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Summary of the report

States as Market Participants in the U.S. and the EU?

Public purchasing and the environment

Jason J. Czarnecki

In efforts to promote environmental interests and help local economies, American states can pass legislation to encourage, and in some cases require, public institutions to purchase products produced in the state (i.e., a geographic preference) due to the market-participant exception. The use of a market participant exception to allow for geographic preferences would face stiff legal challenge under European Union (EU) law. Despite the existence of the exception under U.S. law and its lack of viability in Europe, American states and Member States may be able to use public procurement to encourage or require the purchase of environmentally friendly goods, defined through any of a variety of measures, or might pass legislation to apply to all products sold within the state.

This report analyzes U.S. law in comparison to EU law and discusses the ability of public institutions to make environmental demands when purchasing products. Should public authorities be allowed to make environmental demands when acting on the market? After all, this is the same type of choice allowed by the individual consumer. Given that the EU is presently revising its procurement legislation, this report provides a useful analysis to determine the space for social and environmental requirements in EU public procurement law.

Despite its risks, the market participant exception has proven relatively successful in the United States.

American states should endeavor to become more creative in establishing ecological criteria for public procurement in taking advantage of this exception to dormant commerce clause analysis. However, the geographic preferences often used in market participant exceptions under U.S. law are antithetical to many of the underlying goals of the founding of the European Union. With revisions in EU public procurement law underway, it will be worthwhile for the EU to experiment with the inclusion of environmental criteria in their formalized and nondiscriminatory public procurement process.

The EU might consider increasing general environmental standards for all durables and consumables within the EU, making them applicable to all member states to ensure environmental sustainability in the life-cycle of all products. The same could be said for the U.S., but the EU's founding documents provide a much better foundation for environmental protection compared to the U.S., which has passed few environmental laws since the environmental legislation boom of the 1970s.

Given that new, national environmental legislation remains unlikely, the potential role of environmental federalism remains greater in the United States than Europe. American states should begin to increase environmental standards when products enter state borders to further the economic and environmental

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interests of the states. The EU should continue to support EU-wide environmental law and regulation. Regardless of the future of U.S. federal environmental legislation and EU environmental law, both American states and EU Member States can and should take environmental considerations into account in the public procurement process.

States in both the U.S. and Europe may better achieve environmental policies through more direct and gen-

eral regulation of the goods and services in question. Standing in the way of the success of such regulations are the high bars set by the dormant commerce clause and preemption doctrine in the U.S. and the internal market principles and harmonisation doctrine in the E.U. If states are to create innovative solutions to environmental problems, the evaluation of restrictions of trade must grant more weight to environmental standards as a legitimate government interest.