



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 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



Both crucial, 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**

**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?

EU Goals

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

(Art. 3[1] TEU)

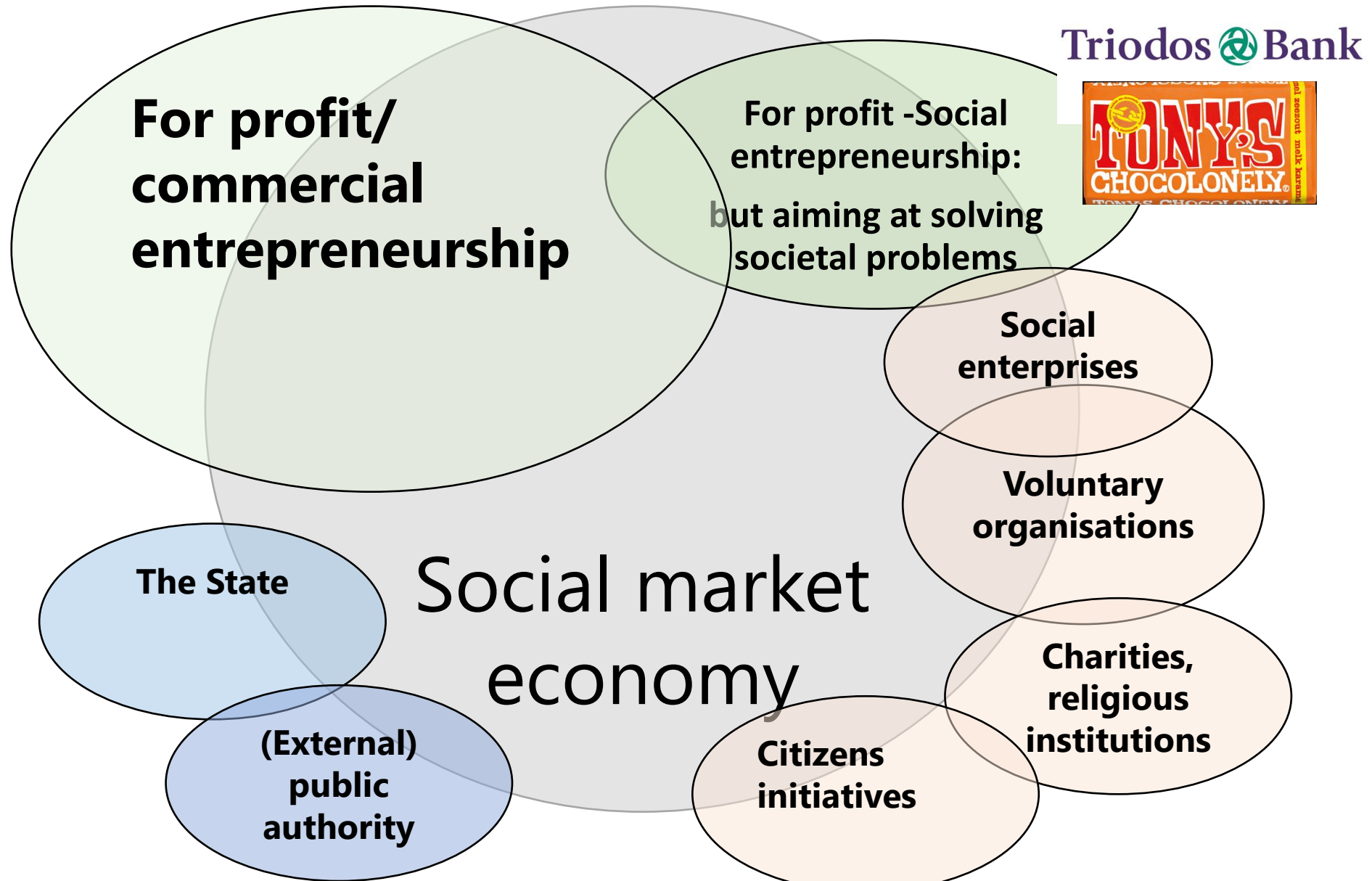
Means:

Internal Market

Competition

**Public
procurement
Rules**

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





3rd mind-set shift:

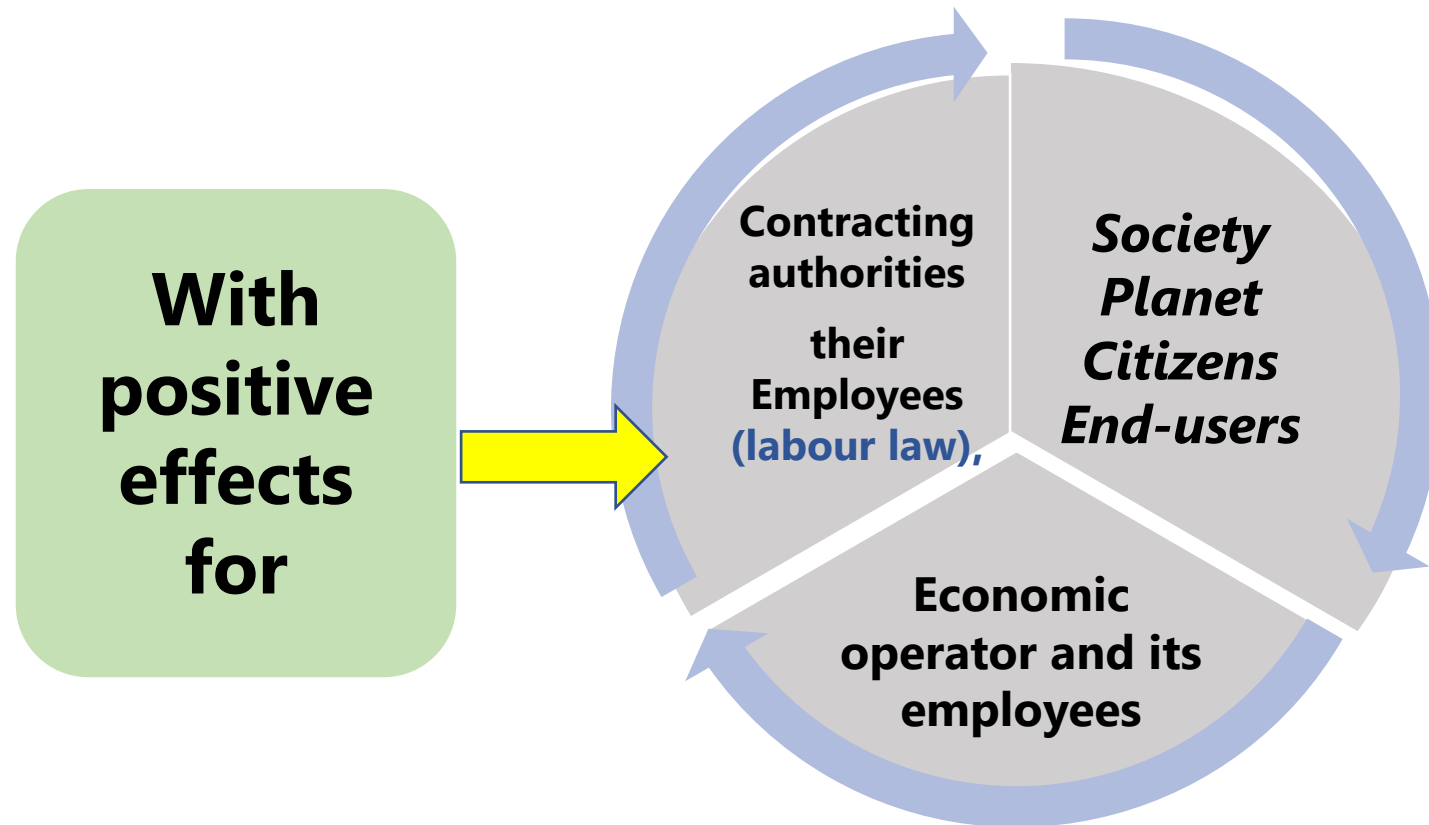
**Stop looking at public procurement as
contracts between two parties ...**

The State in
all its forms

Economic
operators



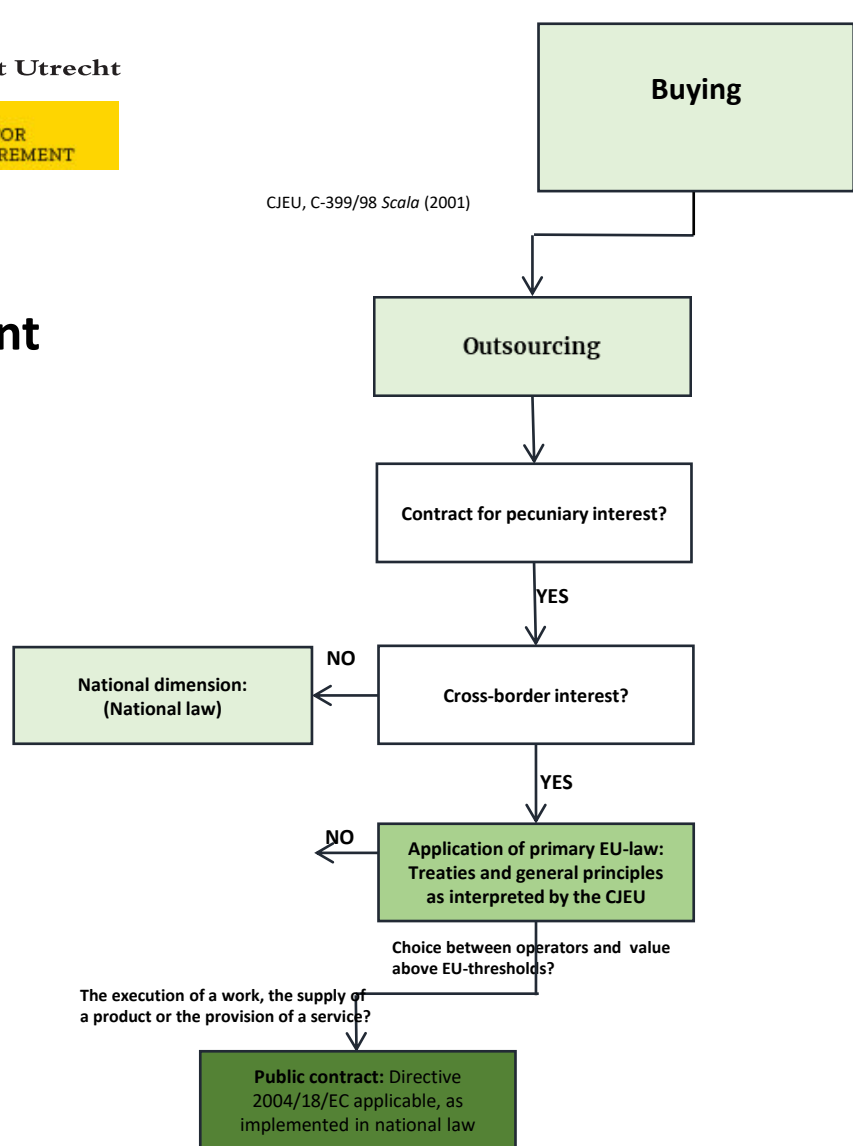
3rd mind-set shift: ...and start looking at public procurement as Responsible Commissioning





Public Procurement Law in *stricto sensu*

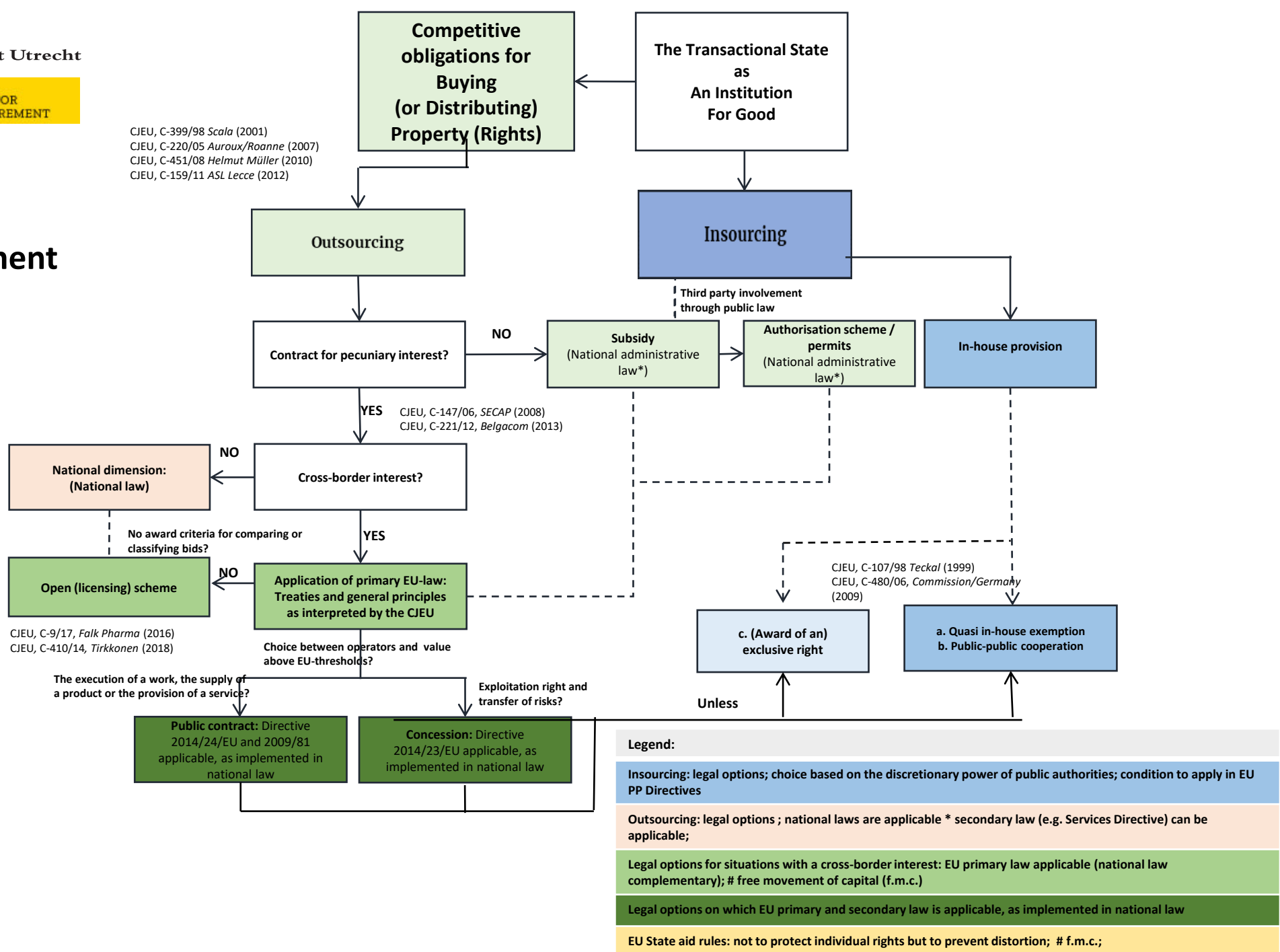
CJEU, C-399/98 *Scala* (2001)



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

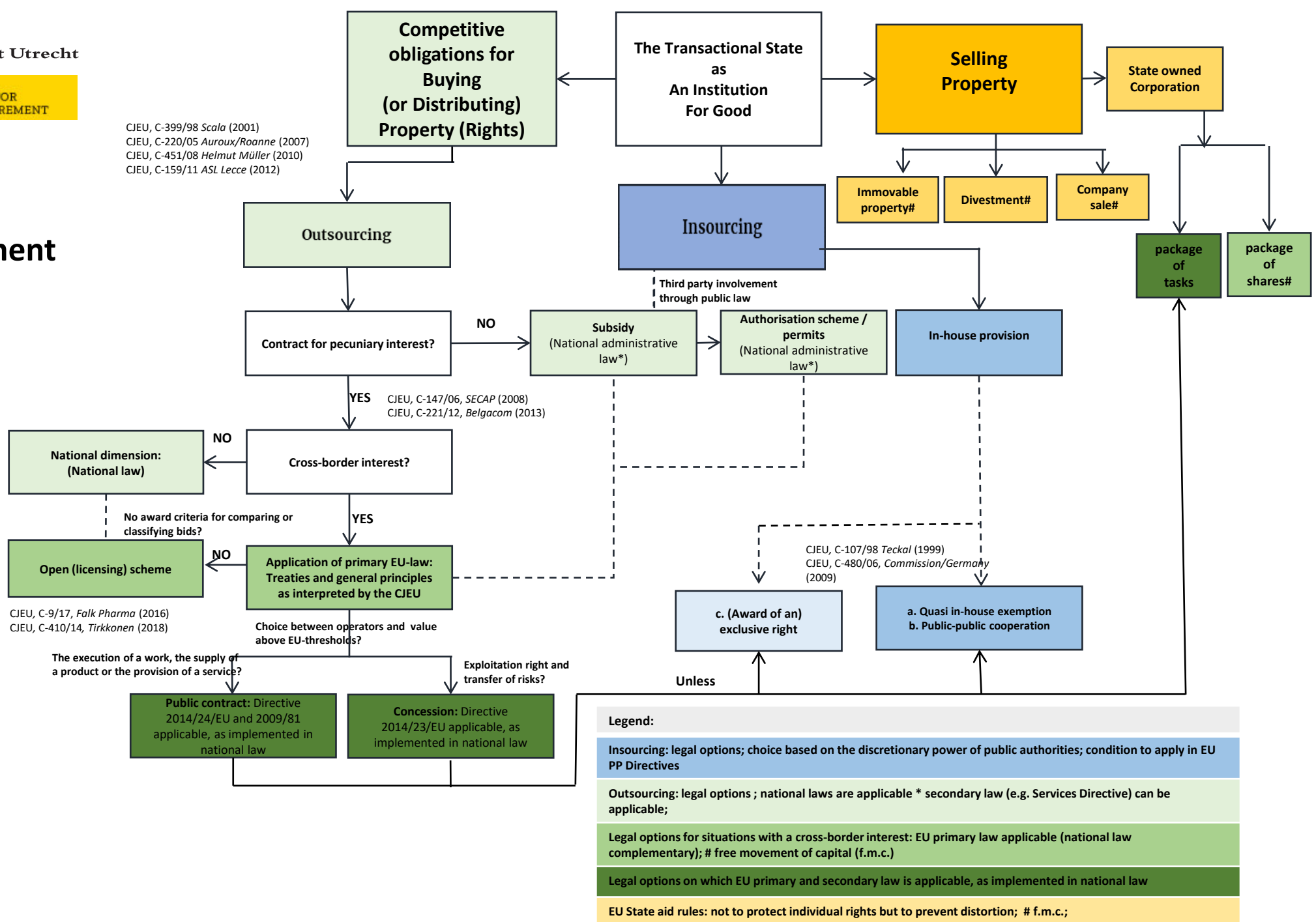


CJEU, C-399/98 *Scala* (2001)
 CJEU, C-220/05 *Auroux/Roanne* (2007)
 CJEU, C-451/08 *Helmut Müller* (2010)
 CJEU, C-159/11 *ASL Lecce* (2012)

CJEU, C-147/06, *SECAP* (2008)
 CJEU, C-221/12, *Belgacom* (2013)

CJEU, C-107/98 *Teckal* (1999)
 CJEU, C-480/06, *Commission/Germany* (2009)

Public procurement in a broad view





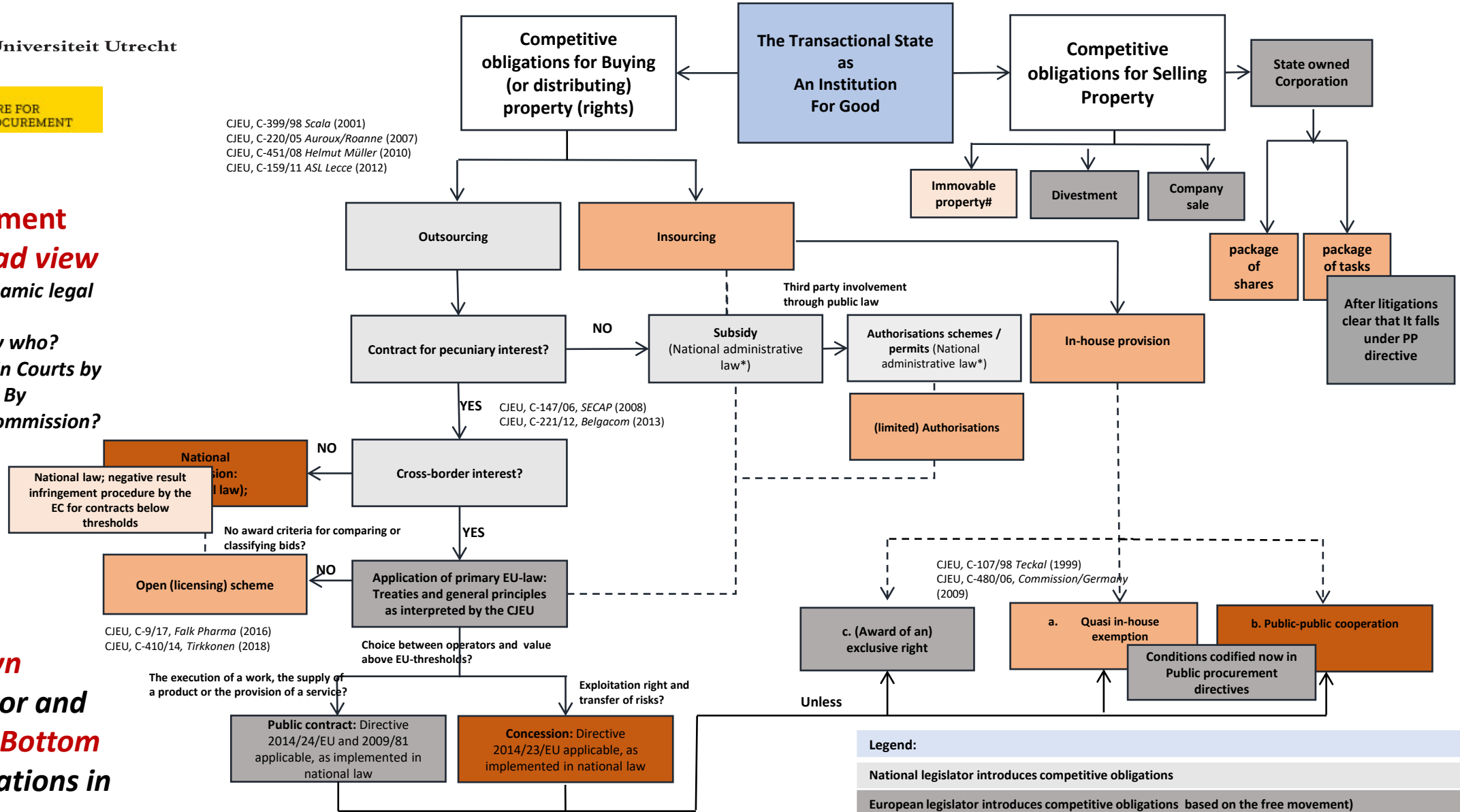
Public procurement in a broad view

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)
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Observation: Litigation in courts triggered a more coherent, consistent and equitable legal system of distribution and award.

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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CENTRE FOR
PUBLIC PROCUREMENT

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Thank you for your attention!