



Utrecht
University

CENTRE FOR
PUBLIC PROCUREMENT

Public Procurement as an Expression of the Rule of Law

16 June 2022

PIANOo Congres “Met elkaar het verschil maken”

- Full Professor of International and European Public Procurement Law
- 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?

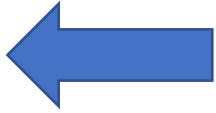
Legitimacy



**Efficiency /
effectiveness**



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: non-discrimination, proportionality, objectivity and transparency

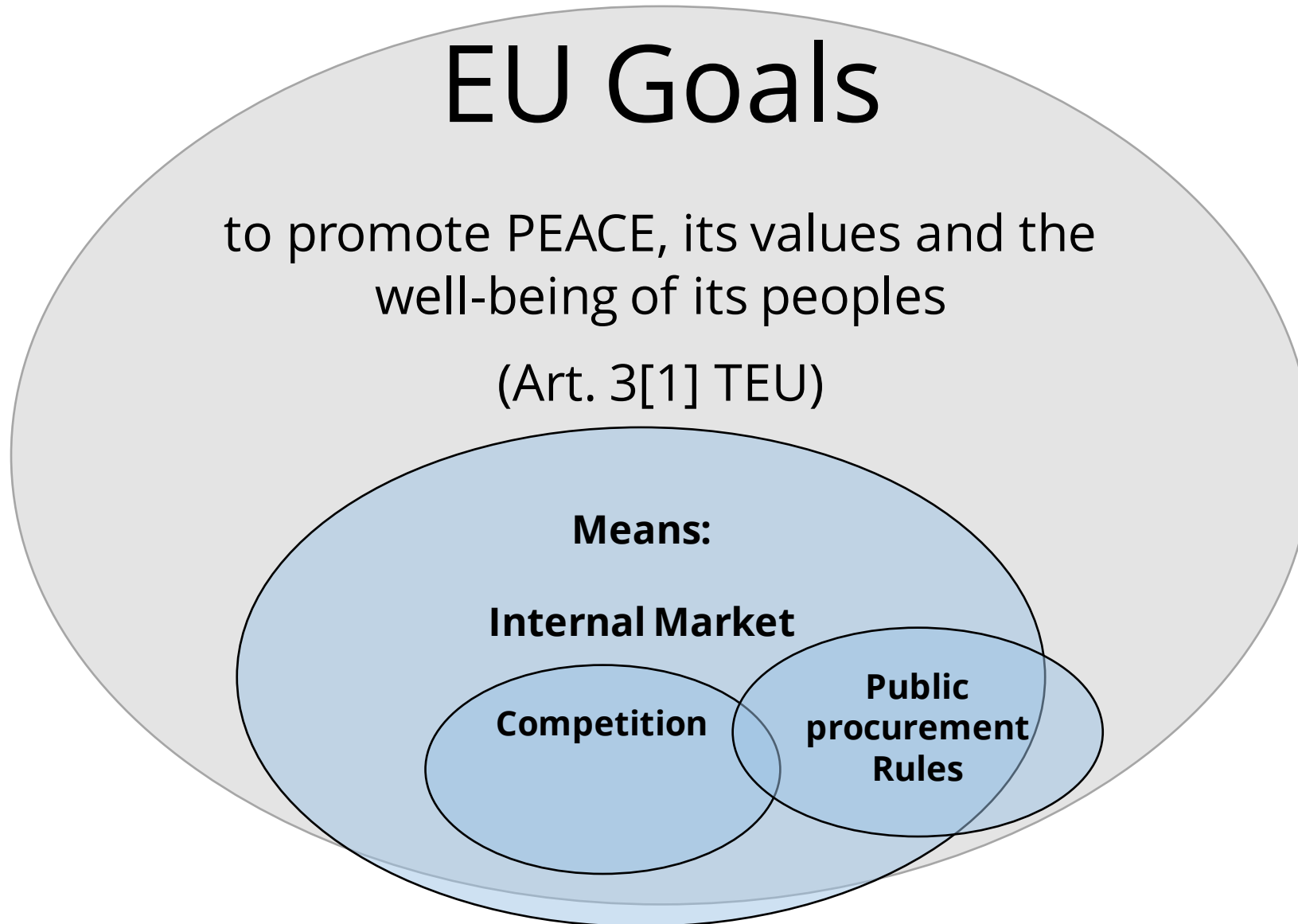
**1st mindset shift:
changing how we estimate cost-effectiveness (!)**

**It's not about the price
of a product, work, service
but about the price of**

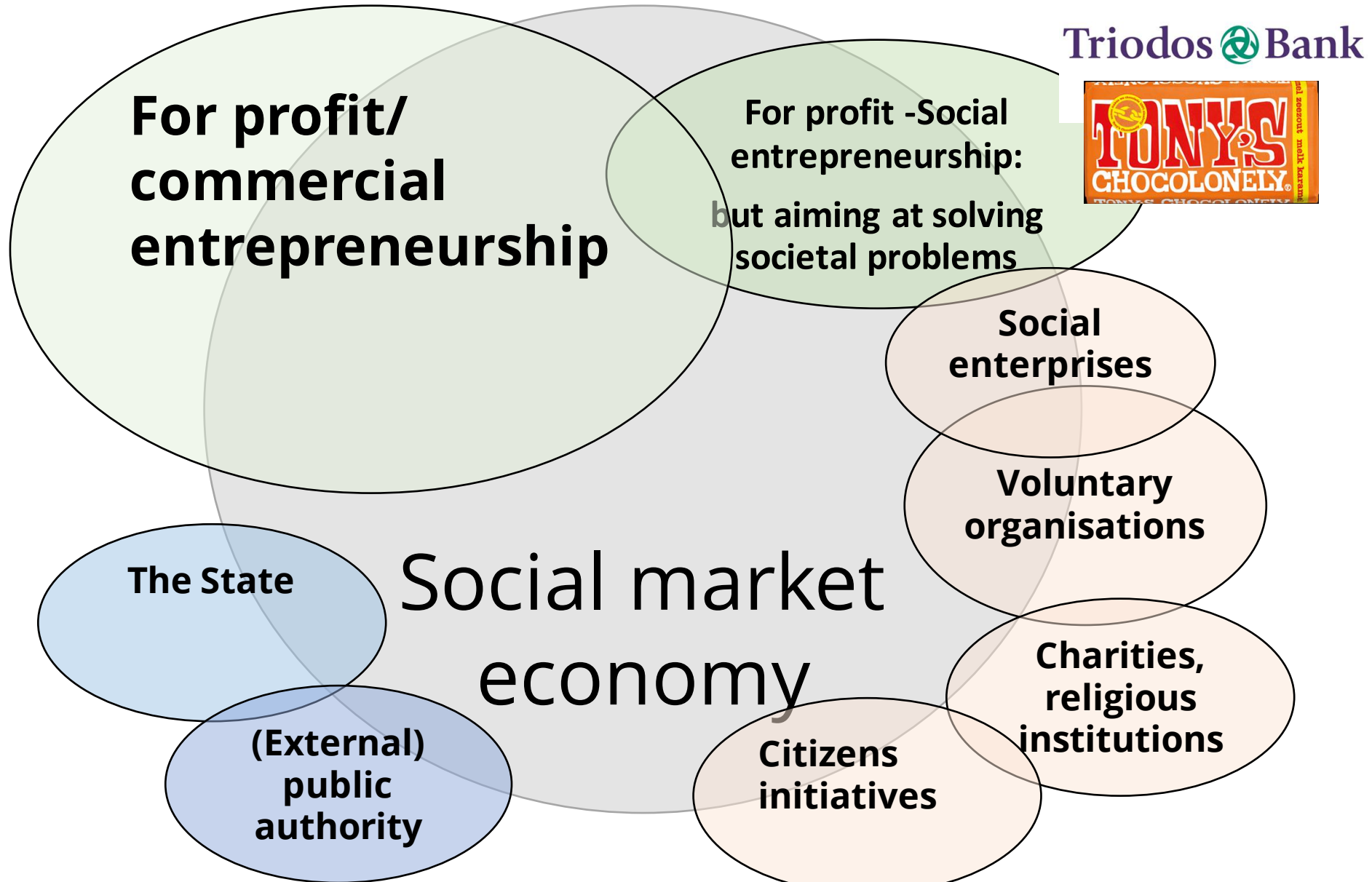
**The
Rule
of
Law**



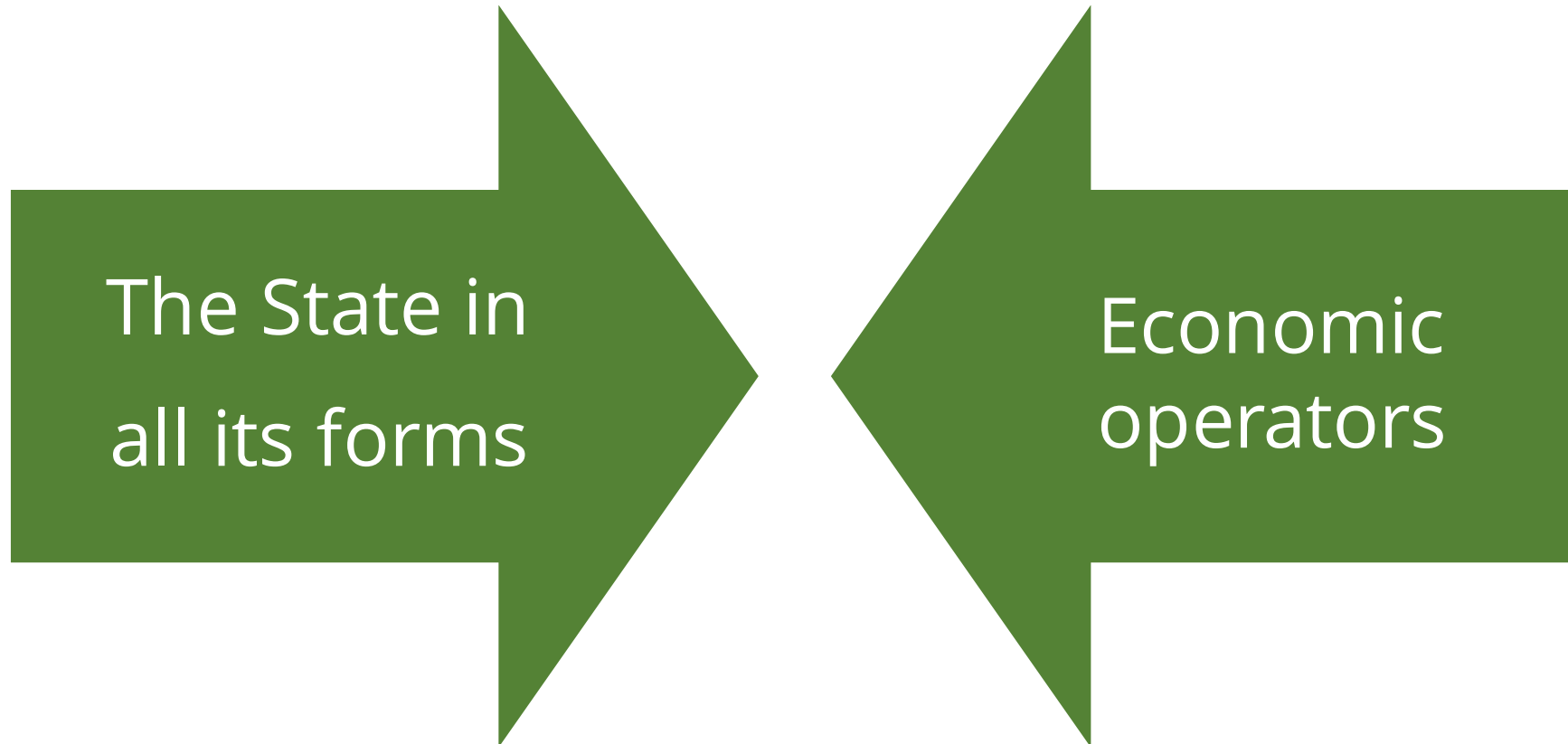
2nd mindset shift: Means and Goals?



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

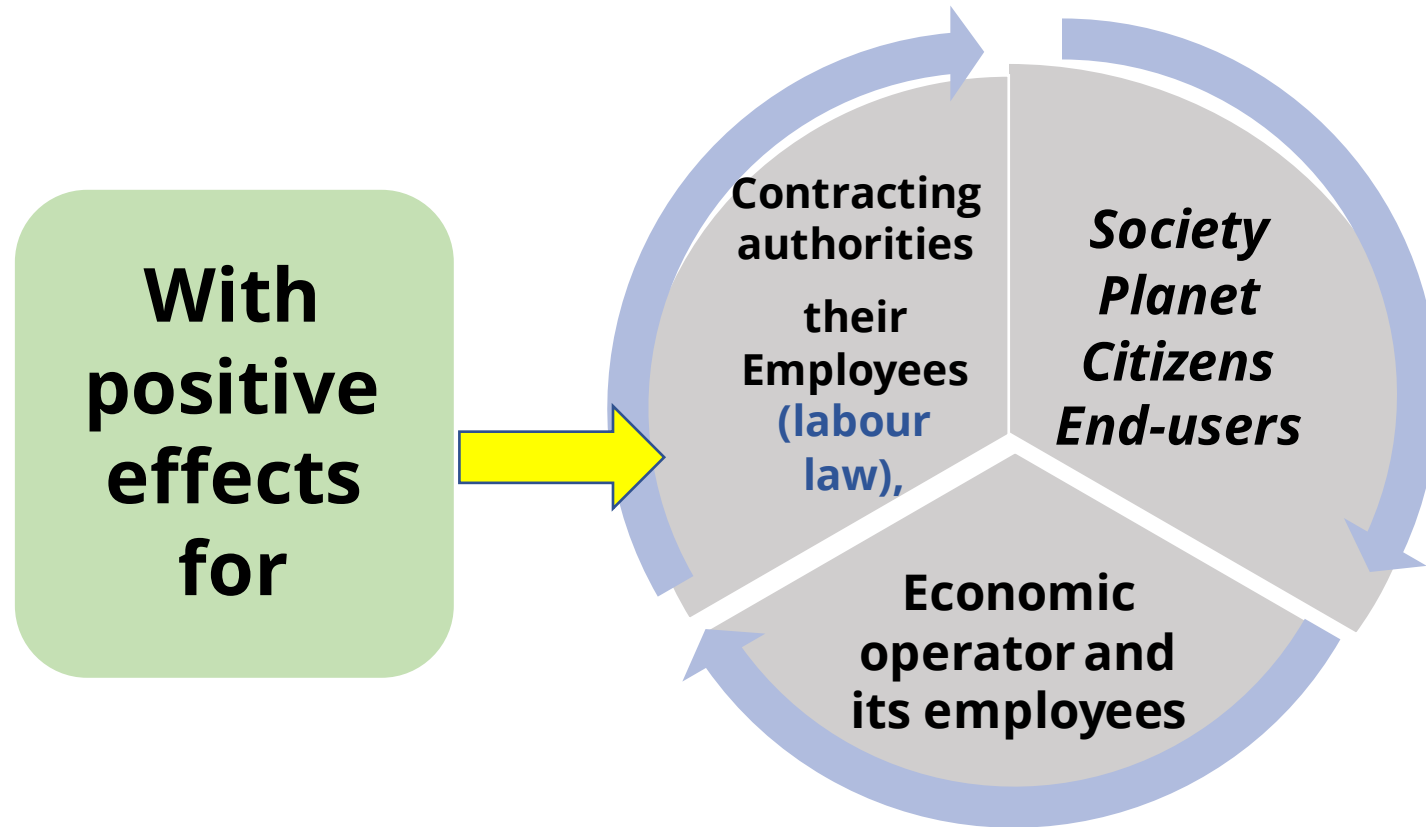


**3rd mind-set shift:
Stop looking at public procurement as
contracts between two parties ...**



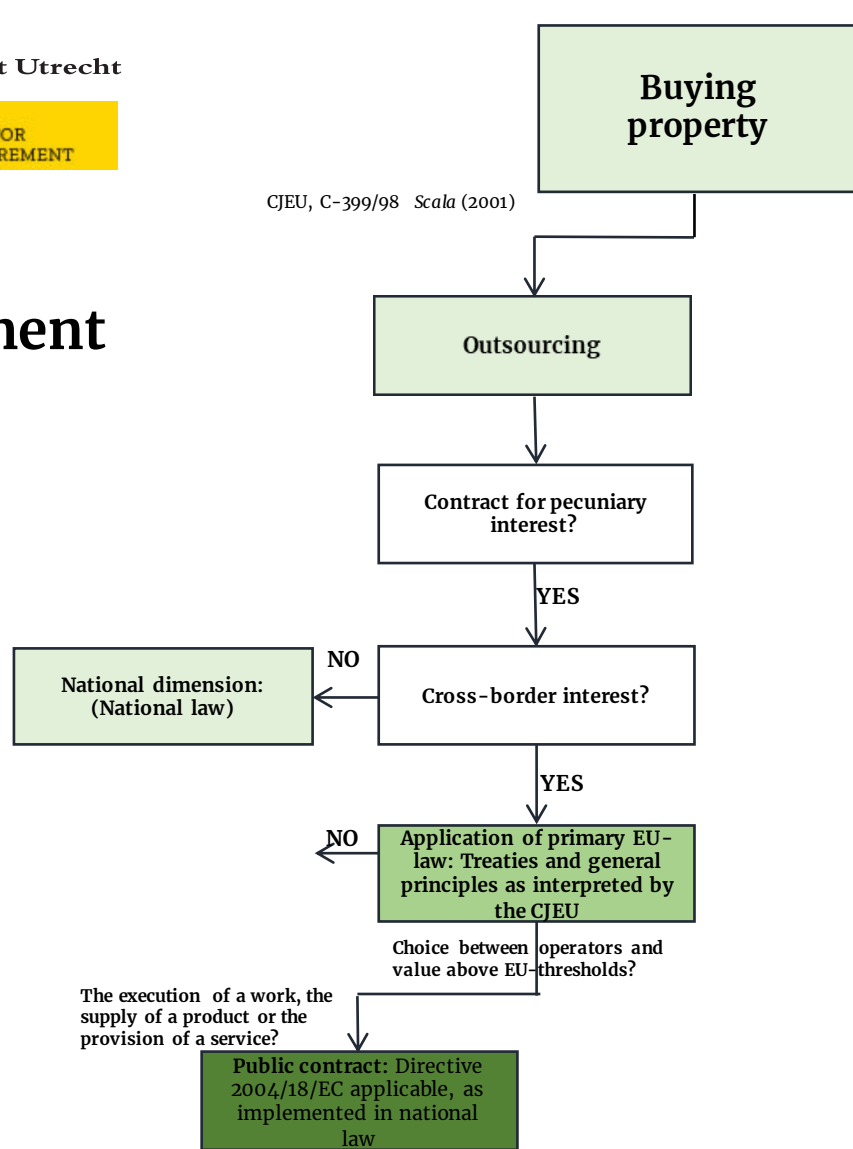


3rd mind-set shift: ...and start looking at public procurement as Responsible Commissioning



Public Procurement Law in *stricto sensu*

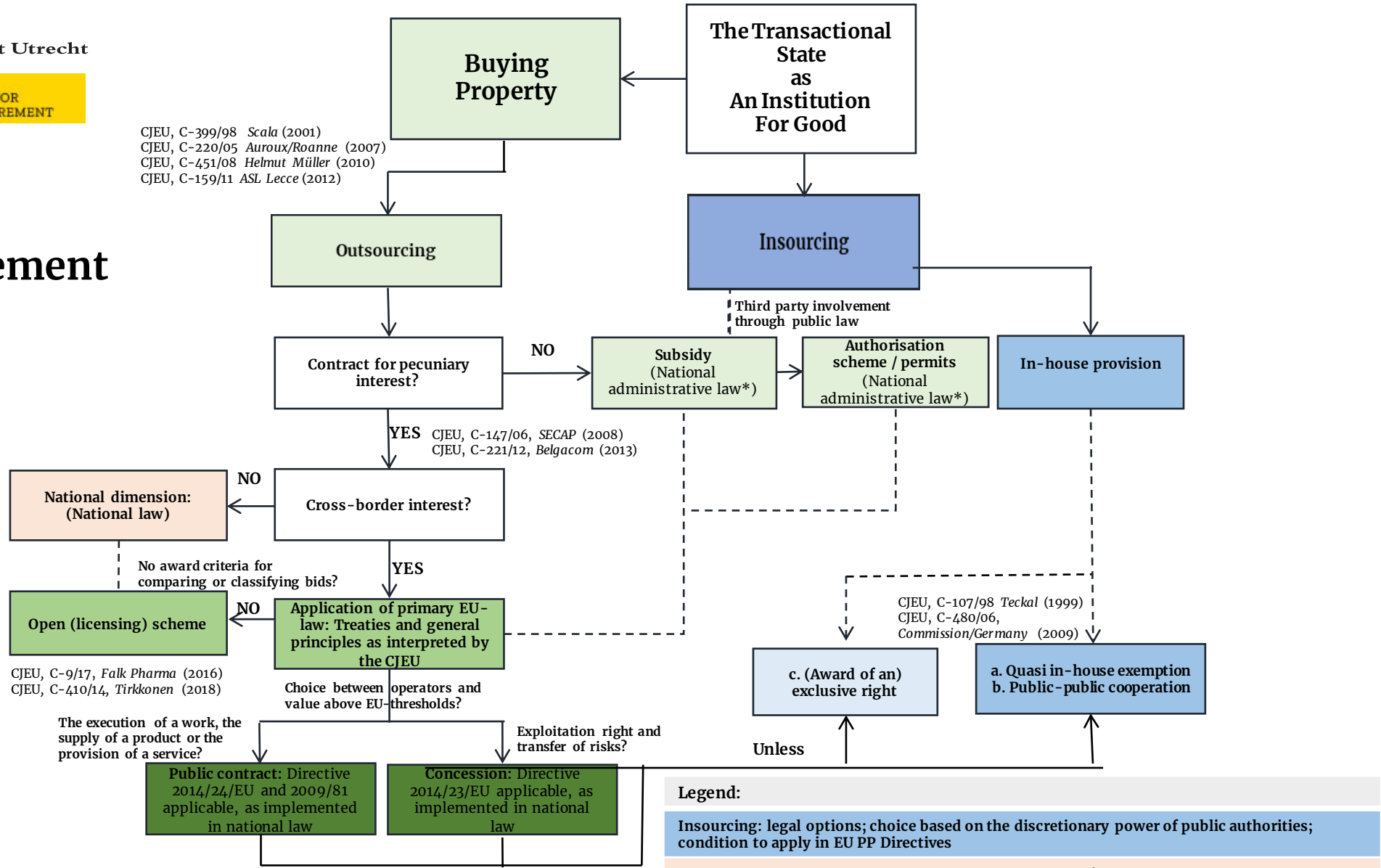
CJEU, C-399/98 *Scala* (2001)



The Transactional State as An Institution For Good

- 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

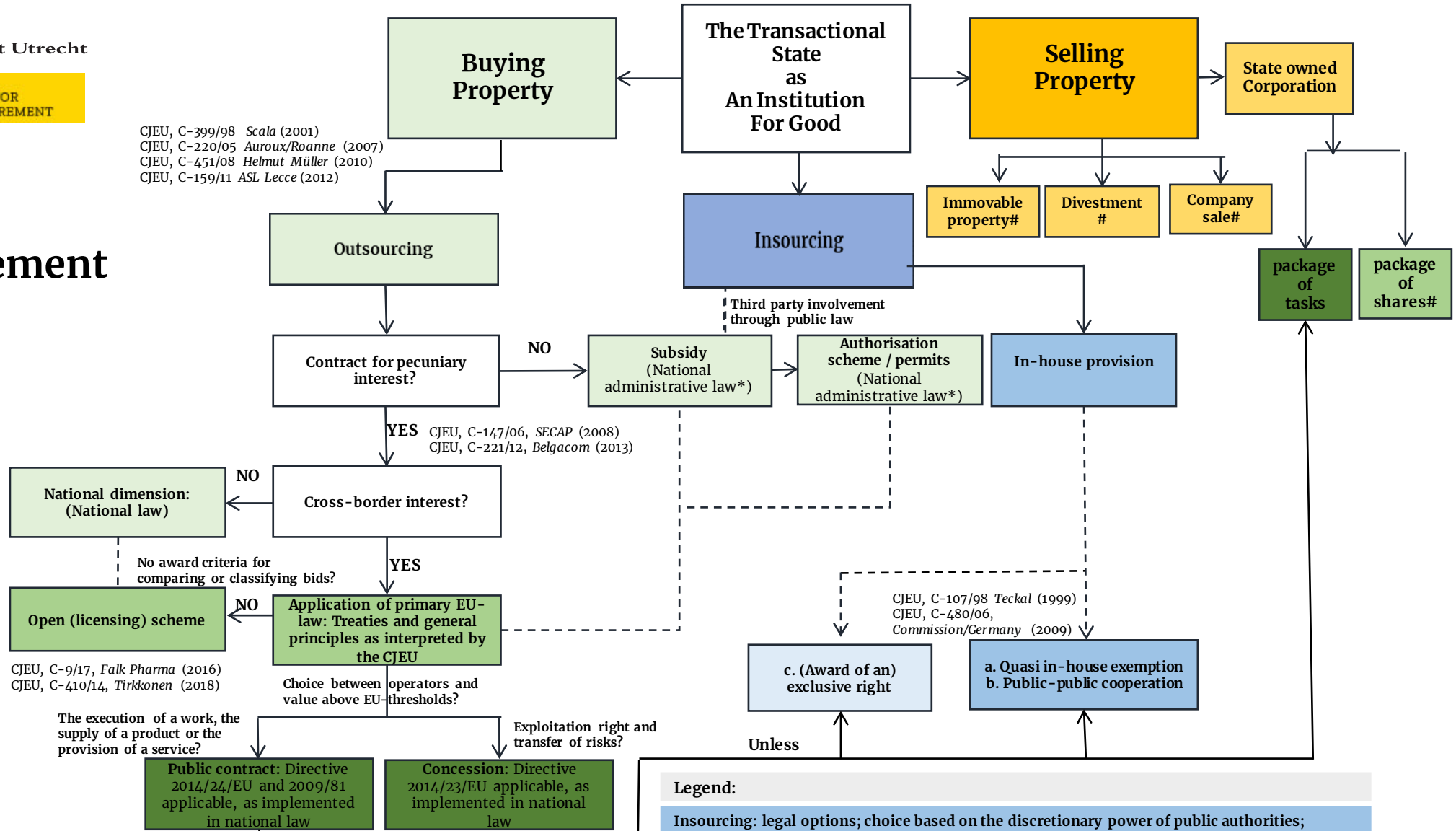
Public procurement in a broad view



- Legend:**
- Insourcing: legal options; choice based on the discretionary power of public authorities; condition to apply in EU PP Directives
 - Outsourcing: legal options ; national laws are applicable *secondary law (e.g. Services Directive) can be applicable;
 - Legal options for situations with a cross-border interest: EU primary law applicable (national law complementary); # free movement of capital (f.m.c.)
 - Legal options on which EU primary and secondary law is applicable, as implemented in national law
 - EU State aid rules: not to protect individual rights but to prevent distortion; #f.m.c.;



Public procurement in a broad view



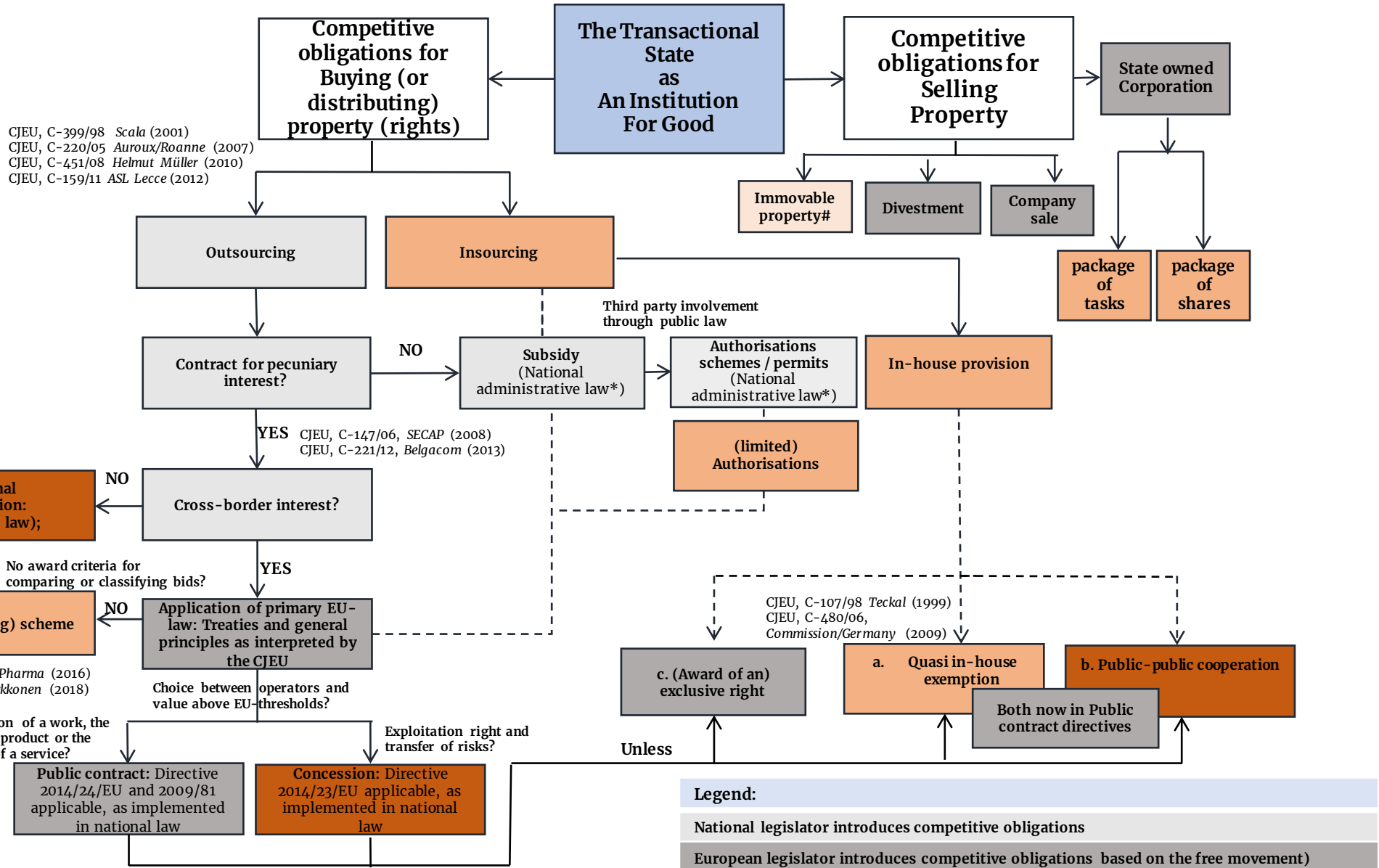
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Public procurement in a broad view

Layered dynamic legal system.
Triggered by who? Legislator? In Courts by Individuals? By European Commission?

Top down (legislator and EC) and Bottom up (litigations in courts)

CJEU, C-399/98 *Scala* (2001)
CJEU, C-220/05 *Auroux/Roanne* (2007)
CJEU, C-451/08 *Helmut Müller* (2010)
CJEU, C-159/11 *ASL Lecce* (2012)



Legend:
National legislator introduces competitive obligations
European legislator introduces competitive obligations based on the free movement
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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Thank you for your attention!