distinct entity.

PPPs have been widely developed in the U.K. Its programme began in earnest in the early 1990s with a politically led initiative aiming to attract private sector finance and management skills in the delivery of public services and infrastructure. Till end of year 2008, 935 PFI and PPP projects in the UK had been signed with a capital value of £66bn.⁶ Since 1996, 10-15% of public sector capital investment could be attributed to PFI/PPPs.⁷ Over the period 1987 – 2008, the major sectors engaging in PFI/PPP procurement have been, transport (25.2%), health (21.9%), education (17.2%) and defence (14.1%).⁸

The PPP market in Europe has also been growing steadily. From year 2001 till 2008, the number of signed deals across Europe (excluding the U.K) totalled to 215 with a cumulative value amounting to €37bn.⁹ This represents less than two thirds of €61bn in the UK for the same period. Spain and France are reported to have had the greatest cumulative value of PPP deals signed by end of 2008, each at €4.1bn, Italy €3.6bn and Ireland €3.3bn¹⁰ with the largest

⁴ See, COM(2004) 327 final. *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, 30.4.2004, pg.3.

⁵ Ibid.

⁶ This data is based on, Public Private Finance, www.publicprivatefinance.com in, McKenzie,D. *PFI in the UK & PPP in Europe 2009*, www.ifsl.org.uk

⁷ Ibid.

⁸ Ibid.

⁹ This data is based on, DLA Piper, European PPP Report, www.dlapiper.com in, McKenzie,D. *PFI in the UK & PPP in Europe 2009*, www.ifsl.org.uk

¹⁰ Ibid.

PPP contracts being found in transport infrastructure. In addition, by the beginning of 2007 circa €68bn worth of PPP projects were being procured in Europe (excluding the UK).¹¹

The following discussion will narrow its focus on a particular high profile UK PPP project that managed to capture debate and controversy across the UK. By putting into context real life experiences alongside the understandings deciphered in this thesis it is hoped that we will be able to reflect and put into better perspective our programmed ways of reasoning, principals and patterns, in order to enlighten further our understandings and progress towards a potentially better European theory of social justice.

6.3 UK-London: Thameslink rolling stock procurement programme – the case in a nut shell

On 9 April 2008, the Department for Transport dispatched a contract notice (reference, 2008/S 71-096012)¹² in the official journal of the EU for and on behalf of the train operating company operating the Thameslink/GN franchise, inviting interested parties to submit expressions of interest for the supply and maintenance of between 900 and 1300 new vehicles for an estimated period of 7 to 10 years together with the arrangement of the necessary finance. However, in the case of financing the department noted that it reserved the right to decide whether or not the chosen bidder would be required to arrange finance, “in which case the ITT may require bids for supplying and maintaining the new rolling stock without the need to arrange finance.”¹³ In addition, the Contract Notice specified that this procurement may also include the development of one or more train depots. The negotiated procedure was to be adopted and the best offer to be chosen on the basis of the most economically advantageous tender, in terms of the criteria stated in the specifications or in the invitation to tender or to negotiate.¹⁴ According to the Contract Notice, the tender was divided into lots and that tenders were to be submitted for all lots. Variants were also accepted. Accordingly, the

¹¹ Ibid.

¹² See, European Commission. *Ted-tenders electronic daily*, <http://www.ted.europa.eu/udl?url=TED:NOTICE:96012-2008:TEXT:EN:HTML&src=0#id2235569-I>. [22 January, 2012].

¹³ Ibid. “ITT” stands for Invitation To Tender.

¹⁴ Ibid.

provision of trains and associated services expected to be in passenger service by December 2015, anticipated that the contract be awarded by mid 2009.¹⁵

The £6 billion Thameslink programme, originally known as Thameslink 2000, is a major expansion programme which comprises major infrastructure improvements including the rebuilding of London Bridge station. The initiative also seeks to provide additional capacity for passengers on the Thameslink route running north-south through London by providing for longer (up to 243m) and more frequent trains (up to 24 trains per hour).¹⁶ The Thameslink fleet is also expected to release carriages to other parts of the network including the north west of England and the Thames valley routes.¹⁷

In November 2008 the Invitation to Tender was released and three bids were submitted.¹⁸ In October 2009 two bidders were shortlisted - two consortiums, one led by Siemens Plc (hereinafter referred to as Siemens) and the other by Bombardier Transportation UK Ltd. (hereinafter referred to as Bombardier). On the 16 June 2011, the Minister of State for Transport announced Siemens Plc with Cross London Trains (XLT) – a special purpose company comprising of Siemens Project Ventures GmbH, Innisfree Ltd and 3i Infrastructure Plc. as preferred bidder for the supply of the new Thameslink trains.¹⁹ It was stated that, “[t]he choice of Siemens Plc with Cross London Trains (XLT) as preferred bidder represents the **best value for money** for taxpayers.”²⁰ As a direct result of this announcement, Siemens declared that it envisaged the creation of up to 2,000 new jobs in their UK operations and across the UK supply chain in particular in the North East of England.²¹

¹⁵ Ibid.

¹⁶ See, Department for Transport. *Thameslink Rolling Stock Project*, <http://www.dft.gov.uk/publications/thameslink> [8 March, 2012].

¹⁷ See, The Rt Hon Theresa Villiers MP. *Thameslink rolling stock*, <http://www.dft.gov.uk/news/statements/villiers-20110616> [8 March, 2012].

¹⁸ See, DfT. *Thameslink Rolling Stock Projects*, <http://www.dft.gov.uk/publications/thameslink> [8 March, 2012].

¹⁹ See, The Rt Hon Theresa Villiers MP. *Thameslink rolling stock*, <http://www.dft.gov.uk/news/statements/villiers-20110616> [8 March, 2012].

²⁰ Ibid. Emphasis added.

²¹ Ibid.

In the meantime Siemens' announcement as preferred bidder spelled disaster for the workforce at the Bombardier plant at Derby and for its various suppliers scattered throughout the country. Shortly after the announcement, in July, Bombardier announced 1,400 redundancies.²² According to Derbyshire County Council 13,500 supply chain jobs were at risk.²³ In view of the fact that the Bombardier plant in Derby is the UK's last remaining train manufacturing facility²⁴ the consequent job and skill losses threatened train manufacturing in the UK. "The Government is concerned that the loss of a UK train design facility is likely to have long term adverse implications for the cost of the railway, because of the specific design requirements of British trains."²⁵ According to the Transport Committee,²⁶

We are concerned that bundling train manufacture and financing together in procurement exercises will skew the market towards larger multinational firms, possibly at the expense of excellence in train design and domestic manufacturing. We recommend that the Government work with the railway industry to establish how train manufacturers can create finance partnerships which offer good value to the taxpayer whilst promoting **long-term best value**.²⁷

6.3.2 Best value for money long-term best value?

Value for money objectives sit at the very heart of PPP contracting. According to HM Treasury (2006) this is defined as, "the optimum combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the user's requirement".²⁸ In essence VFM is not about choosing the lowest priced bid. It is concerned with the trade-off between initial cost, future repair and maintenance costs and overall reliability and flexibility.

²² See, Transport Committee. *Eleventh Report, Thameslink rolling stock procurement and the proceedings of the Committee ordered by the House of Commons, printed 6 December 2011*, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtran/1453/145302.htm> [8 March, 2012].

²³ Ibid.

²⁴ Ibid.

²⁵ See, Transport Committee. *Eleventh Report, Thameslink rolling stock procurement and the proceedings of the Committee ordered by the House of Commons, printed 6 December 2011*, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtran/1453/145302.htm> [8 March, 2012]. Summary.

²⁶ "The Transport Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Transport and its Associate Public Bodies." See, op.cit. (n.25).

²⁷ See, op. cit. (n.25) Summary, emphasis added.

²⁸ See, HM Treasury. *Value for Money Assessment Guidance*, 2006, Controller of Her Majesty's Stationery Office, Norwich. pg. 7.

However, it needs bearing in mind that unlike the private market the distinctive features within which the public procurement market operates deprives it from the invigorating stimuli present in the private market. Consequently, we get what Bovis refers to as a static effect to the Value for Money (VFM) process. Although, openness in public procurement through the principle of transparency is used as leverage for VFM and is claimed to stimulate price competition with the consequent benefits being enjoyed by public authorities, when it comes to public procurement it has been argued that this process can become counterproductive. Within the context of the public procurement rules, transparency in conjunction with the notion of predictability combined with stability of public demand in effect creates an environment that facilitates collusion and other anti-competitive behaviour by bidders.²⁹

It thus becomes increasingly clear that much more needs to be achieved from the *value for money* objectives through PPPs in order to increase social, environmental and economic development. Broader objectives that go beyond the whole-of-life costs and quality of the good or service being purchased need to be met. Given that the main characteristic of PPP contractual arrangements is that they bundle investment expenditure with life-cycle operation costs, the grounds hence for its justification becomes only when the most efficient mix of costs leads to cost cutting with simultaneous increases in social welfare gains.³⁰

PPPs are no panacea for all our problems. On the other hand we should not lose sight of the fact that PPPs can be made to work for society at large. For instance they have been instrumental in poverty reduction – there are ample examples to prove this point. It is all a matter of getting the right PPP framework conducive to fundamental values that do not render the individual as the means for elevating free trade as an end in itself. For what society is founded upon is the common good which is essential for the human flourishing. This is the driving force that motivates each and every individual in order to reach its internal satisfactions. Satisfactions that need to be distinguished from the utilitarian type of satisfaction that aims for the greatest happiness of the greatest number.

²⁹ See, Albano, G.L., Buccirosi, P. and Spagnolo, G., Zanza, M. 2006, "Preventing Collusion in Procurement" in *Handbook of Procurement*, Cambridge University Press, Cambridge.

³⁰ In this respect see also, Hart, O. 2003, "Incomplete Contracts and Public Ownership: Remarks and an Application to Public-Private Partnerships", *Economic Journal*, 113, 69-76.

In an attempt to drive further this point, the following discusses in a nutshell two pro-poor successful PPP initiatives that provide food for thought.

*** Bompart, F. et al describe a successful needs driven innovation for patients in resource-poor settings through a PPP which was instrumental in developing a new anti-malarial combination for patients especially for children within the shortest possible time frame. The PPP set up made it possible to bring together different strengths and make the most out of skills and resources in order to meet new global health challenges for poverty-related diseases. From the outset when the PPP was formed two bold commitments were made. First, the product was not to receive patent protection. This eventually turned out to be one of the key factors behind their success. Second, the partners set a target price of 1USD for an adult treatment and less than US\$0.50 cents for children. Roles and responsibilities for each partner and therefore, the rules for decision making were clearly laid out early on. This proved very useful, as differences in opinions towards reaching common goals had on more than one occasion led to debates and delays in decision making. However, they also learned how to collaborate together. This turned out to be another crucial factor behind their success finding it more fruitful when they dialogued and when they worked together rather than in isolation. As a result of this partnership as of late 2010, the new anti malarial combination, ASAW Winthrop was registered in 30 sub-Saharan African countries and in India, with over 80 million treatments distributed in 21 countries. The challenges brought by the introduction of the new drug meant that the PPP continued to evolve by adding on new partners.³¹

*** In Durban, the second most populous city in South Africa, PPPs are used as one of the mechanisms to achieve urban development.³² Durban faces major socio-economic challenges including poverty, very high HIV/AIDS infection rates, unemployment, severe housing shortages and crime. These socio-economic challenges strongly determine Durban's urban development imperatives - imperatives that seek to be socially orientated and particularly focused on uplifting the lives of the poorest urban citizens. In 1999, the private sector in Durban formulated a "Business Vision" for the city and presented their vision to local and provincial government. As a result, a strategic partnership between business and government was formalized, the Durban Growth Coalition, and which henceforth addressed successfully the planning and implementation of various flagship developments within the city. The Durban Growth Coalition has continued to evolve to include local and provincial government

³¹ See, Bompart, F., Kiechel, J.R., Sebbag, R. and Pecoul, B. 2011, "Innovative public-private partnerships to maximise the delivery of anti-malarial medicines: lessons learned from the ASAQ Winthrop experience", *Malaria Journal*, 10, 143, 1-9.

³² See, Houghton, J. 2011, "Negotiating the Global and the Local: Evaluating Development Through Public-Private Partnerships in Durban, South Africa", *Urban Forum*, 22, 75-93.

representatives, medium sized businesses and internationally and locally renowned business partners such as Mondi Paper and Tongaat Hulett Property Developments. Overall, the Coalition's vision is to, unblock development in Durban, to encourage economic growth and "realise the city's potential as a world class port and leisure centre." ³³

The above examples illustrate how PPPs can be utilised as effective mechanisms capable of uplifting the lives of the poor, of addressing social inequalities and hence as an effective means for moving towards social justice. Social considerations have been weaved into their PPP programme from the very outset and were key to their success. Such success also translated into economic benefits. In order for PPPs to work one requires an enabling environment where, "[C]ommunity is not founded upon law; rather, law is founded upon community."³⁴ And what community is founded upon is the common good as constitutive of the human flourishing.

Therefore, when it comes to the notion of the public procurement regime driving Europe's internal market agenda let's not delude ourselves to the point of obsession. Our walk and our talk need to be in line with Europe's founding values. It's all about human living. After years of chasing illusionary concepts it is now high time to reorder Europe's economic and social dimensions. This essentially boils down to politicsit is a political matter.

6.3.3 On the meaning and content to the fundamental right to equality

The Thameslink rolling stock procurement case clearly demonstrates the major impact public procurement bears on a country's industrial policy. Public procurement decisions are capable of being realised in different directions bearing different consequences on social life, on the distribution of wealth and power..... at times leading to dramatic consequences. That public procurement exchanges go far beyond the simple *quid pro quo* notion found in the *restricted* exchange paradigm which involves the reciprocal economic exchange between two parties is clearly evidenced by this case.³⁵ For,

³³ Ibid. pg. 81

³⁴ See, McCabe, H. 2009, *The Good Life Continuum*, London. pg.6.

³⁵ On the notion of *Exchange* see discussion in Chapter 4, section 4.4.1.1, "*Gaining marketing insights on the nature of services.*"

Public procurement contracts are a special category of contracts wherein one of the parties represents the public interest and is manifest through complex exchanges that occur in social relationships and which in the process are separated in part by the passage of time.³⁶

Failure to recognise this fundamental issue in the theories that we construct to solve our problems means to suppress society's building capacity. How can we, "...justify the choice of one route over another by claiming that it is the market route. There are too many market routes."³⁷

But, as the argument goes,

"[T]he competition to supply trains and maintenance services for the Thameslink programme was designed and launched in accordance with EU procurement procedures."³⁸

"The impact of the award of a contract on employment or unemployment necessarily cannot be taken into account as a relevant consideration."³⁹

"A tender can be crafted to encourage participation of small and medium sized companies, subcontracting arrangements, but anything which indirectly requires location or origin in a particular country is obviously discriminatory."⁴⁰

Discrimination, obviously yes, that's the catch word.

At paragraph 16 in a judgment of the European Court of Justice the following was held:

16. According to the established case-law of the court the general principle of equality, of which the prohibition on discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of community law. This principle requires that **similar situations** shall not be treated differently unless differentiation is objectively justified.⁴¹

Further, in Case 330/91 at paragraph 14 the Court stated:

14. Moreover, it follows from the Court's judgment in Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153 (at paragraph 11) that the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its

³⁶ Paraphrasing proposed definition on public procurement as put forth in chapter 4, section 4.5, "*Concluding remarks*."

³⁷ See, Unger, M.R. 2007, *Free trade reimagined : the world division of labor and the method of economics*, Princeton University Press, Princeton, New Jersey. pg. 94

³⁸ The Rt Hon Theresa Villiers MP. *Thameslink rolling stock*, <http://www.dft.gov.uk/news/statements/villiers-20110616> [8 March, 2012].

³⁹ See, Jonathan Faull, Director General, European Commission, in op. cit. (n. 25).

⁴⁰ Ibid.

⁴¹ See, Case 810/79. *Peter Überschär v Bundesversicherungsanstalt für Angestellte* [1980] ECR 02747 emphasis added.

seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.⁴²

Herein follows the pertinent question - how can we be so sure that it's *discrimination* that actually confronts us? The main test to the *discrimination* argument revolves around its definition. In its investigations in the Thameslink rolling stock procurement case the Transport committee noted the following, "[I]t is hard to escape the conclusion that Siemens' A+ credit rating made a significant contribution to its success in winning the Thameslink procurement."⁴³ It therefore follows, could or could it not be maintained that this is a case that comprises *similar situations*? If in the negative, then does this not qualify as *discrimination*? But if our reply is in the affirmative can this be claimed on grounds of, "level playing field"⁴⁴?

Here is where we need to go through a thorough rethink on current EU doctrine. It goes against Community public procurement policy and the Treaty itself (notably article 34 TFEU and article 56 TFEU) to incorporate preference schemes in order to ameliorate the situation for example of SMEs. This situation contrasts sharply with that of the United States federal public procurement system. In the United States socio-economic policies which include specific programmes of positive action in favour of various 'disadvantaged' businesses is an ongoing manifestation in federal procurement. The main provisions in support of small businesses in the US are set out in the Small Business Act which asserts it as the declared policy of Congress that the Government should aid,

'counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order: to preserve free competitive enterprise; and, to ensure that a **fair proportion** of the total purchases and contracts or subcontracts for property and services for the Government...be placed with small business enterprises...'⁴⁵

Public procurement rules in Europe are concerned with providing equal access to opportunities. Whilst, EU law permits positive action by purchasers it does not allow for positive discrimination. The rationale behind such logic is,

⁴² See, Case C-330/91. The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG. [1993] ECR I-04017.

⁴³ See, op.cit. (n.25), Summary

⁴⁴ See, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit D.2 and Directorate-General for the Internal Market and Services, Unit C.3. *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*, European Commission, 2010, European Commission, Brussels. pg. 25.

⁴⁵ The Small Business Act of 1953, in GHK and Technopolis. 2007, *Evaluation of SME Access to Public Procurement Markets in the EU, Final Report*, Brussels. pg. 102 (emphasis added).

....to guarantee a level playing field, so that purchasers offer under-represented businesses the same opportunities to compete for public contracts as other qualified suppliers. In this way, competition can be encouraged, drawing more companies into the tendering process.⁴⁶

But how can one ever assure a level playing field.....the *playing field* was never level and will never be.⁴⁷ And how can we confine *equality* solely on the basis of ensuring equal access to opportunities? What a contracted view!

“equality is no longer merely an equality of rights, a purely legal notion of formal equality in the definition and application of legal rules – a form of equality which is in any case now much discredited, not because it no longer has any valuebut because it has proved inadequate to ensure what is now perceived as social harmony, namely no longer solely the absence of injustices suffered by the most disadvantaged to the benefit of the most advantaged, but a degree of integration of every individual into the collectivity that will achieve the overall satisfaction of all its members.”⁴⁸

For, it is an equality vis-à-vis the person in its totality that we are concerned with. A totality that recognizes the individual not just as a physical being but also as a social being where at its very core lies its human dignity. It calls for the recognition of the human being as an end in oneself and not as a means to an end as appears to be the case when the Commission confines equality solely to access to opportunities in order to satisfy the free trade dogma. More specifically, we need to refer to an equality that takes into account the *capability to function*.⁴⁹ *Capabilities to function* assert freedom. A freedom that liberates the individual and that provides space for initiative and action. Hence,

[t]he principle of equality thus changes from a ban on discriminatory forms of treatment that create inequalities to an obligation to impose discriminatory forms of treatment that have an equalising effect, i.e. compensatory or positive discrimination.⁵⁰

⁴⁶ See, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit D.2 and Directorate-General for the Internal Market and Services, Unit C.3. 2010, *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*, European Commission, Brussels. pg. 25.

⁴⁷ This claim is based on discussions as put forth in chapters 2 and 3.

⁴⁸ See, Picard, E. 1998, "Citizenship, Fundamental Rights, and Public Services" in *Public Services and Citizenship in European Law*, Clarendon Press, Oxford. pg. 92.

⁴⁹ *The notion of capability to function refers to that conceived by Professor Amartya Sen as discussed in chapter 3, section 3.3, 'The Nature of Poverty: Definitions Abound'.*

⁵⁰ Picard, E. 1998, "Citizenship, Fundamental Rights, and Public Services" in *Public Services and Citizenship in European Law*, Clarendon Press, Oxford, pg. 93.

It calls for profound changes in economic and social structures and not in the least an indefinite expansion of the public sphere.⁵¹ This is how society can decide to expand upon individual freedoms and how society will in return benefit.

When it comes to conceptualising the notion of equality it is only natural that such conception embraces a broad equation. In this respect we may refer to J. Stacey Adams' equity theory where much of the thinking on equity or fairness has been developed.⁵² According to this theory in order to seek social equity in the rewards received for performance people view their outcomes and inputs as a ratio and then compare their ratio to someone else's. Therefore, we end up with a comparison that undergoes the following process:

$$\frac{\text{Outcomes (self)}}{\text{Inputs (self)}} \quad ?/= \quad \frac{\text{Outcomes (other)}}{\text{Inputs (other)}}$$

This formulation is subjective and is based on individual perceptions. Outcomes represent what the individual receives from the exchange whilst inputs represent what the individual contributes to the exchange. According to this theory individuals assign weights to various outcomes and inputs. This ratio is then compared with the perceived ratios of outcomes and inputs of others who are in the same or similar situation in order to determine whether they perceive that they have been equitably treated. When the two ratios are perceived as equal there is equity. When this is not the case the individual may feel under rewarded or over rewarded and as a result the individual becomes motivated to alter the equation, for example by distorting the original ratios by rationalising, trying to get the other person to change her or his outcomes or inputs, leave the situation or change the object of comparison. In essence, it bears noting that the notion of equity or fairness does not simply revolve around one variable, such as that of ensuring equal access to opportunities. The formulation is much more complex and individuals by nature incorporate a much broader spectrum in order to balance out what they perceive as fair. Therefore, when it comes to promulgating public policies should we not be consistent in our approach and hence adopt approaches which are more in sync with our social nature basing our arguments on the notion of equality as seen through the lens of the individual, the lens of *capabilities....capabilities to function*? For *capabilities to function* assert freedom a freedom that can make the human flourishing possible. This notion of

⁵¹ Ibid.

⁵² See, Griffin, R.W. 1993, "Part V, The Leading Process" in *Management*, Fourth, Houghton Mifflin Company, Boston, London. pgs 363 – 389

equality recognizes the individual not just as a physical being but also as a social being where at its very core lies its human dignity. It calls for the recognition of the human being as an end in oneself and not as a means to an end. Free trade will flourish when deep-seated commitments underlie any public policy that is guided by a vision of the human flourishing.

6.4 Arguing for a European Theory of Social Justice

A European theory of social justice can be realised through various institutional formats and PPPs provide the framework of argument exemplifying the way to a European theory of social justice. Our concern here is engaging in a social justice model that seeks to define and meet the ends of its citizens, that capitalises on Member States' diversity and operates on the basis of principles and conditions that enable the flourishing of its citizens by incorporating key values as discussed and understood in this thesis, that is, the respect for human dignity,⁵³ equality⁵⁴ and freedom for participatory action⁵⁵. These are the values that conceptualise the key umbrella concept under mention in this thesis. The social justice model also finds its philosophical underpinnings grounded on Natural Law Theory.⁵⁶ It bears noting that PPPs conceptualised within this framework mark a fundamental departure from the manner by which PPPs are currently institutionalised and captured via the EU public procurement regime. More specifically our concern here represents a divergence from the public procurement contract as presently institutionalised by the EU legal order because we are dealing with totally different philosophical arguments as it takes into consideration the distributive objectives of societal welfare as an ex ante mechanism.

The EU public procurement regime as currently conceived essentially embraces neo-liberalism which also rests on utilitarian logic. Neo-liberalism is primarily concerned with the protection of the free market economy and the role of law is to maintain a healthy level of competition. But the free market economy which is based on the theory of comparative advantage leaves much unsaid.⁵⁷ In addition, as afore noted its justifications are grounded on

⁵³ See, op.cit. (n. 1).

⁵⁴ See, op.cit. (n. 2).

⁵⁵ See, op.cit. (n.3).

⁵⁶ See discussion in chapter 3 in particular section 3.4, "*Freedom for Human Flourishing as Conceived through Natural Law Theory*".

⁵⁷ See discussion in chapter 2, in particular section 2.4, "*The Theory of Comparative Advantage – A General Idea*" and section 2.5, "*The Case For or Against Free Trade*".

the utilitarian view point of social justice. In essence this holds that in order to obtain the social good, social institutions are to be arranged in such a way so as to maximise the *greatest happiness*. Its focus is with the derivation of the maximum distribution of wealth and in the process the individual is recognised as a means towards this end. According to utilitarianism values such as individual freedom, autonomy, rights, quality of life are only valuable in so far as they increase aggregate utility and therefore acquire a subordinate status in relation to the maximisation of aggregate utility.⁵⁸

The alternative as put forth in this thesis is based on a social justice model wherein its principals find philosophical underpinnings grounded on Natural Law Theory. On the basis of the understandings deciphered in this thesis it has been revealed that the EU public procurement regime stands the hallowed principles of Europe's social market model on its head as it superimposes upon potential social dynamic welfare effects whilst dislocating fundamental European values.⁵⁹ This has led to the creation of a vacuum encroaching upon the attainment of Treaty principles and fundamental human rights. Evidently, the need to place, "Europeans at the heart of the market once again"⁶⁰ has featured as an important factor in the re-launch of Europe's single market, wherein Professor Mario Monti⁶¹ in his report to President Barroso advocates, "a social market economy approach"⁶² in the newly proposed strategy.⁶³ But, in so far the EU prefers to cling on to strategies that maintain philosophical underpinnings which essentially hold on to the maximisation of the *greatest happiness*, to the detriment that respect for the human dignity acquires secondary status, the EU cannot move forward – a fact clearly evidenced when one simply glances at the poverty data and the success in maintaining its status quo.⁶⁴ For poverty is fundamentally linked with how society

⁵⁸ To this effect see discussion in chapter 3, section 3.6.1, "*Utilitarianism*".

⁵⁹ See, discussion in chapter 3, in particular section 3.8, "*The Quest for Justice in Poverty Reduction: Putting EU Public Procurement into Perspective.*"

⁶⁰ Monti, M. *Report to the President of the European Commission: A new strategy for the single market*, 9 June 2010, Brussels. pg.3

⁶¹ Ibid.

⁶² *ibid.* pg. 3

⁶³ In this respect see, COM (2010) 608 final. *Towards a Single Market Act for a highly competitive social market economy*, 27.10.2010, European Commission, Brussels. See also discussion in chapter 3, section 3.6 entitled, '*On Europe's Social Model.*'

⁶⁴ Poverty in the EU features as a real problem. Nearly 1 in 7 people in the EU are at risk of poverty. For a discussion in this respect see, chapter 3, in particular section 3.2, "*Poverty across the EU- A Snapshot*".

distributes and re-distributes its resources and opportunities and therefore, by and large exposes the inadequacy of our current systems. The full realisation of one's humanity wherein the dignity of the human person is accorded full respect transpires to be the common denominator that plays a pivotal role intricately linking policy actions with the question of poverty.

Thus, the notion of PPPs as advanced and as discussed hereunder seeks to make up for the social justice fissures that neo-liberalism fails to fulfil. And in doing so it provides the naturally evolving conceptual order to the economic integration of the EU. For economic integration essentially refers to economic life within the existing nation states⁶⁵ and the way about such economic life is not confined to one market route for there are too many.⁶⁶ The market route identified and hence put forth herein is grounded on a social justice model which also finds philosophical underpinnings grounded on Natural Law Theory and in effect reaffirms that, "economic activity is social activity".⁶⁷

If we had to ask the informed and fair minded observer upon the market route the EU citizen would rather opt for, should this be based on utilitarian logic one that utilises the individual as the means for deriving aggregate utility or alternatively the one, '*that exploits the potential and provides the greatest opportunities for all those wanting to engage in it in a sustained manner*'⁶⁸ in other words a market route that seeks to achieve the flourishing of each and every individual as conceived through natural law theory? It is presumed that the answer would point in the direction of the latter, for who would not want to be given a genuine chance in life if willing, irrespective of their social class of origin? This is the social justice model that Europe ought to engage in and translate into the everyday life of the European citizen. It is a model that departs conceptually from utilitarian's interpretation of social justice and hence neo-liberal principals. Moreover, such a departure is fundamentally justified because it sits at the very heart of Europe's founding values:

⁶⁵ For Myrdal economic integration refers to economic life within the existing Nation States. See Myrdal, G. 1956, *An International Economy: Problems and Prospects*, Routledge & Kegan Paul, London. Pg.94

⁶⁶ According to Unger Mangabeira, "There are too many market routes". See, Unger, M.R. 2007, *Free trade reimagined : the world division of labor and the method of economics*, Princeton University Press, Princeton, New Jersey. Pg. 94.

⁶⁷ See, Unger, M.R. 2007, *Free trade reimagined : the world division of labor and the method of economics*, Princeton University Press, Princeton, New Jersey. pg. 142.

⁶⁸ Paraphrasing previous arguments as discussed in chapter 2, section 2.5, "*The Case For or Against Free Trade*".

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁶⁹

Only when an acceptable level of European social justice is achieved through the unconstrained recognition of social rights can Europe progress any further. Thus, the re-ordering of Europe's economic and social dimensions that this thesis has called for essentially endorses a social justice model that seeks to achieve the flourishing of each and every individual willing to engage in it. It is a social model that recognises the human being as an end in itself where at its core lies its human dignity. "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."⁷⁰ This is the market route that policy makers need to adopt in order to give a permanent boost to the prosperity of Europe. For it equates with a European theory of social justice capable of tilting the balance towards a more just equilibrium in the EU legal order as it seeks to achieve societal welfare concepts as defined and ingrained within the diverse cultures of European Member States whilst concurrently achieving economic efficiency that promulgates economic integration. Therefore, when Professor Mario Monti highlighted that the, "success of the European model depends on its ability to combine economic performance with social justice and to involve economic operators and the social partners in achieving this goal"⁷¹ the way about to achieve such a goal necessitates that we tackle the issue from the very grass roots by engaging Europe in a social justice model where its principals find philosophical underpinnings justified on grounds of Europe's founding values.

⁶⁹ See, Article 2, Treaty of the European Union.

⁷⁰ See, Article 1, United Nations. *Universal Declaration of Human Rights, Article 1*, <http://www.un.org/en/documents/udhr/index.shtml#a1> [21 March 2012].

⁷¹ See, Monti, M. *Report to the President of the European Commission: A new strategy for the single market*, 9 June 2010, Brussels. pg. 4.

6.4.1 Advancing a European theory of a social just alternative

In advancing a European theory that is based on the social justice model that has philosophical underpinnings grounded on Natural Law Theory and institutionalised through PPPs the principals that this thesis will engage are those derived and put forth by John Rawls. John Rawls' argument for justice as fairness holds that the just arrangements of major social institutions in a liberal society form the basic structure of society within which justice is located.⁷² Rawls' conception of society draws on social institutions which he maintains need to be fair for all cooperating members of society irrespective of their race, gender, religion, class of origin and so on. Social institutions need to stand up to public scrutiny.

In order to derive with principles of justice based on the notion of fairness, Rawls presents two principles of justice. Absolute or *lexical priority* is assigned to the first principle, the *liberty principle*. The second principle, the *equality principle* focuses on two particular aspects of justice, the first part relates to the *principal of fair equality of opportunity* whilst the second also referred to as the *difference principle* advances that social and economic inequalities between citizens are to be limited as long as they favour the least well off members of society. In cases of conflict the *principal of fair equality of opportunity* takes priority over the *difference principle*. For Rawls a property-owning democracy is necessary in order to realise the principles of justice as fairness. This he distinguishes from welfare state capitalism. It is argued that whilst welfare state capitalism secures a social baseline through ex post redistributive taxation a property-owning democracy sets limits to the accumulation of wealth across a concentrated narrow band of citizens by dispersing capital holdings across the population therefore making use of ex ante redistribution of capital. "The intent is not simply to assist those who lose out through accident or misfortune (although that must be done), but rather to put all citizens in a position to manage their own affairs **on a footing of a suitable degree** of social and economic equality."⁷³

Whereas, Rawls grounds his arguments in favour of a property-owning democracy regime over that of welfare state capitalism there have been others who believe that both regimes can complement each other and that property-owning democracy be regarded as, "useful

⁷² For Egalitarian liberal perspectives on social justice see discussion in chapter 3, section 3.5.3 entitled, "*Egalitarian Liberal Perspectives*".

⁷³ See, Rawls, J. 2001, *Justice as Fairness: A Restatement*, Harvard University, Cambridge, MA. pg 138 in, O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. emphasis added.

extensions of, rather than replacements for, the welfare state.”⁷⁴ This view is congruent with that adopted in this thesis which also aims to demonstrate how Rawls’ principles of justice as fairness through the regime of a property-owning democracy can be institutionalised through public procurement and more specifically through the public- private partnership regime. The following thus attempts to discuss how public procurement manifest through the public-private partnership regime as an ex ante mechanism can be made more socially just by linking the discussion to Rawls’ elaboration in advancing a property-owning democracy.

In advancing the notion of a property-owning democracy Rawls in *Justice as Fairness* presented a socioeconomic system which requires at least the following three institutional or policy-based features:

- (i) Wide Dispersal of Capital: The *sine qua non* of a POD is that it would entail the wide dispersal of the ownership of the means of production, with individual citizens controlling substantial (and broadly equal) amounts of productive capital (and perhaps with an opportunity to control their own working conditions).
- (ii) Blocking the Intergenerational Transmission of Advantage: A POD would also involve the enactment of significant estate, inheritance, and gift taxes, acting to limit the largest inequalities of wealth, especially from one generation to the next.
- (iii) Safeguards against the Corruption of Politics: A POD would seek to limit the effects of private and corporate wealth on politics, through campaign finance reform, public funding of political parties, public provision of forums for political debate, and other measures to block the influence of wealth on politics (perhaps including publicly funded elections).⁷⁵

Policies of type (iii) are consistent with Rawls’ first principle of justice and therefore aim to protect the fair value of the political liberties. Policies of type (i) and (ii) aim to put into operation the second principle of justice, the equality principal. In setting out the linkages with the public-private partnership regime we will first set off by focusing on public procurement policies that have the potential to realise Rawls’ second principle of justice that is type (i) and (ii) policies. Discussion of potential public procurement policies realising type (iii) policies will ensue.

⁷⁴ See, O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. pg. 390. The author also notes that this is very much in line with James Meade’s opinion about policies concerning a property-owning democracy and quotes his view in this respect, “These measures are needed, for the most part, to supplement rather than to replace the existing Welfare-State policies” See, Meade, J. 1964, *Efficiency, Equality and the Ownership of Property*, George Allen and Unwin, London., pg. 75.

⁷⁵ See, Rawls, J. 2001, *Justice as Fairness: A Restatement*, Harvard University, Cambridge, MA. pg. 149-150 in O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. pg. 382.

Public-Private Partnerships as the means for satisfying type (i) policies – As afore mentioned policies in this respect need to satisfy the equality principle which in effect focuses on two particular aspects of justice, the principal of fair equality of opportunity and the difference principle. The former takes precedence in cases of conflict.

One of the major concerns that the notion of equality brings to mind in the context of the EU public procurement regime is the under representation of SMEs participating in above EU threshold public procurement, a fact long acknowledged by the Commission.⁷⁶ This clearly indicates that a narrow band of European citizens are enjoying the fruits of productive resources. Such dominance comes in breach of Rawls' difference principle which postulates that social and economic inequalities between citizens are to be limited as long as they favour the least well off members of society. Therefore, policies aiming to satisfy the difference principle necessitate a move towards the greater dispersal of control over productive resources. Such a move directs our attention on policies aiming at realising Rawls' principal of fair equality of opportunity.

What is actually meant by the term *fair equality of opportunity*? Under Rawls' view, membership to any particular socio-economic group should be based on one's own abilities and efforts irrespective of their social class of origin. Accordingly he notes, "supposing there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin."⁷⁷ Therefore, a public-private partnership regime that aims to preserve *the fair equality of opportunity* over time needs to have a, "keen concern for limiting the influence of social background on individual life chances."⁷⁸ In effect, it could be argued that the *fair equality of opportunity* principal essentially comprise two fundamental concepts, *equality* and *fair opportunity*. One can only claim that she/he has been accorded *fair opportunity* if the safeguards to the notion of *equality* have been secured. In the case of the

⁷⁶ To this effect see discussions in chapter 2 in particular section 2.8.4 entitled, "*Impact on Small and Medium Enterprises*", chapter 3 in particular section 3.8 entitled, "*The Quest for Justice in Poverty Reduction: Putting EU Public Procurement into Perspective*".

⁷⁷ See, Rawls, J. 2001, *Justice as Fairness: A Restatement*, Harvard University, Cambridge, MA. pgs. 114-115 in, O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. Note 34.

⁷⁸ See, O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. pg. 385.

latter, according to European Court of Justice case law, “this principle requires that **similar situations** shall not be treated differently unless differentiation is objectively justified.”⁷⁹ It is at this point that we now come full circle to our previous arguments on the matter.⁸⁰ This argumentation gives further credence to our previous claims in that one cannot adopt a contracted view, one that confines the notion of equality solely on the basis of ensuring *equal access to opportunities* as interpreted by the Commission. It is too simplistic an interpretation.⁸¹

For, it is an equality vis-à-vis the person in its totality that we are concerned with. A totality that recognizes the individual not just as a physical being but also as a social being where at its very core lies its human dignity. It calls for the recognition of the human being as an end in oneself and not as a means to an end. More specifically, we need to refer to an equality that takes into account the *capability to function*.⁸² *Capabilities to function* assert freedom. A freedom that liberates the individual and that provides space for initiative and action.

This conception is also consistent with Rawls’ assertion that citizens situated in this way will, “have a lively sense of their worth as persons and . . . be able to advance **their ends** with self confidence.”⁸³

Therefore, within the context of a public-private partnership regime, on the basis of the above arguments the realisation of type (i) policies justifies the adoption of the so called *preferential schemes* in order to ensure the wide dispersal of capital. Such preferential schemes can include set asides, that is, “...when a percentage of the overall procurement budget or a percentage of a single contract value is reserved to targeted group(s) (SME, domestic, women owned, etc...).”⁸⁴ It may also refer to bid preferences/subsidies, that is, “when targeted firms get a percentage discount on their bid.”⁸⁵ It bears noting however, that generally speaking the

⁷⁹ See, COM (2011) 896 final. *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20.12.2011, European Commission, Brussels, paragraph 16, emphasis added.

⁸⁰ To this effect see in particular discussion in section 6.3.2 entitled, ‘*Best value for money.....long term best value?*’

⁸¹ Ibid.

⁸² The notion of capability to function refers to that conceived by Professor Amartya Sen as discussed in chapter 3, section 3.3, ‘*The Nature of Poverty: Definitions Abound*’.

⁸³ See, Rawls, J. 2001, *Justice as Fairness: A Restatement*, Harvard University, Cambridge, MA. pg. 59, in O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. emphasis added.

⁸⁴ See, Proceedings of conference, entitled *Public Procurement Days – Modernisation, Growth and Innovation*; Fana, M. and Piga, G. 2012, How could simplification of the rules increase SME's possibilities of and interest in participating in competition for public contracts? Copenhagen, Copenhagen Business School, pg. 22.

⁸⁵ Ibid.

usage of the term *preference schemes* and other similar terms are a misnomer because of the negative connotations and consequent misleading effect. In contrast it appears more fitting to use such terms as *appropriation schemes*, *anti discriminatory* and *affirmative action*. Such terms have a better potential to communicate the right signals which generally speaking reflect institutional measures undertaken for the sake of preserving the *equality principal*.

Public-Private Partnerships as the means for satisfying type (ii) policies - Policies falling within this category also aim to satisfy the equality principle, in this case by *blocking the intergenerational transmission of advantage*. To this effect Rawls advocated various forms of inheritance and gift taxes. It is not within the scope of this thesis to argue in favour or against such policies however, we will argue on policies that have the potential to bear the same effect that is, to *block the intergenerational transmission of advantage* via ex ante mechanisms made possible through the public-private partnership regime.

Indeed, the arguments set out above in satisfying type (i) policies can very well have the effect of satisfying type (ii) policies. Nevertheless, we can take this a step further by asking a simple question – what comprises *intergenerational transmission of advantage* in the case of public-private partnerships in order to be able to enact policies capable of *blocking* them out? As soon as we acknowledge the fact that generally speaking public procurement and not in the least public-private partnerships, are essentially concerned with complex exchanges that occur in social relationships and which in the process are separated in part by the passage of time, we derive with an answer. The *intergenerational transmission of advantage* can comprise any measure that blocks the *complex exchanges that occur in social relationships*. Let's for a very brief moment revert to the Thameslink rolling stock procurement case.⁸⁶ The following transcripts make the point:

Professor Williams.....All I have is an envelope and that tells me that Bombardier has a B++ credit rating and Siemens an A+ credit rating. You can then play around with rates of interest and various other things, and on the back of my envelope it looks like it could be anything like £500 million.....the fundamental mistake of issuing a bundled contract where you have multiple policy objectives, where you want low cost finance and you want the trains built appropriately, and you bundle it all together in one contract with one number at the end as the decision principle. Of course, you lose sight of a fair number of your objectives.⁸⁷

⁸⁶ See, section 6.3 entitled, 'UK-London: Thameslink rolling stock procurement programme – the case in a nutshell'.

⁸⁷ See, Professor Karel Williams, Director, ESCR Centre for Research on Socio-Cultural Change, University of Manchester, as witness in response to question 11, minutes taken on the 7 September 2011, in Transport Committee. *Minutess of Evidence - HC 1453*, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtran/1453/11090701.htm> [8 March, 2012].

Professor Williamsthe bundling introduced a bias in favour of Siemens because they had the superior credit rating and that gave them an advantage of maybe several hundred million pounds on the deal. Apart from that, the other issue which all your witnesses are emphasising is that value for money was defined very narrowly as price for quality, as though it were you or I choosing a toaster at John Lewis or my central administrator choosing stationery supplies. That calculus is entirely appropriate for a small-scale decision by you or me at John Lewis. It is not appropriate for a £1.5 billion contract which is relevant to the future of train building in the UK.

.....the scale makes this a kind of procurement industrial policy these considerations have some considerable weight. Each Bombardier worker pays £17k of taxes a year and makes £10k a year of tax contributions. Average pay in the rail supply industry is £44k total compensation. These are material considerations, material sums, which should have been taken into account.....⁸⁸

It is at this point that we now come full circle to our previous arguments relating to the notion of *value for money*.⁸⁹ Within the context of a public-private partnership regime, the realisation of type (ii) policies needs to take account of the *value for money principle*. A principle that incorporates broad objectives that goes beyond the whole-of-life costs and the quality of the good or service being purchased. Hence, justification on the basis of the *value for money principle* is only acceptable when the most efficient mix of costs leads to cost cutting with simultaneous increases in social welfare gains.

Further, in addition to the above mentioned policy and on the basis of the arguments put forth policies that seek to *block the intergenerational transmission of advantage* need also **mandate** that major contracts be divided into lots.

Public-Private Partnerships as the means for satisfying type (iii) policies – As previously noted policies of type (iii) are consistent with Rawls’ first principle of justice and therefore aim to protect the fair value of the political liberties. Policies falling under this category attempt to safeguard against the corruption of politics. In this respect Rawls advocated policies that seek, “campaign finance reform, public funding of political parties, public provision of forums for political debate, and other measures to block the influence of wealth on politics (perhaps including publicly funded elections).”⁹⁰ When it comes to public

⁸⁸ Ibid. in response to question 17.

⁸⁹ To this effect see in particular discussion on the matter in section 6.3.2 entitled, ‘*Best value for money.....long term best value?*’

⁹⁰ See, Rawls, J. 2001, *Justice as Fairness: A Restatement*, Harvard University, Cambridge, MA. pg. 149-150 in, O'Neill, M. 2009, "Liberty, Equality and Property-Owning Democracy", *Journal of Social Philosophy*, 40, 3, 379-396. pg. 382.

procurement and not in the least public-private partnerships it is a known fact that, “[T]he financial risks at stake and the close interaction between the public and the private sectors make public procurement a risk area for unsound business practices, such as conflict of interest, favouritism and corruption.”⁹¹ Thus, all type (iii) policies as advocated by Rawls are applicable within the context of promulgating social justice policies in public-private partnerships. Indeed, one may consider various alternative devices which are consistent with realising Rawls’ first principal of justice. In this respect for instance Roberto Mangabeira Unger advanced a three-tiered economic order.⁹² The first tier would consist of a social investment fund controlled democratically by elected executive and representative bodies responsible for fixing the institutional and economic framework within which the rest of the system operates and that lends capital to funds at the second tier. The second tier in turn comprises a system of subordinate investment funds controlled by semi-independent bodies that borrow from the central fund and that lend to enterprises within the limits set by the central fund. The third tier is composed of firms that borrow capital from the subordinate investment funds and that transact with one another within the rules fixed by the funds. The system aims at achieving a wide dispersion of power whilst seeking to avoid direct links between the central fund and firms themselves.

Policies that seek only to address social justice issues through the enactment of type (i) and (ii) policies cannot deliver social justice because the absence of type (iii) policies will deprive them of all force. Indeed, the public-private partnership regime clearly illustrates the case that type (i), (ii) and (iii) policies are so closely intertwined that a combination of all three as discussed herein have the capacity in delivering more just socioeconomic arrangements.

⁹¹ See, COM(2011) 15 final. *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, 27.1.2011, European Commission, Brussels. pg. 48.

⁹² See, Unger, M.R. 1987, "Fake Necessity" in *Politics*, Cambridge: Cambridge University Press, Cambridge. in, Cohen, J. 2009, "The economic basis of deliberative democracy", *Social philosophy and policy*, 6, 2, 25-50.pgs.45-46.

6.5 Concluding Remarks

Having embarked on a journey of *Verstehen* this thesis culminates by advancing a European theory of social justice. Such theory finds philosophical underpinnings grounded on natural law theory and institutionalised through the public-private partnership regime which puts into operation principals derived by John Rawls in, *Justice as Fairness*. It is now possible to move a step further and conceptualise public-private partnerships by way of presenting a definition that in essence reflects the underpinning philosophical rationale that drives its *public interest* function when put into operation – a rationale that is grounded on natural law theory. The definition hereunder, builds and refines further the definition that was put forth by the European Commission in its green paper⁹³ on public-private partnerships:

Public-Private Partnerships are forms of cooperation between the public authorities and the world of business which aim to best meet clearly defined public interest needs through:

- (1) the optimum allocation of resources, risk and rewards by way of funding, construction, renovation, management or maintenance of infrastructure or the provision of a service and;*
- (2) the simultaneous increases in social welfare gains.*

The public-private partnership regime has made it possible to clearly explicate how a social justice model can be institutionalised by infusing a *public interest function* that incorporates the key umbrella concept as brought to the fore and discussed in this thesis, namely one that incorporates the values of respect for the human dignity, equality and freedom for participatory action. Indeed, the naturally occurring question as to whether such logic could extend to other *public interest* functions for instance to public procurement in general may arise. This all boils down on how we are to interpret the *public interest* function.⁹⁴ For as the discussion on *public interest* revealed this concept is highly vague, overly used and abused. Therefore, unless we put content in order to derive with workable meanings this notion will remain vague, overly used and abused.

It therefore follows that if the *public interest* function in the EU public procurement regime were to be guided by philosophical underpinnings as conceived in natural law theory wherein, the individual is seen as an end in itself, a total re-think on how the EU public procurement

⁹³ See, op.cit. (n. 4). Pg. 3.

⁹⁴ To this effect see discussion in chapter 4, section 4.4.2, “*The public interest: fiction or fact?*” section 4.4.2.1, “*Public interest – some theoretical reflections*” and section 4.4.2.2, “*On the requirement of the common good – expressing the natural law method.*”

regime is conceived and put into operation would become necessary. This being due to the fact that we are dealing with fundamentally divergent philosophical viewpoints. The EU public procurement regime as currently construed essentially embraces neo-liberal principals that are grounded on utilitarian logic wherein the individual is used as a means in promulgating the European single market.

Thus, when it comes to deciding upon which philosophical arguments should underpin and henceforth guide *public interest functions* such decisions need to be based upon sound practical thinking. This thesis advocates in favour of a *public interest* function that takes into account social concerns explicated through a *common good* that fulfils first and foremost the values of human dignity, equality and participatory action and that capitalise on making utmost use of public procurement as a dynamic and powerful policy instrument. And in doing so reaches out towards the achievement of European integration aims – both in its economic and political sense. However, all this necessitates a fundamental departure from how the current EU public procurement regime is conceived. It essentially calls for a change in attitude that moves away from an overriding and unconditional approach that revolves around European economic efficiency logic to a social just alternative that calls for a reordering of its economic and social dimensions.

7.0 Conclusions

The importance of having a clear political philosophy underpinning political action in order to address fundamental questions regarding the *public interest* comes out clear from this thesis. For ultimately whatever philosophy the policy makers and legislators choose to embrace or alternatively fail to embrace will nevertheless bear an inescapable impact on the person vis-à-vis its relation with society. The discussion in the last chapter culminated in the production of a European theory of social justice that is in alignment with the Europe Union's founding values. The theory has clear philosophical underpinnings that draw on natural law theory. It operates on the basis of principals and conditions that enable the flourishing of its citizens by incorporating key values that are tightly enmeshed with each other and that cannot be disentangled for they are mutually reinforcing – the respect for human dignity, equality and freedom for participatory action. These are the values that came to surface as a result of this voyage of *verstehen* which this thesis has embarked upon and that have snatched our attention thereon. Evidently they have come into play only as a result of their impact on the direct and indirect experiences the European citizen is made to endure vis-à-vis Europe's public procurement regime.

For when it came to understanding the extent to which the public procurement regime is serving the *public interest*,¹ practical reasonableness led us in the direction that the human person is not just a mere subject, an end to a means that falls in the equation of supply and demand. The human person entails the respect for its dignity and for its human rights. It is within the very nature of the human person to build relationships and to interact with the community. And it is within this communion that the human person can attain to the highest point of accomplishment its flourishing.

Public procurement contracts are a special category of contracts, more specifically they represent complex exchanges² that occur in social relationships and which in the process are separated in

¹ This is one of the research questions addressed by this thesis and discussed in chapter 5, section 5.4, “*To what extent is the EU public procurement regime serving the public interest?*”

² For a more detailed account on the notion of exchanges that occur in social relationships refer to chapter 4, in particular section 4.4.1.1 entitled, ‘*Gaining marketing insights on the nature of services*’.

part by the passage of time wherein one of the parties represents the *public interest*.³ On the basis of the understandings deciphered by this thesis it was noted that EU public procurement as a vital tool promulgating the internal market comes at the expense of the *public interest*. That is, in so far that, the *public interest* function in question is one that seeks to achieve a *common good* wherein, the individual is seen as an end in itself and not as a means to an end as is the case when single market integration aims pose as the ultimate objective. The author finds the latter problematic as it conflicts with European founding values wherein the respect for human dignity necessitate that individuals be treated as an end in themselves and not be used as a means towards the achievement of ulterior goals. On one hand EU public procurement is seen as serving as a tool that helps dislocate Europe's founding values and on the other it is very well serving as the EU's safety valve, modifying and hence protecting to a certain extent the provision of public services from the overwhelming market forces. The situation is untenable as long as it distances itself from permissible European ideals as contained within its constitution – the respect for human dignity, equality and freedom for participatory action all of which identify with the social conscience of the people of Europe.

7.1 The validity of our actions needs to be limited by time and concrete results

Year 1971 marked the start to the evolution in EU public procurement regulation with the adoption of Directive 71/305/EEC on the coordination of procedures for the award of public works contracts. The argument then was that by guaranteeing transparent and non-discriminatory procedures economic operators across the single market will fully benefit from the basic freedoms in competing for public contracts. During the first half of the 1980's the role of public procurement in the completion of the single market was further accentuated. Its regulation played a crucial part in exposing an economic and legal approach to the integration of public markets with the main object being to enhance competition and unobstructed market access. Year 2011 called on the Single Market Act wherein twelve levers to boost European growth and confidence were identified. Public procurement stood as one of the levers and as one of the market-based

³ On the notion of the *public interest* see discussions in chapter 4 and in particular section 4.4.2.2 , “*On the requirement of the common good – expressing the natural law method*”. The ‘public interest’ that this thesis relates to falls under the unity of common action in the fourth order also referred to by Finnis as the *common good*.

instruments was identified as playing a key role in the Europe 2020 strategy for smart, sustainable and inclusive growth. Hence, a proposal for a revised and modernised public procurement legislative framework that incorporates more simplification and flexibility was put forth by the Commission. The proposed reforms to EU public procurement regulation seek to increase efficiency of public spending, best possible value for money, facilitate participation of SMEs and cross-border procurement and better use of common societal goals such as the protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.

An enticing list indeed! Such was also the, “permanent boost to the prosperity of the people of Europe and indeed of the world as a whole”?⁴ Was it not the Community’s aim to progressively establish the internal market over a period expiring on 31 December 1992?⁵ But some things never seem to expire as is the case with the establishment of the internal market. For in the Commission’s recent proposal for a revised and modernised public procurement legislative framework it is claimed that, “[T]he proposal complies with the proportionality principle since it **does not go beyond what is necessary** in order to achieve the objective of ensuring the proper functioning of the Internal Market through a set of European-wide coordinated procurement procedures.”⁶

But how can such claims be made when the use of European-wide coordinated procurement procedures for ensuring the proper functioning of the Internal Market have now been dragging on for over forty years and we’ve not yet got it right? According to the European Commission⁷ we

⁴ See, Cecchini, (op.cit. n.9) pg. xiii.

⁵ Article 14(1) EEC held that, “The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992.....”

⁶ See, COM (2011) 896, pg.6 op. cit. (n. 18) emphasis added.

⁷ See, SEC(2011) 1586 final. *Commission staff working paper executive summary of the impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors*, 20.12.2011, European Commission, Brussels. pg. 3.

now face three key problems with the current legislative framework on public procurement, which are as follows:

- Insufficient cost-efficiency — current EU rules generate estimated savings of approximately €20 billion on € 420 billion p.a. but procedures may be unduly burdensome as the associated cost is around € 5.6 billion.⁸
- Missed opportunities for society — current rules may not always allow stakeholders to optimise the use of their resources and/or make the best purchasing choices.⁹
- National rather than EU PP market — over 98% of contracts awarded according to EU rules are won by national bidders (approximately 96% of total value).¹⁰

In addition to the above list worth recalling the fact that when it comes to small and medium sized enterprises these remain under-represented in above EU threshold public procurement.¹¹ A matter long acknowledged by the Commission.¹² Further, we have the European Commission claiming that a new directive on concessions is appropriate because for the first time it reflects a comprehensive, clear and unambiguous set of provisions in the area which so far has been

⁸ The reliability of such estimates is seriously questioned. Reliance on the actual initial price paid is not sufficient. What counts is the final price that the public purchaser pays up for. There can be major discrepancies between the initial award price and the actual final price especially for works and service contracts where cost overruns can flow during the contractual period. The Directives are silent when it comes to the post-contractual phase. Measuring such variations would also appear to be a mammoth task. To this effect see discussion in chapter 2, section 2.8.2 “*Impact on Transparency*”.

⁹ That the EU public procurement regime creates *missed opportunities for society* is further reiterated by this thesis. However, the proposals as put forth by this thesis are on a totally different wave length from those being proposed by the Commission. To this effect see discussion in chapter 6, “*On Public-Private Partnerships: For a European Theory of a Social Just Alternative*” and discussion in this chapter section 7.2 “*On a plane of practical reasonableness*”.

¹⁰ From the understandings deciphered by this thesis on the basis of empirical research it was revealed that deeply ingrained cultural preferences features as one of the main trade barriers. To this effect see discussion in chapter 2, “*Free trade: What about it – Myths or Realities?*”

¹¹ To this effect see discussion in chapter 2, section 2.8.4 entitled, “*Impact on Small and Medium Enterprises*”.

¹² To this effect see for instance, COM(1989) 400 final. *Public Procurement Regional and Social Aspects (Communication from the Commission)*, 24 July, 1989, European Commission, Brussels in particular paragraph 41 and Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit D.2 and Directorate-General for the Internal Market and Services, Unit C.3. *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*, European Commission, 2010, European Commission, Brussels in particular page 25.

characterized by continuous uncertainty and erroneous interpretation, often leaving room for unlawful practices.¹³

The “problems” as identified by the Commission have long been in existence - they’re chronic and structural in nature. How can it be maintained that this is not going beyond what is necessary?? Remedial treatment solely through the internal market route as proposed by the Commission can’t fix the “problems” for they go beyond proportionality. Meaningful commitments to the single market project should not entail an overriding and unconditional attitude for ultimately the validity our actions need to be guided and hence limited by time and concrete results.

Reverting momentarily to what history has essentially thought us can always help enlighten us further. If one refers to European economic integration since 1815 there were two major forces shaping European economic integration at the time – technological innovations and political forces.¹⁴ The drive towards economic integration was never the main motive but it emerged as a by-product, a gradual and piecemeal process while other interests were being pursued. And yet, European economic integration stood out for its significant development. The 1992 single market programme marks a significant departure from what history has essentially thought us on the formation of economic integration. Far too much attention, energy and resources have been given and continues to be given towards the drive to European economic efficiency via the internal market route.

Further, in its proposal for a revised and modernised public procurement legislative framework according to the Commission the proposal also complies with the subsidiarity principle. Accordingly, EU public procurement procedures above certain thresholds are claimed to provide European-wide transparency and objectivity, considerable savings and improved outcomes. Such

¹³ See, SEC(2011) 1588 final. *Commission staff working document impact assessment of an initiative on concessions accompanying the document proposal for a directive of the European Parliament and of the Council on the award of concession contracts*, 20.12.2011, European Commission, Brussels. pg. 4.

¹⁴ See, Milward, A.S. 1981, *The Integration of the European Economy since 1815*, George Allen & Unwi Ltd, London.

claims are seriously questioned as they have been the subject of scrutiny in this thesis.¹⁵ In addition, commensurate with the subsidiarity principle is the Commission's claim that the coordination of procedures for public procurement above certain thresholds has proven an important tool for the achievement of the Internal Market. However, when one delves into the notion of the internal market it becomes apparent that the very logic underpinning the internal market which ties into the notion of free trade has at its heart the theory of comparative advantage.¹⁶ A theory that relies on various assumptions that do not always fit with today's realities leaving much unanswered whilst verging into abstractness.

How can actions that yield an overriding and unconditional attitude at the supranational level by way of integrating public procurement markets be legitimated in particular when they are founded upon abstract concepts? This is where rationality loses out to irrationality. Abstract concepts allow a high level of operational ambiguity and thrive on broad discretionary powers that make it possible to offer any appealing explanation for any conclusion one chooses to reach.¹⁷

7.2 On a plane of practical reasonableness

This thesis attempts to prove how the flexible application of public procurement has the potential of realising a social model of integration in the European Union wherein the European citizen is the key actor in the integration process. Notwithstanding the fact that EU public procurement legislation allows a certain degree of flexibility there still remains much scope for its further increase. Indeed, counter arguments concerning this thesis' stance for greater flexibility in EU public procurement legislation may arise largely from three different lines of advance.

¹⁵ See discussion in Chapter 2 and in particular section 2.8, "*Public Procurement vis-à-vis EU's Free Trade Agenda*". For a summary see chapter 1, section 1.1, "*Background to the thesis*".

¹⁶ See, Chapter 2 and in particular section 2.4, "*The theory of Comparative Advantage- A General Idea*".

¹⁷ See in particular discussion in section 2.8, "*The impact of EU Public Procurement legislation vis-à-vis EU's Free Trade Agenda*".

- ❖ First counter-argument - The inherent flexibility of the EU acquis in relation to procurement which has been in existence since the inception of the public procurement regulatory framework may be argued as already balanced in as much as allowing domestic policies to be taken into account in public contract awards. Social service contracts which are listed in Annex IIB of Directive 2004/18/EC are not subject to all the detailed rules of the Directive. Only certain specific rules of the Directive are applicable to such services namely, compliance with technical specifications and publication of the Contract Award Notice. Furthermore, when it comes to the award of contracts for social services with cross border interest there remains a large room for manoeuvre for contracting authorities when compared to other sectors. In such cases compliance with the full set of provisions as laid out in Directive 2004/18/EC is not required other than the requirements as mentioned above and respecting basic principles of Community law, namely the principle of transparency, equal treatment and non-discrimination.

In the case of contracts which include mixed services, that is a social service component and other services that are fully covered by the procurement Directives, the Directive will only apply to a limited extent as noted above if the value of the social service component is greater than the value of the other service.

Further, EU public procurement legislation allows Member States to reserve contracts to sheltered workshops where most of the employees concerned are disabled persons. Contracting authorities are also allowed to lay down special conditions relating to the performance of a contract provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations. When it comes to concessions only work concessions fall under the specific regime of Directive 2004/18/EC. The award of service concessions do not fall within the scope of the directives of public contracts and are only subject to general Treaty provisions instituting the proper operation of the single market and the principles of non discrimination, equality of treatment, transparency, mutual recognition and proportionality.

In addition, contracting authorities can legally award their contracts in accordance to the most economically advantageous offer they receive and not solely by virtue of the lowest offer. Contracting authorities can afford themselves in-house arrangements in delivering public services as well as public-public co-operation. EU law also allows public undertakings to organise and deliver services as they see fit [Art 106(2) TFEU]. Sectoral regulation in transport allows the notion of the internal operator to deliver transport services.

Therefore, following such line of advance it may be argued that given the already ingrained levels of flexibility in EU public procurement legislation any reported failures on its effectiveness may be attributed to its ineffective application on the part of either the Member States or the EU institutions or both.

- ❖ Second counter-argument – Notwithstanding the EU’s public procurement overarching aims which are driven to promulgate the single market, the European Commission’s recent proposal for a revised and modernised public procurement legislative framework further seeks to incorporate more simplification and flexibility whilst increasing efficiency of public spending, best possible value for money, facilitate participation of SMEs and cross-border procurement and better use of common societal goals such as the protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services. Hence, all this adds further impetus to the flexible application of the EU public procurement regime.
- ❖ Third counter-argument - On the basis of EU public procurement expenditure reports, if one takes for instance expenditure values for year 2010, EU public procurement expenditure was reported to be at the region of circa 20% of EU GDP. However, only 3.7% of this expenditure can be attributed to expenditure that is directly related to EU public procurement regulation.¹⁸ Hence, this reflects nothing other than the fact that a

¹⁸ For a more detailed discussion on EU public procurement spend refer to chapter 2, section 2.8.2, “*A foreword note on EU public procurement spend.*”

significant amount of procurement expenditure is sub-dimensional and that there remains ample flexibility at EU Member States' disposal. In the case of contracts with a value falling below the applicable thresholds of the public procurement directives, public authorities need only comply with the basic rules and principles of Community law, that is, the principles of equal treatment, non-discrimination and transparency.

Following such line of argument any claims as this thesis purports to make in that EU Member States could reverse or at least retard the levels of social decline and poverty through flexible procurement policies which take into account social concerns and fulfil the values of human dignity, equality and participatory action do not appear to hold ground given the significant amount of flexibility already enjoyed by EU Member States when it comes to public procurement expenditure. Moreover, social policies rest with Member States' sovereignty and are immune from supranational intervention.

The above counter-arguments obscure the real weaknesses inherent in EU public procurement regulation. The following discussion attempts to address such.

As a follower of political fashion public procurement policy has over the years been used as a vital instrument to secure national economic and social welfare policies. It has a long history where it has been intimately used to drive social justice goals more generally. Notwithstanding such, the use of public procurement policy to serve competition and market access goals on one hand and its use to serve as a socio-economic lever for domestic policy on the other has very often been the subject of friction which can be depicted both at International and EU level.

EU public procurement, estimated at 20% of EU GDP has the potential for significant strategic investments both in the economic and social policy dimension in particular when one bears in mind the highly dynamic and multi-faceted uses of public procurement as a policy tool. Against such a scenario this thesis puts into context the question of poverty. Poverty features as a real problem across the EU. One in seven people across the EU are at risk of poverty. The persistent levels of poverty across the EU which have maintained momentum for well over the past decade raise fundamental political questions. The current wave of social injustices as a result of the current economic crisis is another case in point which cannot be left ignored.

Poverty reflects by and large the inadequacy of our systems which in the author's view is indicative of system failures of market regulation that are too heavily based on neo-liberal economics. The discussion below elaborates further on this issue as it attempts to explain why the author contends such by presenting along the discussion two major supporting arguments.

First supporting argument: At EU level in the so called “*fight*” against discrimination, poverty and social exclusion the EU treads very cautiously and recognises the legitimate freedom of Member States in pursuing their social policy goals.¹⁹ And yet, within the same breadth, Member States are constrained when it comes to the use of vital policy tools, as is the case with public procurement, that have the power to steer a state's social policy agenda. Indeed, public procurement has the potential to serve, aims and objectives stipulated in the European treaties, such as social cohesion, combating of long-term unemployment and achievement of acceptable standards of living. But, because public procurement can also serve Europe's internal market aims the latter takes precedence. It is argued that when the EU limits the use of public procurement to serve as a policy tool at Member States disposal such restrictions represent a straightforward socio-economic burden on Member States. For in exchange to the dismantling of the so called *non tariff trade barriers* the EU concurrently erects social barriers by way of restricting Member States' public purchasing autonomy in the pursuit of their social policies.

Public procurement, as a vital policy tool which is indissolubly linked to national policies and in particular social policies, can assist towards poverty reduction. Herein emanates this thesis' underpinning logic and justifications for regulating EU public procurement. This is not a matter of social versus economic uses of public procurement or about favouring “*protectionism*” per se, but rather about making optimal use of public procurement as a policy instrument which is supported by EU regulation that benefits the EU citizen. The **European citizen** is the fulcrum that stands at the heart of reaching European integration aims. The single market route is not the only market route that is capable of leading Europe towards full integration, that is, political and economic integration. There are various market routes available and all are for the taking. Such routes need not necessarily be bound by economic liberal theories that essentially underpin the single market rationale, for what in effect is economic integration about? Economic integration is

¹⁹ See discussion in chapter 3, “*Poverty and Justice within context*”.

about economic life within the existing Nation States. This is not to be interpreted as a call for nationalism but simply that European citizens are the protagonists on how that life is lived and thus the social dimension cannot be neglected. Enabling European citizens to attain for themselves reasonable objectives constitutes the common good. And the conditions that need to be obtained if each citizen were to attain her or his objectives relate to the common good of the political community – a matter that needs to be addressed at both EU level and by Member States.

This thesis argues that poverty across Europe features as a major obstacle to social cohesion, harmonious development, the attainment of acceptable standards of living and not in the least EU integration objectives. As argued above, the persistent levels of poverty across the EU and current social injustices in the author's view are indicative system-failures of market regulation that are too heavily based on neo-liberal economics. The following below further elaborates on this issue by presenting the second supporting argument.

Second supporting argument: Despite the fact that there appears to be general agreement that the provision of public services exert a highly valid and crucial societal role that cannot be left solely to the whims of market forces on one hand, a growing proportion of public authority tasks including social services, by way of services of general economic interest now fall under Community rules on Competition and the internal market. In this respect such tasks become subjected to market imperatives. The notion of a 'de-centred' state and the subordination of public policies to market forces become further accentuated within the EU - economic efficiency logic dominates.²⁰ On the other, public procurement as a vital public policy tool concerned with the delivery of public services is being utilised to promote single market objectives. Here again economic efficiency logic dominates. Economic efficiency logic draws on utilitarianism and is concerned with the achievement of aggregate utility.²¹ Therefore, the *public interest* function that the EU actively puts into motion draws heavily on aggregative conceptions of the *common good*. In this respect individual freedom, autonomy, rights, quality of life are only valuable in so far as

²⁰ To this effect see discussions in chapter 4, "*On the mission of serving the Public: Services of General Interest and Community Law*" and chapter 5, "*Public Procurement as the EU's safety valve*".

²¹ To this effect see discussion in chapter 3 and in particular section 3.6.1, "*Utilitarianism*".

they increase aggregate utility. For in deriving with aggregate utility the individual is used as its means. This the author finds as problematic as it conflicts with European founding values wherein the respect for human dignity necessitates that we treat individuals as an end in themselves and not be used as a means towards the achievement of ulterior goals. The discussion on poverty²² has revealed that poverty is more than a state of hunger or nakedness that relies on whatever remnants are thrown out by the wealthy others. For respect to human dignity is as important as the satisfaction of hunger. The full realisation of one's humanity wherein the dignity of the human person is accorded full respect transpires to be the common denominator that plays a pivotal role intricately linking policy actions with the question of poverty. It is therefore, on the basis of such logic that the author further contends that the persistent levels of poverty across the EU and current social injustices are indicative system-failures of market regulation that are too heavily based on neo-liberal economics.

The *public interest* function that this thesis endorses and puts forth is one that seeks to achieve a *common good* wherein, the interdependent and harmonious flourishing or fulfilment of each individual in the community can only be made possible through cooperation and coordination in communities. It calls for the incorporation of the key umbrella concept as identified by this thesis namely, the respect for the human dignity, equality and freedom for participatory action to underpin and thus guide such *public interest* functions. The key umbrella concept corresponds to embracing the fight against poverty and social exclusion whilst enabling the participatory engagement of citizens.

Hence, this thesis is based on the premise that a social model of integration in the European Union achieved through the flexible application of public procurement makes it possible to capture a *common good* with consequent ripple effects that reach out towards the achievement of European integration aims – both in its economic and political sense. It is through this social model, wherein the *public interest* function that takes into account social concerns explicated through a *common good* that fulfils first and foremost the values of human dignity, equality and

²² See discussion in chapter 3 and in particular section 3.2, “*Poverty across the E.U.- A snapshot*” and chapter 3.3, “*The Nature of Poverty: Definitions Abound*”.

participatory action that one can capitalise on making utmost use of such a dynamic and powerful policy tool. Indeed, the very dynamic nature of public procurement as a policy tool facilitates the possibility to reinforce Member States' diversity. Diversity is one of Europe's distinctive features. It enables varying ways of how we organise work, combine ideas and machines when moulding our economies at times of varying challenges. Therefore, EU public procurement regulation should seek to reinforce the very dynamic nature and adaptive features of this highly powerful tool and in doing so it will reinforce the very diverse nature including the socio-economic needs of EU Member States. Therefore, the overarching goal of the EU public procurement regime should seek to facilitate and boost the optimal use of such a powerful and dynamic tool as is public procurement in order to serve better as the Member States' safety valve rather than the EU's safety valve, as apparently is the case as revealed in this thesis.²³ It is through the *common good* of the political community, both at the EU level and at Member States' level, that the interdependent and harmonious flourishing of each individual across the EU could be better enhanced.

The intellectual rationale underpinning European integration theories and their consequent impact in guiding European policies have reflected a shift in their *raison d'être* over the years. Neofunctionalist arguments supposed the supranational state as the main actor in the integration process. Neofunctionalist arguments were eventually challenged most prominently by liberal intergovernmental theory wherein the States were seen as the main actors in the integration process. However, this thesis places the European Citizen as the main actor in the integration process. The European citizen and its flourishing are seen as standing at the centre of Europe's growth.

This thesis advances a European theory of social justice by institutionalising Rawls' principles of justice as fairness through the regime of a property-owning democracy and more specifically through the public-private partnership regime. The intellectual rationale underpinning the logic of a public procurement contract therefore takes into consideration the distributive objectives of societal welfare albeit in a limited manner in so far public procurement is concerned. The application of a flexible public procurement regime by way of public-private partnerships that

²³ To this effect see discussion in chapter 5, "*Public Procurement as the EU's safety valve*".

take into account social concerns that fulfil the values of human dignity, equality and freedom for participatory action need to be interpreted as merely one example of the several social and economic uses of public procurement. Therefore, the insertion of such social concerns as advocated by this thesis should not come at the expense of limiting the several uses and thus the very dynamic nature of public procurement as a policy instrument.

In advancing a social model of EU integration public-private partnerships provided the framework of argument. However, there is no reason why the same underpinning logic for advancing a social justice model of EU integration, shouldn't be extended to public procurement in general in so far that it is guided by a *public interest* function that embraces the key umbrella concept namely, the respect for the human dignity, equality and freedom for participatory action. Therefore, in shaping a flexible public procurement regime that reflects a social model of EU integration, more specifically a regime that acts as an ex ante mechanism that takes into consideration the distributive objectives of societal welfare, such a regime needs to be based on the notion of a property-owning democracy as advanced by Rawls in Justice as Fairness. This regime incorporates a socioeconomic system that requires at least the following three institutional or policy-based features:

*** Type (i) policy based features seek the wide dispersal of capital - Policies in this respect are consistent with Rawls' equality principle in justice as fairness and which in effect focuses on two particular aspects of justice, the principal of fair equality of opportunity and the difference principle. The former takes precedence in cases of conflict. On the basis of the discussion put forth in this thesis the realisation of type (i) policies justifies the adoption of the so called *preferential schemes* in order to ensure the wide dispersal of capital.²⁴

*** Type (ii) policy based features seek to block the intergenerational transmission of advantage – Policies in this respect also seek to satisfy the equality principle. On the basis

²⁴ To this effect see discussion in chapter 6, in particular section 6.4.1, "*Advancing a European theory of a social just alternative*".

of the discussion put forth in this thesis²⁵ the realisation of type (ii) policies need to take into account the *value for money principle* that incorporates broad objectives that go beyond the whole-of-life costs and the quality of the good or service being purchased. Hence, justifications on the basis of the *value for money* principle are only acceptable when the most efficient mix of costs leads to cost cutting with simultaneous increases in social welfare gains. In addition to the above mentioned and on the basis of the arguments put forth in this thesis policies that seek to *block the intergenerational transmission of advantage* need also **mandate** that major public contracts be divided into lots.

*** Type (iii) policy based features seek to attain safeguards against the corruption of politics – Policies in this respect are consistent with Rawls' first principle of justice which aims to protect the fair value of the political liberties and seek to safeguard against the corruption of politics. Policies that seek only to address social justice issues through the enactment of type (i) and (ii) policies cannot deliver social justice because the absence of type (iii) policies will deprive them of all force.

As argued, there are various market routes available and all are for the taking. Such routes need not necessarily be bound by economic liberal theories that essentially underpin the single market rationale. Hence, there is no reason why the EU and Member States limit themselves when it comes to the use of such a powerful and dynamic instrument as is public procurement policy in so far one remains guided by a clearly defined *public interest* function.

Domestic public procurement regulation has been highly influenced by EU public procurement regulation. Thus, whilst EU public procurement should further pursue its object of increasing open market access opportunities by way of reinforcing transparency, objectivity and non-discrimination between competing participants in tenders, increase efficiency in public procurement, support common goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, etc., it should not limit or suppress Member States from making additional socio-economic uses of this policy tool in order

²⁵ Ibid.

to promote domestic *public interest* needs. In this respect Member States should lay down the scope and extent of such additional alternative uses. Public procurement for social reasons falls under the sovereign competence of Member States. The overarching balance between utilization of public procurement as a policy tool at EU level in support of common EU goals and its use in support of Member States' domestic goals needs to be guided by a *public interest* function that recognizes the full dignity of the human person as an end in itself and that its flourishing can only be brought about through interdependent cooperation and coordination within the community.

Deriving a balance between social and economic uses of public procurement at EU level and at Member State level is possible through a politics of cooperation and coordination. Any contentions to such a scenario purporting public procurement policy as attempting to serve '*two masters*' and hence contradictory in nature collapses in view of the fact that herein the EU citizen features as the key actor in this balancing act manifest through the common good of the political community. For this is all about policy making that is guided by a *public interest* function that seeks to achieve one *common good* – the EUs common good.

Such a balancing act appears to be well incorporated and workable in international procurement regulations occurring mainly through bilateral trade negotiations. The approach adopted during such negotiations is to maintain the basic model as contained in the Government Procurement Agreement (GPA) thus securing the procurement aspect of the bilateral agreement. However, when it comes to the actual market access objectives of procurement these are contained in the annexes. In such agreements for instance the United States specify almost exactly the same exclusions from coverage as in the GPA notably that such agreements do not apply to set-asides on behalf of small or minority owned businesses. There is no doubt that the EUs stance, at the time the EEC (European Economic Community), on harmonization of public procurement regulation, has had a significant impact in the evolution and hence development of the GPA model. Indeed, the GPA has acted as a basic model to further Regional, International and Bilateral Procurement Regulation. However, notwithstanding the use of the GPA as a basic model, it has never detained the adoption of socio-economic procurement preferences by those willing to do so. A case in point is the procurement chapter of the North American Free Trade Agreement (NAFTA) agreed on October 1992 which includes Mexico, Canada and the United States into one free trade area. The main text of the procurement chapter follows closely the text

of the 1979 GPA model with the main difference being in the market access provisions. NAFTA makes use of a negative listing method by way of listing in the annex all that is excluded by the agreement. Provisions made by the United States exclude set asides on behalf of small and minority businesses. In the case of Canada the agreement is not applicable to any measures adopted or maintained with respect to Aboriginal peoples.

Noteworthy is how the GPA model itself evolved over the years.²⁶ It is highly apparent that the need for creating a balance on one hand between market access aims and fulfilling socio-economic domestic policy aims on the other featured as the main bone of contention during a time period of circa twenty four years, that is between 1955 which marks the beginnings to the GPA till 1979 during the Tokyo Round Negotiations when the text to the final draft was adopted.

As it transpires in the 1979 GPA agreement several countries sought exemptions from coverage by the Agreement. The United States and Canada included set-asides as exceptions in their annexes to the Agreement whilst the European Community did not seek to include similar exceptions for small business or minority set-aside programmes.

The 1994 GPA adopted largely the same approach in that several countries sought exemptions from coverage of the Agreement for particular public procurement preferences, notwithstanding the fact that it now covers previously excluded areas namely, construction works and services, procurement by states (in federally organised countries) and local administration. To date the GPA is the only binding plurilateral agreement concerning public procurement that includes WTO members that are parties to the Agreement.

Hence, when one comes to consider that the major EU argument for eliminating ‘*protectionist*’ public procurement behaviour was because it undermined transparency and fairness thus impacting negatively the creation of the single market and most importantly Europe’s vision of full integration, that is both from the political and economic aspects, such argumentation needs to be considered in the light of where Europe stands today relative to what others are successfully

²⁶ To this effect see discussion by McCrudden, chapter 8, “Evolution of the Government Procurement Agreement Model and Procurement Linkages” in McCrudden, C. 2007, *Buying Social Justice, Equality, Government Procurement and Legal Change*, Oxford University Press, Oxford, pgs. 183-230.

achieving in so far public procurement is concerned. The major question we need ask ourselves is whether or not the underlying rationale and hence present justifications for regulating EU public procurement are realistic and capable of meeting up to proclaimed expectations. It is hoped that this thesis has assisted in putting into perspective a more balanced and realistic view that essentially needs to be factored in when distinguishing sound from unsound practical thinking, that is, between acts that are reasonable all things considered or acts that are unreasonable, all things considered. The various potential uses of public procurement as a vital policy instrument and in particular its social use should not be regarded as a barrier to EU economic growth but as a crucial safety valve at the disposal of Member States for the benefit of the EU citizen and not in the least EU integration aims.

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