
A Comparative Law Analysis of the Use of State-Level Green Procurement in the European Union and the United States

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Abstract

This paper undertakes a comparative law analysis of the use of state level procurement in the European Union and the United States to achieve state level environmental policy objectives. In both places, it is the tension between federal economic goals and state procurement objectives that continues to define the legal and operational contours of this field. As such, the questions to be examined relate to how federal laws compare under both systems in promoting or restricting state level environmental procurement practices. It is initially observed that the market participant exception to the dormant commerce clause gives U.S. states significant additional freedoms in their exercise of many procurement activities. However, recent and expanding Union legislative and judicial doctrines appear to be levelling the field in some respects. And in particular, as states in both the Union and the U.S. are increasingly relying upon green public procurement to play important roles in driving ambitious environmental and economic policy strategies, there may be some convergence between the U.S. and European systems in granting greater levels of flexibility to state procurement practices that are part of more complex projects.

1. Introduction¹

The subject of this paper is a comparative law analysis of the use of state level procurement in

the European Union ("the Union") and the United States ("the U.S.") to achieve state level ("local") environmental policy objectives. And the questions to be examined relate to how federal laws compare under both systems in promoting or restricting state level environmental procurement practices.

In fact, it's possible to make some clear comparisons between the general ways in which the European and U.S. systems operate. Specifically, both federal systems secure economic and free market rights, and the states (either U.S. states or European member nation states) operate semi-autonomously within their federations. Therefore, while state procurement activities are bound in both places to comply and not contradict with federal laws, it is precisely this tension between federal economic goals and state procurement objectives that continually defines the legal doctrines in this area.

It is with some irony, then, that it can be observed that U.S. states enjoy significant additional freedom in their exercise of many procurement activities as compared to Union member states even with their greater national sovereignty. One U.S. legal doctrine, the market participant exception to the dormant commerce clause, is primarily responsible for this divergence.

However, this is only the beginning of an intriguing comparison between the two systems, because it turns out that the strength of the market participant exception in the U.S. may decrease with the increasing complexity of

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many kinds of procurement projects. Simultaneously, Union legislative and judicial doctrines appear to grant greater levels of flexibility to state procurement practices that are part and parcel of more complex projects.

In fact, states in both the Union and the U.S. are increasingly relying upon public procurement to play an important role in driving ambitious environmental and economic policy strategies. Indeed, state procurement activities in both places are often part of legally and structurally complex undertakings with multiple objectives and complicated financing arrangements. And in these types of situations, there is some convergence between the U.S. and European systems as to how much freedom states have in their use of public procurement.

1.1. Defining State Procurement

State procurement goals may involve reducing environmental impacts from purchases, such as requiring public power generation utilities to purchase less polluting fuels. But green procurement is just as likely to involve incentivizing the growth of private green industries, such as linking public fuel purchases to specific renewable energy-producing sectors. And green procurement is equally about influencing the environmental behaviours of private market actors, such as mandating waste recycling and then building collection networks and facilities that permit or preference certain types of materials. Simply put, a state purchase of goods or services may, itself, be the environmental goal, but may, increasingly, be a means to other environmental goals.

In fact, the legal landscape in this area in both the Union and the U.S. has been driven in recent years by these types of combination procurement objectives involving a mix of private and public actors. As such, the legal and programmatic analysis in this paper will focus

on several important areas of state procurement policy: material usage (including state purchasing and incentivizing of local products), state level recycling programs (including state purchases of goods and services, and which represents local decisions about material re-usage), waste disposal (also involving state purchases of goods and services, and which concerns state policies regarding long-term material non-usage), and state energy policies (particularly state purchasing, incentivizing, and support of renewable energy supplies and infrastructure).

1.2 Scale and Potential of State Procurement

Since the impact of state procurement on environmental goals increases with the state's share of the economic market, some information on size and scale may be a good way to start thinking about programmatic potential. For the Union as a whole, public spending (at combined local, state, and federal levels) as a percentage of GDP is approximately 45%.² In the United States, this same figure (also at combined local, state, and federal levels) is approximately 40%.³ At these aggregated levels, then, the relative sizes and potential markets appear comparable.⁴

Obviously, though, total expenditures don't isolate spending for procurement, and

² See European Commission Economic Paper (2008); and see OECD Report (2003); and see Audet, D (2001).

³ See US Department of Commerce Report (2011); and see Audet, D (2001).

⁴ It should also be mentioned here that there are a number of factors that make creating accurate figures difficult in the environmental public procurement context: first, there are fundamental differences (and uses) of corporate and government accounting systems; next, government activities are often non-economic (non-market) goods, which can be difficult to assign values to; and, finally, these valuation problems are also found within the resulting environmental benefits, because these are also often non-market, aesthetic, and/or difficult to quantify. See European Commission Economic Paper (2008).

many government outlays need to be eliminated. But even when this is done, and all that remains is government spending for goods and services, many estimates still include government employee wage compensation; importantly, this expenditure should also be eliminated as it pertains to regular employees, whereas wages paid to service providers should be retained in procurement accounting.⁵

Looking to state level expenditures as a percentage of GDP for selected European member states, the first thing that becomes clear is how variable government spending for procurement (excluding government employee wages) is across nations: Hungary = 18%; Sweden = 15%; Austria = 12%; France = 9%; Germany = 7%; Belgium = 5%.⁶ In fact, these figures show a variation of more than 300% between the highest and lowest procurement expenditures found in the Union. This may also indicate disparate potential impacts from environmental procurement projects.

Comparable figures for U.S. states are hard to find directly. However, some commentators have done studies estimating that as much as 50% of total state expenditures in the U.S. are used for the procurement of goods and services.⁷ Using this simplified estimate in conjunction with detailed state-level finance data from the U.S. census, may allow some reasonable comparisons to be made for selected U.S. states, including the three largest states by GDP (California, Texas, and New York) and one smaller GDP state by way of comparison (Alabama).⁸ Taking half, then, of overall state expenditures compared to state GDP figures produces the following estimates: California =

11%; Texas = 8%; New York = 12%; and Alabama = 10%.⁹

There seems to be less variation in expenditure levels between this small sample of U.S. states than was found in the Union. But overall, these levels appear comparable to those found in European member states, which suggests the potential impacts and benefits of environmental state procurement may also be comparable. On this point, again, the magnitude of these numbers doesn't demonstrate overwhelming buying power in state economic markets.¹⁰ In fact, it has been claimed that the further procurement purchasing gets from centralized (federal) or cooperative (inter-state) action, the smaller the market shares become and the less effective it is for affecting policy goals.¹¹

However, as already discussed, state purchasing may not only be an environmental end in itself, but may be part of much broader and inter-connected environmental and incentive goals. Obviously, the aforementioned market impacts and potentials may be greatly leveraged in such cases. This leveraging effect may be necessary for markets where states have little buying power, and may, on the other hand, be optimal for exploiting significant environmental gains in markets where states do have more significant market shares. While the legal context of these types of projects is certainly more complicated and uncertain, they also hold the greatest potential for states wishing to affect large scale, positive environmental impacts.

⁵ See OECD Report (2000); OECD Report (2002); OECD Report (2003); and see Audet, D (2001).

⁶ See OECD Report (2000); and see Audet, D (2001).

⁷ See McCue, CP et al (2003).

⁸ See US Department of Commerce Report (2011).

⁹ Id.

¹⁰ But see European Commission Report (2004), which points out that in specific markets, state governments may be more influential purchasers.

¹¹ See Audet, D (2001).

1.3 Examples of State Environmental Procurement Projects

Guidance from The European Commission and U.S. federal government for purchasing and procurement projects promotes the environmental lifecycle criteria, but also strongly emphasizes the use of widely accepted methodologies and technical standards.¹² Clearly, federal governments are protective of their internal markets, and may be seeking to avoid the types of legal confrontations and entanglements outlined in the sections below by employing more conservative approaches. So, for example, engineering and environmental standards that have already achieved consensus throughout the Union appear to be safe ground for inclusion as specifications in member state purchasing contracts.¹³

State and local environmental procurement programs, while having much in common with the federal programs, are also situated quite differently with respect to economic and legal constraints, and, perhaps, with respect to considerations about how to optimize impacts. While the following examples of state programs reflect the environmental and federal-state balancing issues introduced in the preceding sections, they also describe the full range of common practices for environmental procurement projects involving complex and mixed strategies.

¹² See US EPA Final Guidance (1999); and US EPA Guidelines (2011); and European Commission Report (2004).

¹³ See, for example, European Commission; *Green Public Procurement Thermal Insulation Technical Background Report* (2010) at page 2 ("The core criteria are those suitable for use by any contracting authority across the Member States"). But note, even with technical specifications the Union may require an "or equivalent" provision that can, itself, be defined by its acceptance by another member state. See *Dundalk Water*, 45/87.

San Joaquin: Buy Local, Buy Green

The "Buy Local, Buy Green" initiative in San Joaquin, California, is a collaborative marketing and procurement program undertaken by local businesses and the municipal government.¹⁴ In contrast to the other examples in this section, this project isn't specific to any given category of goods or services, but is an attempt to get all regional private and public consumers to buy everything and anything from local producers and suppliers.

The fact that this program is legal in the U.S. will be an important point of departure from the situation in the Union, where it most certainly would not be allowed to stand.¹⁵ The program's justifications are explicit and twofold: first, environmental benefits from reduced carbon emissions resulting from reduced transport driving distances; second, buying locally stimulates the local economy. Even this obviously discriminatory economic intent and impact is allowable, which will require some explanation later to square with the fact that distortionary burdening of interstate free markets is also protected against in the United States.

Austria: Material Usage

Next, consider a relatively simple example from Austria of hospital supply purchasing. Following a 1993 law requiring green procurement by all government agencies, Austria implemented several successful programs regarding purchases of building materials, office equipment, and cleaning supplies. To support these programs, Austria

¹⁴ See Greater Stockton Chamber of Commerce, *Responsible Purchasing Policy and Buy Local, Buy Green*.

¹⁵ Cf. *Commission v. Ireland*, 249/81 (a "buy Irish" government campaign, that didn't involve any other activities giving in-state undertakings any competitive advantages, and didn't necessarily result in any actual discriminatory results, was still prohibited as a state measure potentially discriminating against imports).

created an extensive catalogue of all products and supplies required to operate their agencies as a way of controlling purchasing and ranking the best environmental options.¹⁶ The Austrian government also created its own eco-label to more broadly communicate its environmental assessments and to influence other, primarily Austrian, suppliers and manufacturers.¹⁷

For instance, The Vienna Hospital Association examined its use of detergents and cleansers in the context of its ordinary and medical requirements. Through this process, it reduced 120 cleansing agents found in its products to less than 40, thereby reducing chemical pollution to municipal waste-water.¹⁸ In addition, the hospitals phased out PVC-packaging materials, thereby reducing burdens on municipal waste disposal.¹⁹

California: Recycling

Turning to another U.S. example, consider a California procurement program called The State Agency Buy Recycled Campaign ("SABRC") requiring state agencies to buy products with high recycled content.²⁰ As background, there are no federally mandated recycling programs, and most of the garbage collection, garbage disposal, and recycling also occurs at state and local levels, either owned publicly, or procured as services from private companies. Under the California program, a variety of purchasing goals are established that include, for example, reducing the purchase of white paper, reducing the purchase of any products made with virgin materials, increasing the percentage of recycled or used materials in products, and influencing state

suppliers from the private sector to increase their use of recycled materials.²¹

For a state recyclable content procurement program to work well, however, there must be several other steps present in this process, including, at minimum, local collection and transportation. And, in fact, California public entities are involved in most of these other steps. For example, The California Beverage Container Recycling and Litter Reduction Act contains a deposit refund program in which a refundable tax is applied to all beverage containers to encourage their collection by operation of the fee redemption.²²

And the process continues, because many recycling centres for materials like glass, aluminium, and paper in California are also publicly owned. With respect to paper, most of the actual recycling is done when it is sold to the pulp and paper industry, private undertakings, which then sell their new products (containing recycled content) back to consumers (including the state). The interesting point here is that the state of California's recyclable content procurement program is part of a larger state policy, in which the state exerts simultaneous influence as buyer, collector, and seller of recyclables.

Sweden: Biogas Infrastructure and Vehicles

Sweden has become actively involved over the last 15 years in projects related to biogas fuels and biogas vehicles. And, importantly, Swedish green procurement policies are driving components of these projects. In fact, taken together, these projects could reasonably be described as extensive and ambitious state efforts towards developing the technologies for producing biogas and biogas vehicles, and creating the critical demand and supply

¹⁶ See Ines, O (2001).

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ See California PCC, Sections 12153-12156 (2009).

²¹ Id.

²² See California Division 12.1, Sections 14500 et seq (2010).

necessary for the long-term viability of the economic markets.²³ And, at present, Sweden's use of the biofuel it produces is among the highest in the world, using more than 50% of approximately 1.2 TWh of its biofuel energy production in 2006: with the largest portion of this domestic use (almost 25%) being used for vehicle fuelling.²⁴

These biogas and biogas vehicle projects are being realized through many connected state and municipal activities, including and with participation and partnerships from the private sector. Funding, however, has been coming from Sweden in large amounts for many years: for example, according to the Swedish Energy Agency, during 2009 alone the government granted SEK 150 million (about \$20 million) to promote and develop technology in the biogas sector; this money was distributed to a variety of public, private, and mixed groups involved in developing biofuel vehicles of every type, producing biogas, improving fuel production processes, and the like.²⁵

And at the centre of these biogas investment projects is extensive state and municipal purchasing. In fact, as large as have been the research and development grants in this area, based upon the numbers outlined below Sweden has also spent a large amount of money in purchasing biogas vehicles, the biogas to run them, and all the related infrastructure and construction projects. Since 2009, all automobiles purchased by the Swedish

government must be green cars.²⁶ In 2008, The City of Stockholm had 82 biogas buses and 60 biogas garbage trucks in operation.²⁷ By 2002, Linköping had replaced all of its diesel buses with biomethane buses, and had the world's first biogas train service.²⁸

In 2003, it was estimated that there were more than 7000 biogas and natural gas vehicles being operated in Sweden, with the state and municipal sectors being responsible for a significant part of this purchasing.²⁹ More recent estimates suggest that these numbers have increased dramatically, with biogas vehicle purchases in 2007-2008 alone estimated at nearly 13,000 new vehicles, and with a growing consumer (non-state) share of the market.³⁰

Sweden has also offered fiscal policy incentives over many years to households and consumers for the purchase of biogas vehicles. For example, through 2009 green car purchases, including biogas cars, were eligible for an SEK 10,000 government rebate, and many Swedish municipalities still offer free parking for green cars.³¹

An important point related to vehicles is that grants have been given for many years by the Swedish government to joint public-private research and development consortiums to subsidize technological advancements and economic development for biogas cars and trucks. Typically, and for example, the grant applicant is a regional, pro-business development body like Business Region Göteborg ("BRG"). However, the SEK 19,000,000 grant that BRG received last year from Sweden for its "BiMe Truck" program to develop viable

²³ Actually, what's presented here is a sample of the activities and organizations involved, but research suggests that these only scratch the surface of the true numbers in Sweden of currently active participants, stakeholders, and project partners.

²⁴ See Petersson, A (2009). And note: much of this fuel purchasing is done by the state, which, as shall be discussed, has acquired a significant fleet of biogas vehicles.

²⁵ See Swedish Energy Agency Press Releases (2011).

²⁶ See Naturvårdsverket Report (2009).

²⁷ See SenterNovem Report (2009).

²⁸ See IEA Bioenergy (2006).

²⁹ See Jonsson, O et al (2003); and see Rydberg, T et al (2010).

³⁰ Id.

³¹ See Östersunds Kommun Report (2009).

economic markets for new biogas heavy duty trucks is being spent in working partnership with Volvo, a Swedish-based private company that is also a world leader in developing biomethane diesel engines.³²

The state's influence through green procurement also extends to both supplying inputs from and producing biofuels at its waste and sewage collection facilities. Among ongoing procurement projects are plant construction and upgrades to allow wastes to be transformed into biogas, and to increase plant capacities.³³ For example, Stockholm Vatten, the municipally-owned water company³⁴ has been involved for many years with treating sewage to produce biofuels: at the Hendriksdal treatment plant in Stockholm, anaerobic digestion of sewage produces upwards of 1,400 Nm³/h of biogas.³⁵ And, Stockholm Vatten's biofuel production is now tied to the city's procurement of green vehicles because the water company signed contracts with the City Council to supply the biogas required for the city's purchase of 120 new biogas buses.³⁶

Of course, the private sector in Sweden has grown right along side the public sector in biogas production, including, for example SvenskBiogas AB and FordonsGas AB. And again, Swedish undertakings in this sector have benefited over the years from state funding. For

instance, AGA Gas AB, a private Swedish energy undertaking³⁷, received SEK 17,300,000 from government grants in 2010 to improve the liquefaction process for biogas.

Additionally, from only a few biogas stations in Sweden just a few years ago, there are now over 100 biomethane re-fuelling stations in the country.³⁸ And, this is obviously quite important to anyone's decision to buy biogas cars, since they would not be attractive products, or effective parts of an environmental procurement strategy, without convenient places to refuel. These days, Swedish and other regional private companies also play integral roles in this growing re-fueling and fuel transport infrastructure; for example, AGA Gas AB transports biogas made at the Hendriksdal facility to neighbourhood Shell service stations.³⁹

And, no doubt, publicly subsidized projects and grants have also facilitated the private sector's entry into and expertise with these infrastructure and service roles. For instance, the state-subsidized BiMe Truck economic development program mentioned above also includes FordonsGas AB, a private company⁴⁰ dominant in Sweden in biogas refuelling infrastructure.

The success of these Swedish biogas projects from an environmental and economic perspective looks real. As with the following example from the U.S., the legality of these Swedish programs, particularly their procurement aspects, will be discussed after the relevant legal frameworks are examined.

³² See Swedish Energy Agency Press Releases (2011); and see Business Region Göteborg (2011); and note: to be precise, Volvo has had a dominant Swedish presence during the last 15 years of state granting, even though it was also owned by Ford. Volvo was recently bought by Geely, a Chinese company.

³³ See Balkenhoff, B et al (2010).

³⁴ Stockholm Vatten is owned by Stockholm Stadshus AB (98%), which is itself owned by City of Stockholm, and Huddinge municipality (2%); See Stockholms Stadshus AB, Annual Report (2009).

³⁵ See Hellström, D (2009).

³⁶ See Balkenhoff, B et al (2010). And, on the city's side, of course, was a matching green procurement item, the purchase of biogas from Stockholm Vatten.

³⁷ AGA is a wholly-owned subsidiary of the DAX-listed Linde Group; see The Linde Group, Annual Report (2009).

³⁸ See Balkenhoff, B et al (2010).

³⁹ See Held, J et al (2008) at page 68.

⁴⁰ FordonsGas AB is also half-owned by a private Danish company, Dong Energy; see Dong Energy, Annual Report (2009).

Arizona: Renewable Energy

Consider next a U.S. example from the energy sector, where a majority of states now have some form of Renewable Portfolio Standard ("RPS") or Environmental Portfolio Standard ("EPS") that requires a percentage of the state's electricity demand to be purchased from renewable sources. Often this threshold requirement is targeted to increase over time, and these mandates apply to a wide variety of private, public, and mixed producers, wholesalers, and distributors of energy.

In Arizona, for example, an EPS program requires that renewable energy (primarily solar and wind) supply 3% of in-state electricity demand in 2011, set to rise to as much as 30% by 2025.⁴¹ Among those affected by the EPS mandates, are both the Arizona Salt River Project, one of the largest publicly-owned utilities in the U.S. that supplies Phoenix (Arizona's largest city) with power, and the Arizona Public Service Corporation, Arizona's largest private utility company. In addition, to offset the higher cost associated with using renewables to generate electricity, the Arizona Corporation Commission (the state utility agency that regulates the field) levies an EPS surcharge tax on all its in-state and out-of-state residential and commercial customers.⁴²

Alongside the EPS, however, Arizona has also launched in recent years a variety of multi-million dollar solar and wind energy incentive programs to benefit in-state actors by offering generous tax credits, deductions, and exemptions: for the support and recruitment in Arizona of renewable energy manufacturing, supply, and support companies; for commercial installation of solar capacity; for residential installation of solar panels; for sales tax rebates

for equipment purchases associated with wind power production, and so on.⁴³

One initial observation, Arizona's EPS is legal.⁴⁴ And this point will be set aside for now, even if it looks like the state (as with Sweden's involvement in biogas) is using an interconnected strategy of procurement, purchasing mandates, and taxes (including taxes that affect its out-of-state customers) to benefit (directly and indirectly) in-state renewable energy undertakings. In any case, Arizona, like California and several other states undertaking this combination of mandates and subsidies, is clearly leveraging its public role in the electricity market (as purchaser, owner, operator, and regulator) to broadly and aggressively influence the environmental behaviour of many in-state actors and market participants to create long-term supply and demand for renewable energy and related businesses.

2. Legal Frameworks in the European Union and the United States

The following legal frameworks and cases describe ongoing developments in the Union and the U.S. that are related, on the one hand, to balancing environmental objectives against those of the free market, and, on the other hand, how this process has become increasingly defined with respect to a local environmental focus. In fact, the most important legal aspects of state procurement activities are also related to this same balancing process. And the economic sectors discussed in most of the following cases, such as recycling, waste disposal, and energy policy, remain illustrative,

⁴¹ See Arizona AC R14-2-1801 et seq (2007).

⁴² *Id.*

⁴³ See Arizona SB 1403 (2009).

⁴⁴ And so is Illinois' RPS, which also contains provisions requiring that part of its renewable energy quota be purchased from in-state suppliers. See IL HB6202 (2009).

if not squarely in the centre, of the main legal considerations for environmental procurement.

2.1 The European Union

As in the U.S. system, federal primary law protection of free markets and economic integration remains one of the main legal constraints on many state activities, including environmental goals. After setting forth these basic treaty protections, the cases applying them to the environmental area will be examined. These foundational cases not only demonstrate the important principles developed by the European Court of Justice ("CJEU") to balance economic freedoms against local environmental objectives, but they continue to relate directly to legal issues surrounding state-level use of environmental procurement policies.⁴⁵

Starting with Article 26 TFEU of The Treaty of Lisbon, the internal market is established:

The Union shall adopt measures with the aim of establishing and ensuring the functioning of the internal market ... [which] shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.⁴⁶

With respect to state procurement activities, which potentially involve the purchase of goods and services, but which also may affect

the creation or re-location of business enterprises, most of the aforementioned free movement rights are applicable: Articles 34 and 35 TFEU pertain to goods; Article 49 TFEU applies to establishment; and Article 56 TFEU applies to services.⁴⁷ Importantly, and as compared to competition law, these provisions related to Union commercial practices are primarily concerned with state measures, and preventing state laws and actions from burdening free markets.

And while these economic freedoms operate legally in somewhat different ways, the basic protections are common to all of them. For example, the relevant provisions related to the free movement of goods read as follows: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."⁴⁸

However, these economic rights are not absolute. For example, Article 36 TFEU defines the strongest class of possible state restrictions to the free movement of goods based upon justifications of "public morality, public policy, or public security."⁴⁹ While these categories sound rather broad, the CJEU protects free market interests vigorously, and only the most serious state interests will qualify.

Environmental protection, by comparison, is not an Article 36 derogation, but is one of the many legitimate public policy exceptions known as "mandatory requirements" that may, in some cases, permit a restricting of economic free movement.⁵⁰ And in considering the application of mandatory requirements, the Court

⁴⁵ In fact, state environmental interests had little or no presence in the governing treaties for much of the history of The European Communities, whereas economic and internal market goals were always of primary treaty importance. *See* Edward, D (2008) at page 4 ("So it is not surprising that, by the time environmental protection became a matter of serious public concern, there was already a substantial body of case law limiting any action on the part of Member States that might hinder the free movement of goods").

⁴⁶ *See* Article 26 TFEU. *And* to understand the historical importance to the Union of economic integration and the economic free movement rights is to understand their role, not only in promoting the creation of wealth, but as the central part of an ambitious peace-making enterprise. *See* Chalmers (2010) at Chapter 16.

⁴⁷ *See* Articles 34, 35, 49, and 56 TFEU.

⁴⁸ *See* Articles 34 TFEU.

⁴⁹ *See* Articles 36 TFEU. *And note:* while this treaty-based class of derogations are slightly different with respect to services and establishment, their general content and application is similar to that of goods.

⁵⁰ These mandatory requirements are court-created categories of derogations. *See* *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*"), 120/78.

always applies proportionality, its principle balancing test, to ask if the public policy exception is proportionate to its claimed objectives when balanced against the costs of restricting treaty-protected free movement doctrines.⁵¹

Two additional treaty provisions, pertaining to taxation and state aid, should also be mentioned briefly.⁵² Article 110 TFEU specifically prohibits tax discrimination that "directly or indirectly" imposes any tax on the products of other states "in excess" of that imposed on domestic products.⁵³ Taxation, as has already been seen in the examples above, is often a supporting component of state environmental and procurement projects, but, moreover, comes in many forms. In addition, Article 107 TFEU, prohibits "any aid" in "any form" by means of state resources that favours "certain undertakings or the production of certain goods."⁵⁴ In fact, state aid burdens out-of-state undertakings in a different manner than discriminatory taxation, by giving assistance to in-state undertakings that are competing with out-of-state (and un-aided) businesses.⁵⁵

⁵¹ See Article 5 TEU.

⁵² On the other hand, legal doctrines related to services of general economic interest ("SGEI") will not be examined. See Article 106(2) TFEU. The provisions related to SGEI, or public services, note that while competition law still applies to undertakings entrusted by the state to undertake these services, they must still abide by competition law, but only 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." This area of law is certainly relevant to procurement, insofar as it applies to increasingly common mixed public-private buying and service arrangements. But since the focus of this paper is primarily the law's relation to state activities, analyzing the legal status of these private enterprises under competition law will not be considered here.

⁵³ See Article 110 TFEU.

⁵⁴ See Article 107 TFEU.

⁵⁵ But, the significance of both prohibitions is the simultaneous and closely-related prevention of state

In fact, these principles of free market protection, as well as some of the specifically prohibited practices just mentioned, are the subject of many of the most important environmental and procurement cases in The Union. Starting, then, with *Waste Oils*, which was decided before environmental goals had a treaty basis, it was noted that environmental protection did appear in the preamble to the controlling oil recycling directive.⁵⁶ However, the CJEU found that the French law prohibiting the exportation of waste oil for recycling elsewhere (as opposed to within France under state-created programs) violated treaty protections of the free movement of goods.⁵⁷ By way of examining local environmental programmatic goals, cases like this one began defining when waste products would also be considered protected, commercial goods.⁵⁸

By contrast, the CJEU in the *ADBHU* case applied proportionality in determining that some restrictions on economic free movement were justified by legitimate state environmental objectives.⁵⁹ Here, French prior approval requirements for exporting waste oils were justified by the need to ensure that the eventual disposal in some other Member State was

economic patronage of in-state undertakings and interference in the specific or general functioning of free markets.

⁵⁶ *Syndicat national des fabricants raffineurs d'huile de graissage and others v. Groupement d'intérêt économique "Inter-Huiles" and others ("Waste Oils")*, 172/82.

⁵⁷ *Id.* at ¶ 14 ("Clearly the environment is protected just as effectively when the oils are sold to an authorised disposal or regenerating undertaking of another Member State as when they are disposed of in the Member State of origin").

⁵⁸ At this point, then, wastes that were, in fact, going to be transformed back into useful products were protectable goods.

⁵⁹ *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)*, 240/83.

"carried out in a way which avoids harm to the environment."⁶⁰

In *Walloon Waste*, the last of the waste cases, the environmental policy goals were almost entirely local when The Commission challenged a Belgian law prohibiting the importation of waste into the country for disposal based upon environmental protection justifications.⁶¹ The CJEU allowed the law to stand, even after noting that waste is a potentially valuable good under Article 34 TFEU, and, therefore, protectable as against state measures restricting movement and import.⁶² The important step that distinguishes this case from previous rulings on this subject is the Court's characterization that waste "is matter of a special kind" because it can cause environmental harm. On this basis, environmental protection can justify restricting the movement of wastes into and through member states.

But, what's more, the *Walloon Waste* Court upheld this result against the Commission's argument that Belgium was still making an untenable discriminatory assumption that hazardous waste produced out-of-state was somehow more hazardous or environmentally harmful than hazardous waste produced in-state. The Court concluded that because of these "special" characteristics of waste it must "accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste."⁶³ In all of these ways, the ruling is quite favourable to local environmental interests and policy-making.

Turning to the recycling cases, there seems to be a similar progression, both in terms of a re-balancing in favour of environmental interests and in treating local policy concerns with increasing deference. Starting with the *Danish Bottle Case*, the Court agreed that environmental protection was an "essential" European Union objective, but it firmly limited its application when balanced against free economic movement rights.⁶⁴

Compare this result to the more recent decision in *Radlberger*, which involved a German deposit-and-return requirement that similarly imposed costs and burdens on beverage makers who produced large proportions of non-reusable containers.⁶⁵ In fact, in this case the burden was found to be discriminatory, as foreign suppliers tended to use more non-reusable materials. Nevertheless, the CJEU allowed, in principle, that this type of program would be permissible given the importance of environmental objectives. In finding against the specific law at issue in this case, the Court's main requirement was that foreign producers be allowed a "reasonable transitional period" to adapt to the new program.

From the renewable energy area, the Court in *Outokumpu Oy* did not allow a Finnish tax scheme to stand that charged lower rates for locally produced electricity from renewable sources.⁶⁶ Even though the tax was clearly discriminatory, one explanation given was that the fungible nature of electricity being

⁶⁰ *Id.* at ¶ 11.

⁶¹ *Commission of the European Communities v. Kingdom of Belgium ("Walloon Waste")*, C-2/90.

⁶² *Id.* at ¶ 28 ("waste, whether recyclable or not, is to be regarded as 'goods' the movement of which ... must in principle not be prevented").

⁶³ *Id.* at ¶ 34.

⁶⁴ *See Commission v. Kingdom of Denmark ("Danish Bottle Case")*, 302/86 (This rejection was based solely upon the program's purported burden to inter-state commerce, for while the Court discussed the law's potential burden to foreign undertakings, there was no claim of discriminatory impact since the reduction in numbers of allowable containers applied equally to Danish undertakings).

⁶⁵ *See Radlberger Getrankegesellschaft mbH & Co v. Land Baden-Wurttemberg*, C-309/02.

⁶⁶ *See Outokumpu Oy*, C-213/96.

imported meant that it was difficult to know if it was produced by more or less polluting means, which justified some disproportional burden in favour of local clean energy initiatives. The CJEU accepted that environmental policy goals were important enough to impose some economic restrictions, but seemed concerned in its rejection of Finland's arguments that foreign suppliers had not even been given an opportunity to demonstrate the manner in which their power was produced.⁶⁷

All of the environmental cases discussed so far involve legal issues that are also related to state purchasing, but the *Preussen Elektra* ruling deals directly with state green procurement.⁶⁸ Here, the CJEU upheld a German law requiring power suppliers to purchase electricity from in-state producers of renewable energy at above-market prices, the extra costs of which were to be shared among upstream and downstream energy market participants. The CJEU argued forcefully and on a number of grounds that Union environmental objectives were now sufficient to support this kind of state environmental program against free economic movement interests, even considering the fact that the law was clearly discriminatory in mandating purchases from in-state suppliers.⁶⁹

In addition, though, the *Preussen Elektra* Court argued further that the German law did not involve state aid because there were a sizable number of private undertakings

involved in sharing the costs of these in-state energy purchases. While this part of the ruling may (or may not) be persuasive with respect to avoiding treaty-based state aid prohibitions, it ignores the other, independent form of discrimination that has been created. In short, using state resources to favour in-state undertakings also burdens out-of-state businesses that are trying to compete in the same market on equal terms: the power suppliers in this case included private undertakings, but also those owned partially or wholly by the state; in fact, two of the eight German suppliers were majority state-owned; and, as such, Germany itself was subsidizing a substantial part of its renewable energy mandates to buy locally.⁷⁰

While the underlying justifications for Germany's renewable energy purchase mandates and its de facto subsidy program were not discussed at length in the decision, the rationale is nonetheless clear. Without the state measures, in-state energy providers would not support relatively expensive in-state renewable energy producers (and for short and long-term environmental policy reasons, Germany wanted to support them); and, without the shared compensation scheme, too much of the increased cost burden would fall on one level of the energy supply and distribution market (and for economic reasons, Germany believed this might be disadvantageous or even disruptive of this crucial sector). But what also seems quite likely is that the German law has another longer-term economic objective to use state subsidies to build a strong and profitable in-state renewable energy industry.

Therefore, what's interesting here is that the CJEU addressed the direct form of purchasing discrimination in its balancing analysis, but didn't seem overly concerned with

⁶⁷ *Id.* at ¶ 31 (The "Treaty therefore does not preclude the rate of an internal tax on electricity from varying according to the manner in which the electricity is produced and the raw materials used for its production, in so far as that differentiation is based, as is clear from the actual wording of the national court's questions, on environmental considerations").

⁶⁸ See *Preussen Elektra AG & Schleswig AG*, C-379/98.

⁶⁹ *Id.* at ¶ 73-77 (citing various primary law environmental obligations, Union pledges to combat climate change, and the protection of health for animals and plants).

⁷⁰ Cf. *Commission v. Ireland*, 249/81, *supra*.

the indirect form resulting from state subsidies. This is worth keeping in mind, because recent U.S. decisions appear much more concerned about matching potentially discriminatory impacts to public funding and subsidy sources.⁷¹ And, further, the CJEU demonstrated again that it has become willing to allow significant and even discriminatory inter-state economic burdens in the promotion of locally focused, environmental program objectives.

But, finally, compare the seemingly expansive ruling of *Preussen Elektra* to recent statements made by the European Commission ("the Commission"). In guidance documents, the Commission stated that it would be discriminatory for a member state to apply criteria "penalising contractors solely on the basis of the distance they travel to deliver the goods."⁷²

Important Directives, Block Exemptions, and the Post-Lisbon Situation

While there are many Union directives and regulations applying to environmental protection, climate change, and green energy, most of these play supporting roles with respect to the legal issues surrounding state environmental procurement.⁷³ There are two directives, however, which are directly applicable: the first of these sets forth most of the Union's substantive and procedural requirements affecting state procurement ("The Procurement Directive")⁷⁴; the second directive

provides more detail on similar subjects that applies to specific sectors, including water, energy, and transport ("The WETPS Procurement Directive").⁷⁵

One of the Procurement Directive's first instructions to member states is to ensure that their government purchasing does not distort free and competitive economic markets.⁷⁶ In the very next paragraph, the Directive states that The Lisbon Treaty (and with specific reference to Article 6 TEU) requires that environmental protection be integrated into all state procurement decisions.⁷⁷

Beyond this, the Procurement Directive is clear that environmental characteristics are valid award criteria for state purchasing activities.⁷⁸ More specifically, and while states may always award their purchasing contracts based upon low price, they may, alternatively, use other mixed considerations of valuation that include environmental performance characteristics.⁷⁹

And moving beyond the products, it may also be appropriate to award contracts to applicants having other types of related environmental characteristics, including environmental management systems, their use of approved eco-labels, or established programs that reduce pollution and energy use in the manufacturing process.⁸⁰ The Procurement Directive encourages states to avoid awarding public contracts to parties who have been

⁷¹ See *infra*, West Lynn Creamery.

⁷² See European Commission Report (2004) at page 39.

⁷³ That is, it's certainly persuasive when justifying state activities or purchasing against claims of interference with the free market if legitimate environmental mandatory requirements are also supported by explicit Union policy objectives. See, for example, Biofuels Directive, 2003/30/EC (which is not a binding law, but provides targets for conversions to biofuels); and see Directive on the Promotion of the Use of Energy from Renewable Sources, 2009/28/EC.

⁷⁴ See Directive on the Coordination of Procurement Procedures, Directive 2004/18/EC.

⁷⁵ See Directive on the Coordination of Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services, 2004/17/EC.

⁷⁶ See Directive on the Coordination of Procurement Procedures, Directive 2004/18/EC at Preamble 4. And note: While preamble language does not usually have legal force, it is important to understanding and interpreting legal acts, and is, therefore, persuasive and often cited by the CJEU.

⁷⁷ *Id* at Preamble 5.

⁷⁸ *Id* at Article 3(b).

⁷⁹ *Id* at Article 53(1)(a) on Contract Award Criteria.

⁸⁰ *Id* at Preamble at 44; and see Article 50; and see Article 23(6); and see Preamble at 29.

involved in criminal violations, including environmental crimes.⁸¹ Operationally, the burden of compliance with the Procurement Directive falls upon the member states, although the Commission does offer assistance, including requirements that procurement notices be sent to the Commission before publication.⁸²

The WETPS Procurement Directive contains the same introductory admonitions against market distortion and the same expectations regarding integrating environmental considerations.⁸³ In fact, the WETPS Procurement Directive's treatment of environmental procurement essentially parallels the provisions found in the Procurement Directive, making them directly applicable to the law's named sectors.⁸⁴

Furthermore, the CJEU has already decided several important cases related to state-level environmental procurement that contributed to and were later codified as part of the aforementioned directives. And, moreover, these cases are quite favourable in their support of the state's ability to use buying power in an environmentally progressive manner. For example, in *Concordia Bus* the city of Helsinki opened a public procurement process to replace its municipal bus fleet.⁸⁵ Among the groups that tendered bids, were several out-of-state manufacturing undertakings (including "Concordia"), and a Finnish public corporation ("HKL") that ended up winning the contract.

This result was challenged by the foreign undertakings, who noted that the stringent

environmental contract requirements for biofuel vehicles, as well as a relative scarcity in Finland of privately available biogas refuelling infrastructure, essentially guaranteed that the Finnish public company would prevail.⁸⁶ First, the CJEU decided that the "economically most advantageous tender" may include considerations of ecological and environmental protection.⁸⁷ And, next, the Court concluded that while non-discrimination "lies at the very heart of the public procurement directives" this did not preclude Helsinki from including strict environmental protection criteria even though "the contracting entity's own transport undertaking" was "one of the few undertakings able to offer a bus fleet satisfying those criteria."⁸⁸

The next case is *EVN*, which involved an Austrian public procurement offering that sought suppliers of electricity.⁸⁹ The procurement competition criteria weighted heavily the suppliers' ability to produce energy produced from renewable sources. Citing the *Preussen Elektra* decision, the Court noted it "has already held that the use of renewable energy sources for producing electricity is useful for protecting the environment."⁹⁰ On this basis, the CJEU ruled that stringent environmental procurement requirements are "not incompatible with the Community legislation on public procurement."⁹¹

⁸¹ *Id.* at Preamble at 43.

⁸² *Id.* at Articles 35 and 36.

⁸³ *See* Directive on the Coordination of Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services, 2004/17/EC at Preamble 11 and 12.

⁸⁴ *Id.* at Preamble 42, 53, and 54 *and* at Articles 3(b), 6, 38, and 52(3).

⁸⁵ *See* *Concordia Bus Finland v. Helsingin kaupunki and HKL-Bussiliikenne*, C-513/99.

⁸⁶ *Id.* at ¶ 71 ("At the date of the invitation to tender, there was only one service station in the whole of Finland supplying natural gas. Its capacity enabled it to supply about 15 gas-powered buses. Shortly before the invitation to tender, HKL placed an order for 11 new gas-powered buses, which meant that the station's capacity was fully used and it was not possible to supply fuel to other vehicles. Moreover, the service station was only a provisional one").

⁸⁷ *Id.* at ¶ 69.

⁸⁸ *Id.* at ¶ 81 and 86.

⁸⁹ *See* *EVN AG and Wienstrom GmbH v. Republic of Austria*, C-448/01.

⁹⁰ *Id.* at ¶ 40.

⁹¹ *Id.* at ¶ 43.

And the Court defended these rulings even in cases where petitioners attempted to show that the state's program may not ultimately be successful at achieving its environmental objectives.⁹² In fact, the Court's only real objection to Austria's procurement procedure was its inability to verify whether or not the electricity produced by the contracting parties actually came from renewable sources.⁹³

Next, with respect to the state aid prohibitions outlined earlier, there have been important block exemptions ("GBER") developed in recent years that apply directly to issues of green procurement, environmental protection, and renewable energy.⁹⁴ In essence, the GBER exempts listed classes of activities that might normally be considered to violate Union commercial practices or competition law, and does so in the interest of some overriding economic or public policy objective.⁹⁵

As with the Procurement Directive, the burden of incorrect interpretation of the GBER falls upon the member states.⁹⁶ Further, compliance with the GBER obviates the need for member states to provide notice to the Commission in advance of planned state aid payments.⁹⁷ But, the Commission can also determine that the GBER does not apply or should be withdrawn if it finds a member state has over-reached or abused the provisions.⁹⁸ However, the Commission also publishes guidance documents that, while non-binding, are useful for providing member states more

detailed examples and assistance for analyzing common situations.⁹⁹

The GBER specifically exempts many kinds of "environmental investment aid for the promotion of energy from renewable energy sources" and "aid for environmental studies."¹⁰⁰ These categories of exemptions may also be relevant to state green procurement policies, as they may cover a variety of state purchasing arrangements that give private parties and undertakings favourable treatment or terms. However, the GBER goes further in its section on aid with "the acquisition of new transport vehicles enabling undertakings active in the transport sector to go beyond Community standards for environmental protection."¹⁰¹ This Article relates directly to state environmental procurement activities, on their own behalf and on behalf of private undertakings.

The GBER also provides flexibility as to how state aid can be administered, covering, for instance, the use of tax exemptions and incentives in addition to direct investment.¹⁰² In fact, one section of the GBER covers aid in the form of "reductions in environmental taxes"¹⁰³ Very important, however, is to remember that the GBER does not exempt subsidies or purchasing activities that discriminate against foreign undertakings: "This Regulation should not apply to export aid or aid favouring domestic over imported products."¹⁰⁴

Finally, and moving on to another important development under Union law, The Lisbon Treaty's clear and expanded emphasis on environmental protection might also affect the ways the Court undertakes its balancing of

⁹² *Id.* at ¶ 53.

⁹³ *Id.* at ¶ 51 and 52.

⁹⁴ *See* General Block Exemption Regulation for State Aid, Reg No 800/2008.

⁹⁵ *Id.* at Article 3(1).

⁹⁶ *Id.* at Preamble 5 ("This Regulation should exempt any aid that fulfils all the relevant conditions of this Regulation").

⁹⁷ *Id.* at Preamble 1.

⁹⁸ *Id.* at Preamble 6.

⁹⁹ *See*, for example, Commission Guidelines on State Aid for Environmental Protection.

¹⁰⁰ *Supra* at Articles 23 and 24.

¹⁰¹ *Id.* at Preamble 46 and Article 19.

¹⁰² *Id.* at Preamble 19.

¹⁰³ *Id.* at Article 25.

¹⁰⁴ *Id.* at Preamble 8.

environmental policy goals against the free economic movement doctrines. This, of course, may also affect the ability of states to undertake green procurement projects that impose some burdens on economic markets.

It's with Article 6 of the TEU that a genuine paradigm shift occurs within Union law.¹⁰⁵ While the CJEU has previously made use of and even developed fundamental right law doctrines, for the first time they are set forth as foundational principles in the treaty, legally equivalent in purpose and effect to all other Union laws, including those of free movement. For example, Article 6 TEU's recognition of the Charter of Fundamental Rights ("CFR") includes recognition of the CFR's environmental protections:

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.¹⁰⁶

In fact, The Treaty of Lisbon also expands upon the concept of "sustainability" found in previous treaties by recognizing that what's required are balanced social, economic, and environmental dimensions.¹⁰⁷ Although the *Schmidberger* case was decided before the Treaty

of Lisbon was ratified, it's a good example of CJEU jurisprudence that reflects something similar to these new balancing elements. The case involved a lawfully registered environmental demonstration "on the Brenner motorway, the effect of which was to completely close that motorway to traffic for almost 30 hours."¹⁰⁸

The *Schmidberger* petitioner claimed its trucking business suffered damages amounting to a restriction of the free movement of goods because Austrian authorities failed to prevent the demonstration and the resulting traffic obstruction.¹⁰⁹ For its part, the CJEU noted that the defendant's actions and inactions could be considered a measure of equivalent effect to a quantitative restriction,¹¹⁰ but noted that "the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of ... the free movement of goods."¹¹¹

In fact, the Court then re-stated these ideas even more forcefully: "the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators" which "form an integral part of the general principles of law" from which "the Court draws inspiration from the constitutional traditions common to the Member States."¹¹² Applying a proportionality analysis to these facts and principles, the CJEU then ruled that "the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that

¹⁰⁵ Article 6(1), (2), and (3) TEU ("1. The Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties ... 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms ... 3. Fundamental rights ... as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law").

¹⁰⁶ See Charter of Fundamental Rights, Article 37.

¹⁰⁷ See Article 3.3 TEU (The Union "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")

¹⁰⁸ Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, Case C-112/00, ¶ 2.

¹⁰⁹ *Id.* at ¶ 16.

¹¹⁰ *Id.* at ¶ 64.

¹¹¹ *Id.* at ¶ 66.

¹¹² *Id.* at ¶ 69, 70.

demonstration could not be achieved in the present case by measures less restrictive."¹¹³

The striking and important results of *Schmidberger* are not only the CJEU's defence of environmental rights in the face of economic interests, but its deference to state values, and, just as importantly, to the flexibility member states require to implement their community and local objectives. In the context of The Lisbon Treaty's expanded protections of fundamental rights and the environment, an argument could be made that the re-balancing seen in *Schmidberger* is likely to proliferate. This, in turn, could have important implications for local-level environmental projects, including those in the green procurement area.

2.2 The United States

While provisions in the U.S. Constitution and rulings from relevant case law appear to create legal frameworks similar to the Union's internal market and free economic movement doctrines, commercial practices and relationships in the United States also developed quite differently. First, foundational principles and early cases will be set forth, including those developments in U.S. environmental law cases that relate to the procurement area. Next, procurement cases that define the contours of modern jurisprudence will be discussed.

To begin with, though, federal statutory sources are one category of legal authority that can be dispensed with fairly quickly with respect to state procurement. To be sure, there are many federal legislative and executive provisions relating to federal green procurement.¹¹⁴ And this isn't to say there aren't any

federal laws and agency practices relevant to state purchasing, but these aren't pervasive, and usually aren't overly constraining on state actions.¹¹⁵

Next, and moving to constitutional underpinnings, the commercial law relationship between the U.S. federal government and the individual states is founded upon several explicit and implied doctrines. Article I, § 8 of The U.S. Constitution enumerates the various explicit powers of Congress, including the commerce clause: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹¹⁶ Moreover, Article I, §10 of The U.S. Constitution also expressly limits state powers in some areas, including the following: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws."¹¹⁷

The "dormant" or "negative" commerce clause is an implied legal doctrine building upon Article I, § 8's positive grant of commercial regulation (and the Constitution's supremacy clause¹¹⁸) by creating a negative converse obligation: states are prohibited from enacting laws which interfere with interstate commerce. Early U.S. Supreme Court cases asked if a state measure discriminated directly against economic interests from other states, or did so indirectly by favouring in-state

through Waste Prevention, Recycling, and Federal Acquisition (1998).

¹¹⁵ Of course, there are some exceptions. For example, under The Resource Conservation and Recovery Act, 42 U.S.C. § 82 et seq (1976), and Executive Order 13101, *supra*, state and local agencies that meet specific criteria are obligated to buy products with certain levels of recycled content.

¹¹⁶ The Constitution of the United States, Article 1, Section 8, Clause 2.

¹¹⁷ The Constitution of the United States, Article 1, Section 10, Clause 2.

¹¹⁸ The Constitution of the United States, Article 6, Clause 2.

¹¹³ *Id* at ¶ 93.

¹¹⁴ *See*, for example, *Armed Services Procurement Act*, 40 U.S.C. § 2302 et seq (1994), which governs military procurement; *and see* *The Federal Property and Administrative Services Act*, 41 U.S.C. § 25 et seq (1949), which governs procurement by federal civil agencies; *and see* Executive Order 13101, *Greening the Government*

interests.¹¹⁹ And, importantly, these prohibitions operate even in the absence of any federal legislation or pre-existing regulatory presence.¹²⁰ However, once The U.S. Congress does legislate to regulate interstate commerce in a given field, states gain some measure of flexibility in implementing the federal provisions.¹²¹

Subsequent applications of and judicial challenges to the dormant commerce clause led to the development of a series of balancing tests. For instance, facially discriminatory state laws are "virtually per se" invalid¹²², but can still be saved if it can be shown that there is no less-restrictive means to advance important state interests (aside from economic benefits).¹²³ Where the state measure is not patently discriminatory, and it's primarily intended to enact legitimate state goals, but it still has "incidental" effects on interstate commerce, the Courts employ a balancing test to determine if the commercial burdens are "excessive in relation to the putative local benefits."¹²⁴

¹¹⁹ See *Gibbons v. Ogden*, 22 U.S. 1 (1824); and *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

¹²⁰ See *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175 (1995).

¹²¹ See *Northwest Airlines, Inc v. County of Kent, Michigan*, 510 U.S. 355 (1994) (in this case, federal rules allowing airport taxation for specific purposes allowed defendants to set their own tax levels without being struck down under the dormant commerce clause because The Court found they were not unreasonable under or prohibited by the federal statute). Cf. The shared competencies of Member States and federal authorities in implementing Union Directives; but see *André Ambry*, C-410/96 (Member State's cannot implement Directives in contravention of other important Union goals or rights).

¹²² See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

¹²³ See *Maine v. Taylor*, 477 U.S. 131(1986) (here, a Maine law prohibiting the importation of out-of-state bait fish was upheld because of the state's environmental and ecological concerns that parasites harmful to local fish stocks were also being introduced with the out-of-state products).

¹²⁴ *Pike v. Bruce Church Inc*, 397 U.S. 137 (1970) at 142. And see *Department of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801 (2008).

Similarly, if the state is regulating interstate commerce directly in an "even handed" manner, the "incidental" burden on interstate commerce will likewise be weighed against the actual benefits to local interests.¹²⁵

In practice, the *Pike* case demonstrates that even non-discriminatory state laws may be held by federal courts to be unconstitutionally burdensome to interstate commerce by means of this balancing process.¹²⁶ And Courts are particularly sensitive to discriminatory intent, striking down disguised protectionism that is justified as legitimate public policy.¹²⁷ And, as might be expected, the dormant commerce clause has been applied to a wide variety of state measures, including transportation, taxation, state aid, utility regulation, and economic development.¹²⁸

¹²⁵ *Pike v. Bruce Church Inc*, 397 U.S. 137 (1970) at 142.

¹²⁶ This is probably an appropriate place for a reminder that only U.S. Supreme Court cases have the force of supremacy throughout all federal and state jurisdictions.

¹²⁷ See *Hunt v. Washington State Apple Advertising*, 432 U.S. 333 (1977) (in this case, Washington State apple growers, who employed ratings standards stricter than federal standards, were prohibited by the State of North Carolina from affixing these ratings to products imported into North Carolina; this state measure was held to violate the dormant commerce clause by favoring in-state apple producers). Cf. *German Quality Products* C-325/00 (which seems to present the converse result disallowing "German Quality" stickers as creating a discriminatory bias towards German products within Germany; and perhaps this also raises an interesting question for the U.S. system of whether the Washington State ratings systems would be held discriminatory within Washington State as against out-of-state apple importers).

¹²⁸ Private parties and undertakings have standing in the U.S. to bring suits for alleged dormant commerce clause violations (cf. vertical direct effect for state measures restricting economic free movement in the Union). In the U.S., the party bringing suit bears the initial burden of proof that the state measure discriminates or places some burden on interstate commerce; at which point the burden shifts to the state to prove there is no discrimination or that the burden is not excessive compared to the benefits of a legitimate

Looking to seminal examples of commerce clause jurisprudence from the environmental area, in the *Clover Leaf Creamery* case the Supreme Court upheld a Minnesota law banning non-returnable plastic milk containers to promote recycling programs. The Court noted that the law was not excessively burdensome on out-of-state plastic companies under the dormant commerce clause compared to important state conservation interests.¹²⁹

In *Sporhase*, a Nebraska water conservation initiative disallowed the withdrawal of groundwater from within its borders for use in another state unless that other state granted reciprocal rights to withdraw and transport water back into Nebraska. The Supreme Court held that this reciprocity requirement violated the dormant commerce clause by creating explicit barriers to commerce between the various states in the region.¹³⁰

In the area of waste transportation and disposal, in *City of Philadelphia v. New Jersey*, a New Jersey statute prohibited the importation of most wastes originating from other states in order to protect its environment and reduce landfilling. However, The Supreme Court struck this measure down, noting that the exclusion was based only on the waste's place of origin, and not any other characteristic, environmental or otherwise.¹³¹ The Court said that New Jersey was trying to isolate itself from environmental problems common to many U.S.

states by imposing additional burdens and costs on out-of-state waste streams that it didn't impose on in-state waste producers.¹³²

And finally, three important cases that describe key issues under U.S. law relevant to a wide variety of state procurement activities. First, the *New England Power* case involved a New Hampshire statute requiring in-state utilities to seek permission from the state before selling energy to any out-of-state buyer. The justification for this state measure was to ensure that state residents received the economic benefits from locally generated and supported hydroelectric power. In short, having already paid for the energy infrastructure investments, the people of New Hampshire wanted to keep the lower cost hydro-power for themselves. The Supreme Court invalidated the statute as being facially discriminatory to interstate commerce.¹³³

In *Wyoming v. Oklahoma*, the state of Oklahoma cited natural resource management goals to justify legislation requiring the use of a minimum of 10% Oklahoma coal for all in-state utilities using coal. The state claimed the measure was necessary both to ensuring diversification of the state's energy portfolio and managing in-state coal resources into the future.¹³⁴ The Court rejected both arguments, finding the legislation discriminatory to out-of-

state interest. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979).

¹²⁹ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). *Cf. Radlberger* C-309/02 (*see supra*, deposit-and-return program imposing costs on foreign suppliers upheld given important environmental policy justifications; *but see Commission v. Denmark*, 302/86 (*see supra*, re-usable container law struck down as not proportionate to environmental objectives).

¹³⁰ *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

¹³¹ *Cf. Walloon Waste, supra* (the CJEU allowed restrictions on waste importation, even though these wastes were not fundamentally different in characteristics from those produced in-state).

¹³² *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). *Cf. Walloon Waste*, C-2/90 (*see supra*, The Commission allowed a Belgian environmental law prohibiting the importation of waste into the country for disposal, noting that waste is of a distinguishable character from other kinds of goods).

¹³³ *New England Power Co. v. New Hampshire*, 455 U.S. 331 at 339 (1982) ("The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states").

¹³⁴ Importantly, there was no claim or argument that this resulted in any environmental benefit beyond sound (and profitable) natural resource management.

state coal suppliers, and the justifications in favour of local interests wholly insufficient.¹³⁵

The third case, *West Lynn Creamery*, remains seminally important to all state program efforts, but particularly those involving public funding or state aid.¹³⁶ Here, plunging milk prices threatened Massachusetts dairy farmers, persuading legislators to intervene with a non-discriminatory tax on all raw milk sold in the state, coupled with a subsidy to in-state dairy producers that consisted of the disbursement of the revenues from the aforementioned tax.

Interestingly, the Supreme Court noted that perhaps neither the tax nor the subsidy would be violative of the dormant commerce clause on their own, but in combination formed an unconstitutional discriminatory tariff that clearly benefited in-state undertakings at the expense of out-of-state actors. Problematically, though is footnote 15 of the decision: "We have never squarely confronted the constitutionality of subsidies, and we need not do so now."¹³⁷ In fact, it is reasonable to interpret *West Lynn Creamery* as rather ominously suggesting that the Court's protection of free markets under the Commerce Clause may be expanding again to the constraint of state activities.

After *West Lynn Creamery*, it could be argued that U.S. states need to carefully uncouple subsidies from funding sources. But in practice the ruling may threaten more ambitious state programs, and particularly those with high capital or start-up costs, such as renewable energy projects, that may require recoupment on behalf of in-state taxpayer investments. Recoupment is often attempted by states either by levying taxes aimed at out-of-state entities, or through creating competitive

benefits bestowed primarily on in-state undertakings.

The Market Participant Exception

It is the "market participant" exception to the dormant commerce clause in the U.S. system that shifts the balance for procurement activities in favour of local level decision-making and policies. Consider the following, related descriptions of the market participant exception from U.S. federal court and Supreme Court jurisprudence:

When a state acts as a market participant, as a competitor in a market rather than primarily as a market regulator, these acts are not subject to the limitations of the commerce clause.¹³⁸

When a state acts primarily as a market participant, no conflict between state actions and federal authority usually arises with respect to the commerce clause.¹³⁹

As such, case law in the U.S. related to state procurement has shown considerable deference toward state level activities. However, as the following cases demonstrate, this deference has important limits that, in close relation to the basic principles set forth in the commerce clause cases discussed above, circumscribe the ability of state and local authorities to achieve many environmental objectives.

For example, *Alexandria Scrap* is an environmental case which actually introduced the market participant doctrine.¹⁴⁰ Here, a Maryland statute offered bounties to scrap processors to collect and recycle abandoned

¹³⁵ *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

¹³⁶ *West Lynn Creamery Inc v. Healy*, 512 U.S. 186 (1994).

¹³⁷ *Id* at page 199.

¹³⁸ See *Environmental Technology Council v. Sierra Club*, 98 F.3d 774 (4th Cir 1996), cert denied 521 U.S. 1103 (1997); and see *Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (9th Cir 1984), judgement affirmed, 471 U.S. 81 (1985).

¹³⁹ See *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208 (1984).

¹⁴⁰ *Hughes v. Alexandria Scrap Corp*, 426 U.S. 794 (1976).

automobiles, but the program effectively favoured in-state undertakings by requiring out-of-state actors to file burdensome documentation. Nevertheless, The Supreme Court upheld the state law by noting Maryland wasn't primarily acting as a regulatory agency here, but was actually making a decision to buy recycling services with its own state funds in a manner that also happened to affect inter-state economic markets: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favour its own citizens over others."¹⁴¹

Then again, the bounty paid in this case isn't really a clear-cut example of a state making a purchase, because it certainly also has elements of public monies being used to incentivize and influence economic markets to achieve environmental goals. Nevertheless, the Court characterized Alexandria Scrap as a straightforward procurement case, and is consistent in this way with other, early judicial decisions that were quite careful in trying not to expand the market participant exception to situations involving state support or subsidies.¹⁴²

And this is an important point to emphasize, because the market participant exception does allow U.S. states the ability to purchase from in-state providers in a manner that discriminates against out-of-state options.

As the cases being developed here suggest, however, it is the frequent combination of an ordinary state purchase (which can discriminate and burden interstate commerce because the state is acting only in its role as a market participant) and some other, connected subsidy, mandate, or tax (in which the state is acting more as a regulator) that may run afoul of the commerce clause. In fact, the relationship between procurement decisions and state support remained anything but clear in the case law, as Courts realized the line between them was often hard to fix, and particularly so when multiple state objectives were being pursued. Not surprisingly, this legal uncertainty also applied to many complex and expensive environmental projects.

For example, in the *Carbone* case, a city in New York State attempted to address municipal waste disposal in a more environmentally responsible manner, and contracted with a private company to build a modernized waste transfer facility to handle solid waste and remove recyclable materials.¹⁴³ To afford the \$1.4 million price, the city agreed to allow the builder to operate the facility for five years and guaranteed it both high flows of materials and advantageous "tipping fees" to be charged to the waste collection undertakings that brought waste to the new facility; in return for these arrangements, the city would then be allowed to buy the facility for \$1 after five years.

In its ruling, The Supreme Court struck down the city ordinance that allowed this arrangement to function, particularly the requirement that all public and private waste collectors deliver solid waste generated in the town to the new transfer facility. The Court noted the "flow control" regulation in this case was actually a financing measure so the city

¹⁴¹ *Id* at 810.

¹⁴² See Collins, Richard (1988) at 103-04 (The "Court has consistently described the immunity to be for 'market participants' rather than for subsidies ... [and] could readily distinguish a new case involving passive subsidies" and "Passive subsidies may not enjoy the same immunity from dormant commerce power scrutiny"). And see *Alliance for Clean Coal v. Miller*, 44 F.3d 591 at 597 (7th Cir 1995) ("[S]ince first enunciated [in *Alexandria Scrap*] the market participant doctrine has been narrowed to exclude many state actions that appear to be subsidy equivalents").

¹⁴³ *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

could build an important facility to provide environmentally important services.¹⁴⁴

In *Carbone*, then, the form of the financing or subsidy, coupled with the fact that the law potentially discriminated against out of state disposal centers seeking business from local waste collectors, was held violative of interstate commerce. In fact, the city's argument that the burden on inter-state commerce for environmental purposes was justified because there was no less restrictive means to achieve their objective was also rejected because of this same availability of other methods of public financing. And it was only in the dissent that the market participant exception was obliquely raised.¹⁴⁵

In the *United Haulers* case, The U.S. Supreme Court broke with many years of disallowing state-level waste flow control regulations for environmental purposes.¹⁴⁶ As the Court began:

In *C & A Carbone* ... this Court struck down under the Commerce Clause a flow control ordinance that forced haulers to deliver

waste to a particular private processing facility. In this case, we face flow control ordinances quite similar to the one invalidated in *Carbone*. The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation.

Problematically, then, and from the outset, the Court doesn't acknowledge the role the city took in *Carbone* to plan, initiate, solicit bids, contract, and arrange payment for the construction of a waste transfer and recycling facility, and in such a manner that it would fully own and operate the facility within 5 years. In fact, just as in *Carbone*, the state's plan in *United Haulers* involved building improved facilities, and paying for them by "restricting competition" on behalf of their newly created public-benefit corporation to ensure high volume and "above-market" tipping fees. Moreover, the plaintiffs in this case were waste haulers who showed they could dispose of waste collected in these counties at out-of-state disposal sites for much lower rates.

A more accurate way to describe the "salient" but "significant" difference the Court used to distinguish this case from *Carbone* would be that the mortgaged waste and recycling facilities in *Carbone* were temporarily owned by a private contractor, whereas in *United Haulers* they were temporarily owned by municipal bond holders (who are ultimately, of course, also private parties). Nevertheless, it is on this foundation that the Court continues. For example, the Court relies heavily on balancing, noting that any burden on inter-state commerce isn't excessive compared to the public environmental and health benefits created through extensive recycling programs. And the ruling appears favourable and supportive of the state's right to procure goods and services (here, both, in the form of a recycling center and its operational staff) for

¹⁴⁴ Interestingly, however, all concurring and dissenting opinions seemed to agree that state subsidization by other means (for example, via a general tax fund) of this local environmental program goal might be permissible even if it still led to a state subsidized procurement facility directly competing with out of state private waste disposal undertakings; *Cf.* the *Preussen Elektra* case, *supra*, and the manner in which the CJEU dealt with the prohibition against state aid under Union law.

¹⁴⁵ *Id.* at 430 ("The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect. Local Law conveys a privilege on the municipal government alone, the only market participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents").

¹⁴⁶ *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007).

legitimate environmental policy objectives (recycling), and even if it's all paid for through the use of non-discriminatory regulatory mandates (the flow control requirements and above-market tipping fees) that create a subsidized state enterprise that competes at a significant (almost monopoly) advantage against out-of-state undertakings:

The flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same. Because the question is now squarely presented on the facts of the case before us, we decide that such flow control ordinances do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.¹⁴⁷

It's interesting that the *United Haulers* Court didn't invoke the market participant exception. However, The Supreme Court addressed this oversight in a later case, in which it upheld a Kentucky development program that exempted state municipal bonds, but not out-of-state bonds, from taxation: "This case, like *United Haulers*, may also be seen under the broader rubric of the market participation doctrine."¹⁴⁸

The final case relevant to state environmental procurement does little to clarify the relevant doctrines related to balancing criteria, environmental objectives, or the role of the market participant doctrine. In *New Energy*, The Supreme Court struck down an Ohio statute that gave a tax credit to offset vehicle fuel sales taxes on the condition that the fuel contained certain percentages of ethanol produced in Ohio.¹⁴⁹

The statute certainly encouraged the use of greener fuels. But the non-discriminatorily applied and redeemed tax credit was also

clearly designed to support and subsidize in-state green fuel industries. The Court, sounding much different than in *United Haulers*, argued that it is impermissible economic protectionism to use state regulatory provisions that benefit in-state actors and, thereby, burden out-of-state competitors.¹⁵⁰

The Court did, however, agree that the environmental and health objectives of reducing "harmful exhaust emissions" are a "legitimate state goal." But, importantly, the Court then notes that encouraging out-of-state green fuel producers would be just as beneficial to these goals, and concludes that Ohio's alleged state interests are "occasional and accidental" to its main goal of favourably treating in-state ethanol producers.¹⁵¹

Moreover, the *New Energy* Court as easily dispenses with the market participant doctrine in the current subsidy context:

The market-participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes -- a primeval governmental activity. To be sure, the tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market.¹⁵²

And, yet, the Court has one final point to make about states and their subsidies, stating that there are still circumstances, many perhaps, in which subsidies would be perfectly permissible. The distinction drawn here seems to turn on whether the state is also acting in a regulatory capacity (taxing, regulating, or mandating) in addition to only a purchasing capacity:

¹⁴⁷ *Id.* at 342.

¹⁴⁸ Department of Revenue of Kentucky v. Davis, *supra*, at 1807.

¹⁴⁹ New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988).

¹⁵⁰ *Id.* at 273-77.

¹⁵¹ *Id.* at 279.

¹⁵² *Id.* at 277.

The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition.¹⁵³

3. Comparative Law Conclusions

In both the Union and the United States, the challenging and interesting part of characterizing the legal frameworks of state environmental procurement is a function of combining three individually challenging areas of law: state rights, as balanced against federal protections of free markets; environmental law, a globally important and disputatious field; and public procurement, representing an area of legal rights and obligations unto itself. Nevertheless, there are many similarities in how European and U.S. laws developed in these areas, and also in how the respective state systems appear to be deploying environmental and procurement activities.

For example, cases from the CJEU and The U.S. Supreme Court dealing with environmental law as connected to a state-federal balancing of economic rights followed roughly the same pattern. First, was getting environmental issues to be recognized at all as against protections of the free market. Next, came the cases describing how important environmental goals at federal and inter-state levels might balance economic and internal market concerns. And, finally, cases from both systems seem to demonstrate increasing deference to environmental activities of a local and intra-state character.

Alternatively, consider general procurement issues combined with this same state-federal balancing of economic rights. Here, the

U.S. system was certainly well ahead of the Union for many years with respect to state flexibility in purchasing, and this was primarily due to the market participant exception. For example, with or without an environmental justification, a U.S. state can still buy its paper products from a local manufacturer at a relatively high price; and, the fact they're doing so to be environmentally responsible by paying more to reduce transport distances and related emissions is not something they would be called to balance against any discriminatory free market burden in the way member states in the Union surely would. That said, however, Union procurement directives have closed this gap somewhat by broadening the variety of criteria that states can permissibly consider when making purchases.

In other words, "buy local, buy green" programs like the one described in the example from San Joaquin would be very difficult to implement in Union member states, because they would likely be considered blatantly discriminatory against free economic movement. While Union directives and block exemptions do allow environmental factors to be considered in procurement, non-discrimination is still the underlying expectation.

And at this point, recall the Commission report concluding that green procurement programs could not, for example, exclude suppliers based upon the distances they have to travel.¹⁵⁴ Such transportation considerations are surely valid from an environmental standpoint, but it is the unavoidable local bias that distinguishes this situation from a case like *Concordia Bus*. While that decision seemed to be stretching the doctrine of allowing local purchasing based upon the growing importance of environmental policy objectives,

¹⁵³ *Id.* at 278.

¹⁵⁴ See European Commission Report (2004) at page 39.

it is actually rather consistent with the aforementioned Commission guidance.

Specifically, *Concordia Bus* allowed the selection of a local producer because of environmental criteria that were so strict no existing out-of-state rivals could compete. It still, however, allowed for the possibility that out-of-state undertakings could, or someday might, compete. Compare this to the equally environmentally valid restriction on transport distances, which completely, and permanently, precludes any out-of-state undertaking from ever being selected. In this way, for example, the *Concordia Bus* decision still doesn't equal the greater flexibility granted to U.S. states by the market participant exception.

However, then there's *Preussen Elektra*, which seems to allow a quite blatant local bias in Union environmental purchasing. And while this case may signal a new direction in CJEU decision-making in this area, there are still some important nuances to understand here. For one, compare this to the U.S. system, where states are legally permitted to buy locally in order to economically preference domestic undertakings regardless of any environmental justifications. As the *New Energy* case made clear, even direct subsidization will not be considered problematic in procurement as long as the state is acting only as a purchaser, and isn't straying into other, mixed state regulatory functions.

And this is precisely where it may be possible to draw an important distinction with *Preussen Elektra*, which involved not only green purchases for their own sake, but in furtherance of the broader environmental goal of strengthening an in-state renewable energy industry. The *Preussen Elektra* court talked a lot about the subsidy and potential state aid components of Germany's program. Perhaps, then, *Preussen Elektra* isn't primarily about giving local green purchasing additional

protections, so much as it's about acknowledging the importance of large scale state environmental policy goals and green procurement's important role in achieving them. In fact, given the CJEU's reasoning, there isn't much evidence to support the belief that the *Preussen Elektra* court would uphold the aforementioned restrictions on transport distances as part of a local green purchasing initiative.

On the other hand, the *Preussen Elektra* case may be signaling that when all three legal elements are considered together (environment, state rights, and procurement), the distance between Union and U.S. systems may be narrowing even further when procurement is combined with other, related state taxes, mandates, or subsidies. Moreover, environmental procurement directives have granted European member states significant latitude in conducting their environmental activities. In other words, by raising the importance and profile of environmental considerations, these Union legal instruments have also given member states stronger environmental justifications in restraint of inter-state trade. And, as discussed above, perhaps this deference to local environmental policy goals will increase further after The Treaty of Lisbon.

In addition, these combined and more complex environmental projects are becoming increasingly important to states acting to maximize programmatic environmental potentials. In this context, combining the Union's environmental procurement directives with important block exemptions to state aid for environmental projects has opened additional flexibility and options for member states. At the same time, it is precisely in these types of situations in the U.S. where application of the market participant exception often drops away, meaning that both systems are again

bound by baseline prohibitions against discrimination or over-burdening inter-state economic activities.

Actually, if Union legislative and judicial developments have opened up the European procurement landscape, recent U.S. Supreme Court procurement cases may be signaling a narrowing of options for these more complex and combined projects. Certainly, cases like *New Energy* and *West Lynn Creamery* seem to be taking an abruptly reactionary and market-protective path. Although, the recent *United Haulers* decision appears quite favourable to state environmental and procurement programs even when they add some burden to inter-state commerce.

But still, as cases in both systems demonstrate, there are real limits to how the state's leeway can be exercised, and many environmental and procurement situations continue to run into trouble. And this occurs in both systems where the discrimination against out-of-state actors appears too blatant, too unfair, or too burdensome (for example, *New England Power*, *New Energy*, and *Outokumpu Oy*).

But, as of now, it's only in the U.S. that constitutional entanglements are also occurring where some structural characteristic of state purchasing or subsidies appears too directly tied to market discrimination (for example, *Carbone* and *West Lynn Creamery*). And it's only in the Union where discriminatory state purchasing that is entangled with broader environmental programmatic subsidies and goals has been explicitly upheld (*Preussen Elektra*). The closest U.S. case on this latter point is *United Haulers*, but The Supreme Court was quick to point out that the flow control regulations (and broader environmental objectives) were being upheld because the mandates were non-discriminatory.

Consider, then, how the example of Sweden's biogas procurement, investment, and subsidy programs might be analyzed under current Union law. In general, case lines ending with *Walloon Waste* and *Radlberger* seem to grant localities increasing deference for environmentally related activities. *Schmidberger* might be added here as well, particularly those aspects of the ruling sympathetic to the flexibility often required by local decision-makers in promoting important environmental goals. And *Preussen Elektra* is right on point, supporting green energy procurement efforts and buying arrangements, and even overlooking the indirect discriminatory effects of state subsidies used to develop local green energy markets.

While the Procurement Directive and the WETPS Procurement Directive explicitly prohibit purchasing that distorts free and competitive economic markets, they are broadly supportive of considering an expanding array of environmental criteria in procurement decision-making. In building so much local and regional expertise and infrastructure, it's hard to imagine that Sweden's biogas program efforts aren't often looking locally for inputs, supplies, and products. And, in fact, reading the directives in conjunction with *Concordia Bus* suggests that some amount of local preferencing will be allowable to support stringent environmental objectives.

And, the GBER has created broad exceptions that are quite relevant to Sweden's biogas programs. First, it allows using state funds to support general environmental investments: this would probably cover many of Sweden's large grants to private and mixed public-private technology and manufacturing development projects. The GBER also permits state-sponsored tax benefits for environmental purposes: and this certainly applies to Sweden's

tax rebates for green car purchases. And, finally, the GBER also allows certain amounts of state aid for the purchase of biofuel vehicles. Without knowing the exact limits of these provisions, it's plausible that Swedish money invested to help undertakings with marketing, sales, and buying incentives would be permitted; and, perhaps it's even possible that purchasing in this context could extend to infrastructure development (such as building refuelling facilities) or even other process-related investments that improve the prospects (such as higher quality or lower costs) for future potential purchases.

Then again, perhaps the applicability of the GBER's "environmental investment aid" could be contested with respect to developing in-state economic markets in green energy; and, this has been the focus of many of Sweden's grants to public-private partnerships. In other words, while you can make a good argument that building strong economic markets will encourage the spread and quality of green technologies, helping private undertakings establish profitable demand and supply markets may or may not be what the drafters of the GBER were contemplating.

And, interestingly, these new block exemptions became law in 2008, which doesn't apply to Sweden's procurement and subsidy programs that began well before that. What's more, discrimination is still prohibited under the GBER, so perhaps state activities that result in the creation of strong domestic biogas economies would still be vulnerable to legal challenges. But, leaving aside the idea of retrospective liability and some of the stricter issues of interpretation, it certainly looks like many of Sweden's biogas procurements and investments are on safer legal footing because of the GBER.¹⁵⁵

By comparison, consider the U.S. green procurement example involving Arizona's EPS program. Under the *New Energy* line of reasoning: the state is a direct and major purchaser of energy (buying and selling), which perhaps grants Arizona some leeway under the market participant exception; then again, the state clearly shouldn't subsidize its own green energy economy with tax credits because this disadvantages out-of-state competitors; but, perhaps the EPS program, itself, is permissible because it's mandates and surcharges apply in a non-discriminatory way that are not directly connected to the other green energy subsidy programs.

Consider, next, *Carbone* and *United Haulers*. These rulings may disagree somewhat as to how the mixed private and public aspects related to the various players should affect the outcome. *United Haulers* was particularly supportive of state environmental program objectives, even when they are sometimes financed by the creation of subsidized state enterprises with significant competitive advantages over out-of-state undertakings.

Carbone, however, seemed more concerned about state buying and selling arrangements that might end up disbenefiting undertakings from other states seeking to do business in-state. And, neither case directly seems to offer Arizona safe harbour under the market participant exception as a major purchaser at

of Sweden's regional biogas development consortiums): "I am rather more concerned about fertility and the growing climate for operations like Tekniska Verken in the future. The level of interest in infrastructure, energy supply and environmental issues has increased dramatically in recent years, and this is very welcome. Despite this, there is a hint of a return to a more regulated market. In 2010, new rules will be introduced into the Competition Act, which will make it harder, if not impossible, for state-owned, municipal and county council-owned companies to carry on certain types of sales activities." *See* Tekniska Verken, Annual Report (2009) at page 4.

¹⁵⁵ Although on that upbeat note, consider the words of the General Manager and CEO of Tekniska Verken (one

the centre of these green energy programs. Particularly on this last point, perhaps Arizona would be afforded more protection the greater the state's role as a legitimate purchaser of existing product on the market; as opposed, on the other side of the spectrum, to Ohio's unsuccessful argument in *New Energy* that it was a buyer of the new market.

And getting back to *West Lynn Creamery*, the Court might well look straight through purportedly separate state activities regarding buying green energy and subsidizing green energy economic markets when they are so clearly related to common programmatic objectives. In fact, if the Supreme Court is moving towards a renewed protection of free markets with *West Lynn Creamery*, cases like *New England Power* may increase in relevance in their insistence that the recoupment of monies in support of expensive, large-scale green energy investment projects does not justify Arizona burdening inter-state commerce.

Actually, and to draw some final conclusions for both systems, there are good reasons to believe that extensive state-partnered environmental programs will continue into the future, including those aspects related to state procurement. However, there are clearly some risks, as the legal doctrines are also always adapting to changing political climates and state programmatic strategies.

In fact, the vagueries and remaining uncertainties from the environmental procurement case law speak volumes to how fine the distinctions are between the different areas of law, between permissible and impermissible state purchasing, and between biased patronage versus legitimate investment. The crux of the balancing tests (where applicable) in both the Union and the United States has always been non-discrimination, and this applies equally to state procurement which has

always been connected to the longstanding tug-of-war between states and federal governments over free markets.

And yet, going back to basics, public procurement in its simplest form is usually non-discriminatory when bids are fair and open to undertakings from all states. But once a state initiates a broadly-based economic and environmental program, it is difficult not to see the ultimate objectives, including the state purchasing components, for what they really are.

By intertwining many parallel activities in purchasing, tax incentives, direct subsidies, and regulatory mandates, states (like Arizona and Sweden) end up giving valuable incentive benefits to in-state businesses that they aren't giving to undertakings trying to build these same industrial sectors in other places. What, for example, is really the difference between a direct subsidy and discriminatory tax treatment? What, for that matter, is the discriminatory impact difference between giving in-state undertakings cash to develop new markets, and the two-step alternative of, first, subsidizing research and development of a new technology through state funding, and, second, using procurement programs to purchase that new technology from market-leading domestic suppliers?

Indeed, to become a successful and profitable company in advanced and innovative technology markets requires significant research, investment, and development expenditures. But these expenditures are unlikely to occur if undertakings are uncertain about the future market viability of their product lines. Further, this market development must include related markets for production inputs (parts), operation inputs (expertise, fuel, refuelling), and operation services (repair). When all of these stable market prerequisites are present,

this allows companies the opportunity to test, improve, and market their new products, thereby gaining significant first-mover advantages over existing competitors that don't have such domestically advantageous market environments.

Of course, the key legal element here is the state's participation. States may give grants to universities to conduct technology research, hoping this will spawn new economic markets. But, perhaps the types of programs under discussion here close the gap between state purchases and corporate profits a little too quickly. And if things go according to plan, the end result of all this state activity is a thriving domestic industry with many new and profitable in-state undertakings, where before there were none. And since the touchstone balancing principle of these types of environmental and procurement cases is still discrimination, how is this result not patently biased and discriminatory under federal free market protections?

And, yet, it could be argued that this is exactly how state green procurement and related projects should work, by letting states and their undertakings reap big economic rewards for doing important economic and environmental innovation. But, even if this were in some sense optimal and did benefit the environment, it still doesn't help us much in dealing with the law as it actually stands. These programs may be exonerated by their environmental purposes, and may be granted additional leeway because of their procurement-related functions, but they're still often discriminatory. And this presents some problems: in assessing legal risk and certainty, when giving advice to clients, and while trying to develop environmental procurement programs that fit legally into the state's other environmental and economic objectives.

In fact, in some important ways state environmental procurement policies are intended to interfere with existing business practices and norms on regional or even international levels. It makes perfect sense that many states would prefer to emphasize local environmental goals they can see, control, and directly influence. Put the two elements together, however, and it isn't hard to understand some of the criticisms and concerns with achieving local environmental preferences that may affect or disrupt (and possibly in an uncoordinated manner) broader economic equilibriums.

And as a result, federal governments have their own strategic procurement preferences, ones often based upon consensus (and perhaps conservative) standards and approaches. This is certainly not to suggest that universally accepted environmental standards may not be helpful for state-level purchasing decisions. It's possible that the easiest and legally safest ways for states to conduct green procurement would be to reproduce federal programs on a smaller scale. But the specific focus of this paper is with local level environmental activities, the idea being that one-size solutions might not be possible to efficiently scale down, may fail to recognize important local environmental potentials and considerations, and, worst of all, may result in a routinization of low grade environmental performance within many states for the sake of greater inter-state economic integration.

In this sense, perhaps states should play more of a role in challenging and expanding upon federal environmental policies by testing more of their own programs and projects. This may be particularly true for state-level environmental procurement projects, which, given their diversity of form, their increasingly mixed private-public components, and the rapidly evolving legal contexts in which they

operate, could continue to play significant roles in innovating environmental solutions in both Europe and the United States.

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