



CENTRE FOR PUBLIC PROCUREMENT

### **Public Procurement** as an **Expression** of the **Rule of Law**

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"Met elkaar het verschil maken"

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- Co-Head of the Utrecht University Centre for Public Procurement
- Co-Head of the Platform 'The Transactional State as an Institution for Good,' (Institution for Open Societies, Utrecht University)
- Co-Head of the Building Block 'Conceptual, Constitutional, Theoretical Foundations of Shared Regulation and Enforcement for a Stronger Europe' (Centre for Regulation and Enforcement Utrecht University)



#### **Balancing legitimacy with efficiency?**



Legitimacy



#### No! Both crucial but they both pursue different goals





Legitimacy

Efficiency / effectiveness



Democratically well-developed countries ensure Public Procurement **Legal Systems** based on the fundamental principles of law: nondiscrimination, proportionality, objectivity and transparency





#### 2nd mindset shift: Means and Goals?

### **EU Goals**

to promote PEACE, its values and the well-being of its peoples

(Art. 3[1] TEU)

**Means:** 

**Internal Market** 

Competition

Public procurement/Rules



#### 3rd mindset shift: Means and Goals? Striving for *Better* not *More* Competition

For profit/ commercial entrepreneurship

**The State** 

For profit -Social entrepreneurship:

but aiming at solving societal problems

Triodos & Bank



Social enterprises

Voluntary organisations

Social market economy

(External) authority

public

Citizens initiatives

Charities, religious institutions



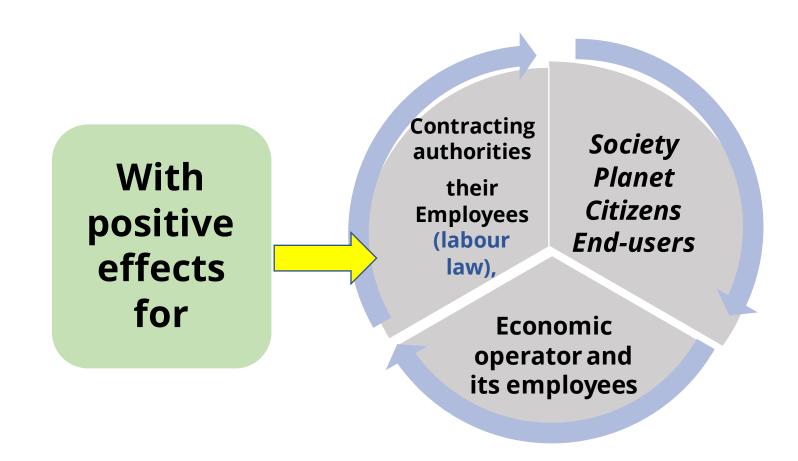
# 3rd mind-set shift: Stop looking at public procurement as contracts between two parties ...

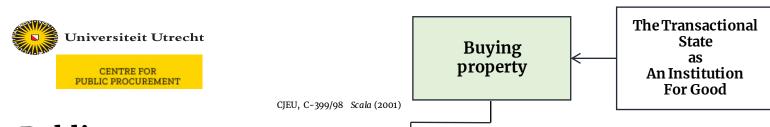
The State in Economic operators all its forms



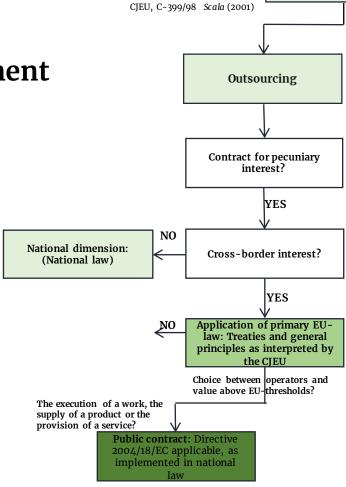
#### 3rd mind-set shift:

## ...and start looking at public procurement as Responsible Commissioning





#### Public Procurement Law in stricto sensu



#### Legend:

Insourcing: legal options; choice based on the discretionary power of public authorities

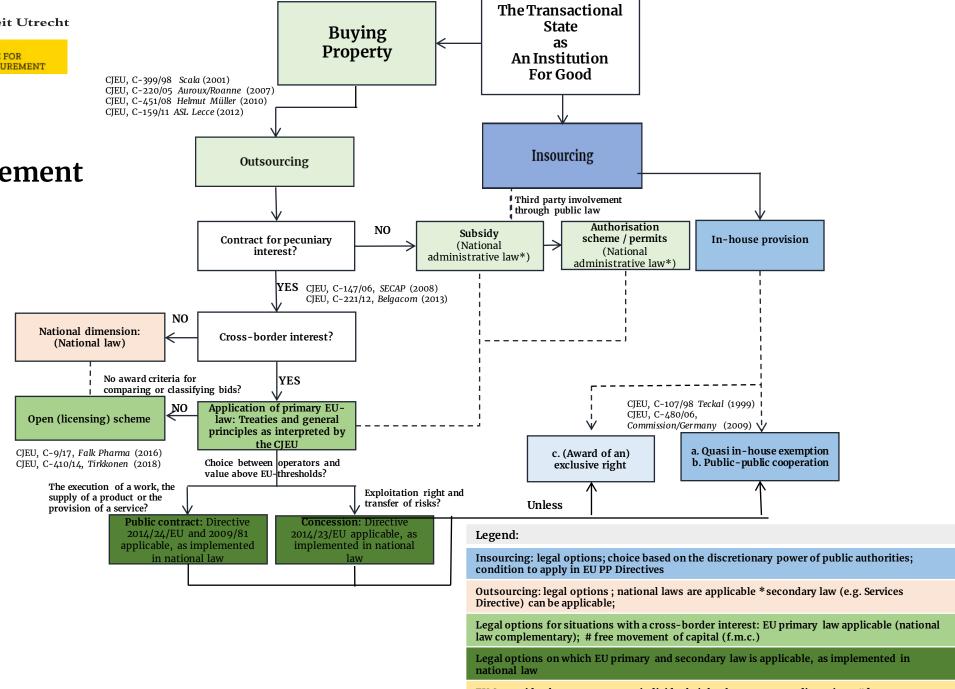
Outsourcing: legal options; national laws are applicable

Outsourcing: legal options for situations with a cross-border interest: EU primary law applicable (national law complementary);

Outsourcing: legal options on which EU primary and secondary law is applicable, as implemented in national law



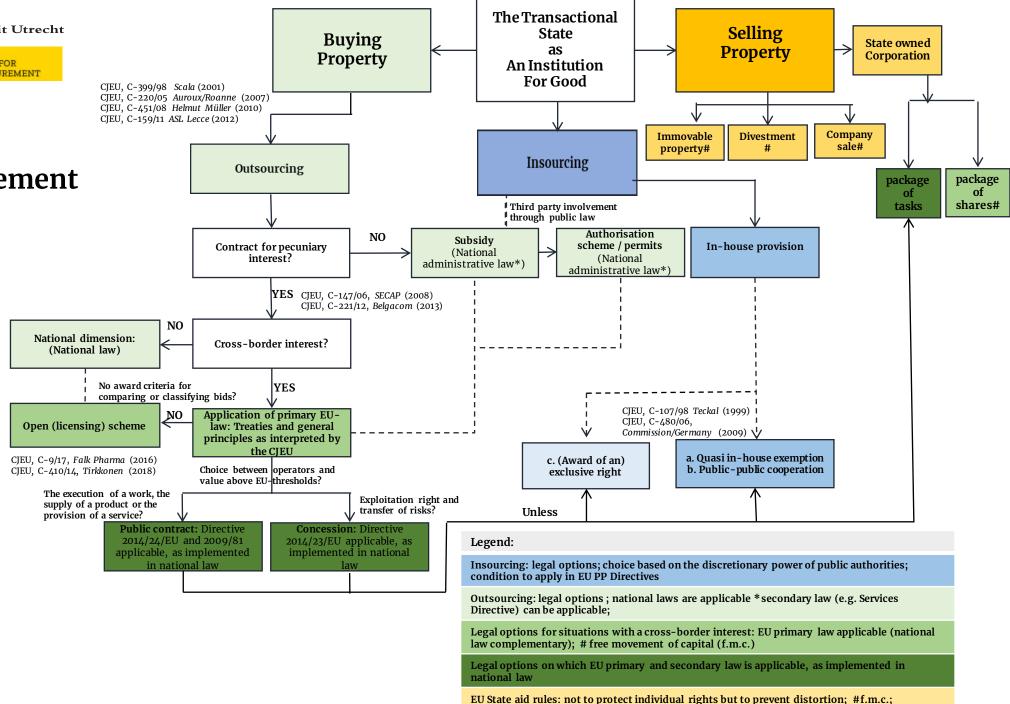
# Public procurement in a broad view



EU State aid rules: not to protect individual rights but to prevent distortion; #f.m.c.;



Public procurement in a broad view





#### **Public** procurement

system. Triggered by who? Legislator? In Courts by **Individuals? By** 

Immovable Company Divestment property# sale Outsourcing Insourcing in a broad view package package of of Layered dynamic legal tasks shares Third party involvement through public law Authorisations NO Subsidy In-house provision Contract for pecuniary schemes / permits (National (National interest? administrative law\*) administrative law\*) YES CIEU, C-147/06, SECAP (2008) **European Commission?** (limited) CJEU, C-221/12, Belgacom (2013) **Authorisations National** Cross-border interest? National law; negative law): result infringement procedure by the EC No award criteria for YES comparing or classifying bids? CJEU, C-107/98 Teckal (1999) Application of primary EU-NO CJEU, C-480/06, Open (licensing) scheme law: Treaties and general Commission/Germany (2009)  $\checkmark$ principles as interpreted by the CIEU Quasi in-house b. Public-public cooperation CJEU, C-9/17, Falk Pharma (2016) c. (Award of an) exemption CJEU, C-410/14, Tirkkonen (2018) Choice between operators and exclusive right Top down value above EU-thresholds? **Both now in Public** The execution of a work, the contract directives Exploitation right and (legislator and supply of a product or the transfer of risks? Unless provision of a service? Public contract: Directive **Concession:** Directive 2014/24/EU and 2009/81 2014/23/EU applicable, as Legend: applicable, as implemented implemented in national in national law National legislator introduces competitive obligations

Competitive

obligations for

Buying (or

distributing)

property (rights)

CIEU, C-399/98 Scala (2001)

CJEU, C-159/11 ASL Lecce (2012)

CJEU, C-220/05 Auroux/Roanne (2007) CJEU, C-451/08 Helmut Müller (2010)

The Transactional

State

as

An Institution

For Good

EC) and **Bottom up** (litigations in courts)

European legislator introduces competitive obligations based on the free movement)

Competitive

obligations for

Selling

**Property** 

State owned

Corporation

Demanding competitive obligations with Infringement procedures (free movement); accepted only for concession contracts

Individuals challenge in National and European Courts competitive award based on principles and free movement (in case of insourcing without a positive result)

National Courts recognises competitive obligations based on principles; EU only preventing market distortion perspective





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