

The Role of Soft Law in Digital Regulation: Challenges and Opportunities

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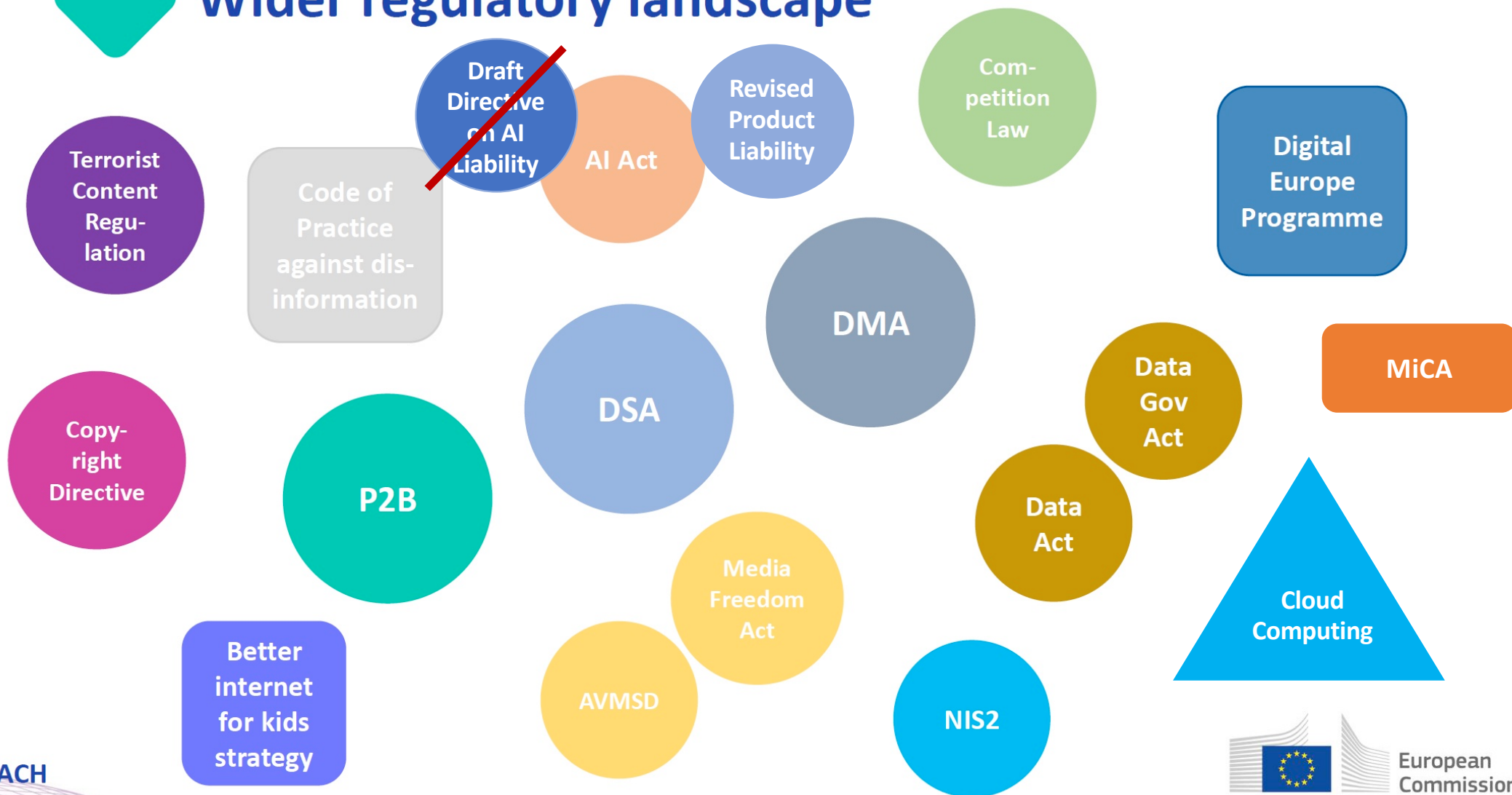
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Wider regulatory landscape



The Role of Soft Law:

I.- Artificial Intelligence

I.1.- AI Governance and Regulation

I.2.- AI Liability

I.3.- AI Agents and Contracting

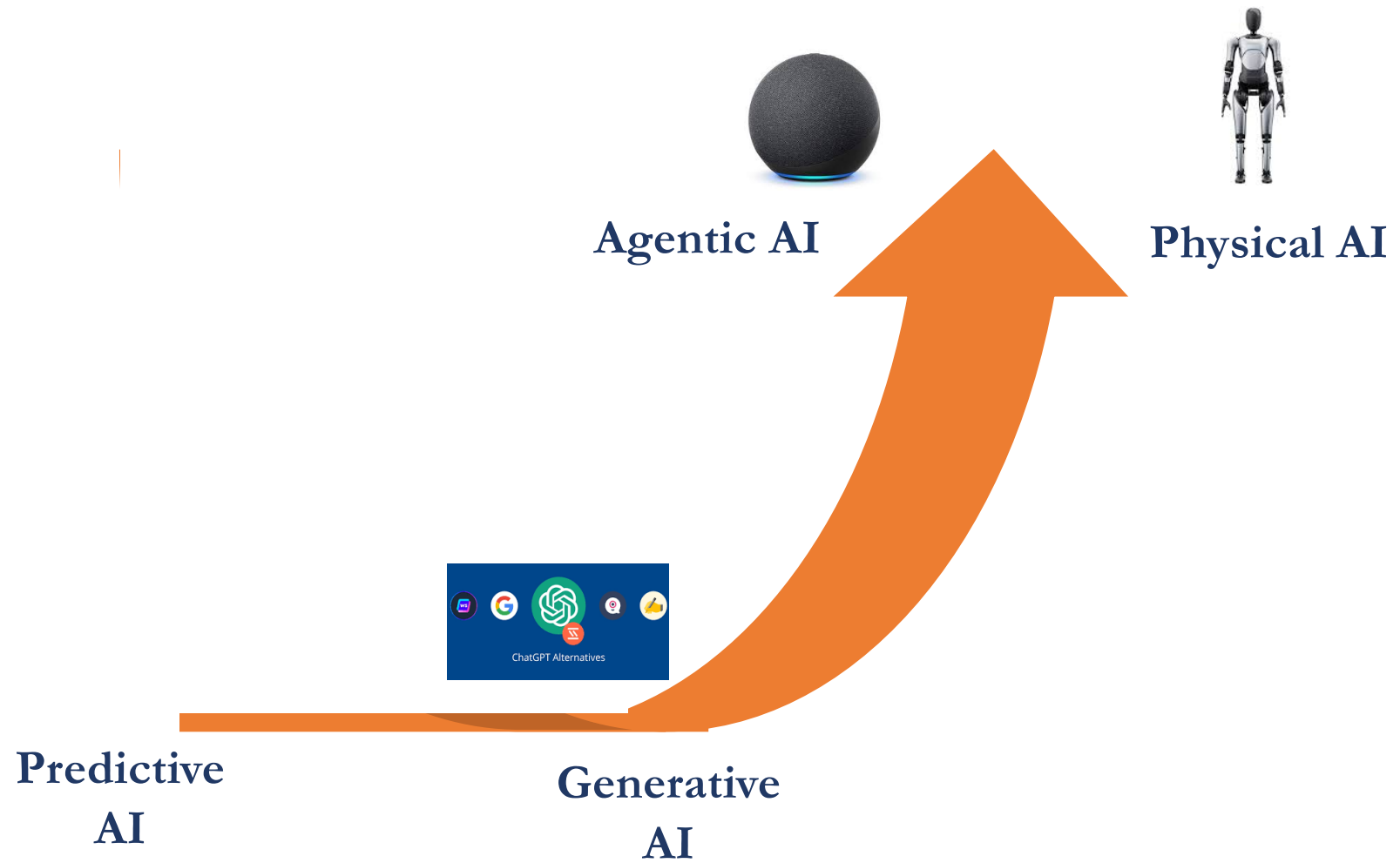
II.- Data Contracts and Data Sharing

III.- Digital Assets

The Role of Soft Law:

I.- Artificial Intelligence

I.1.- AI Governance and Regulation



Self-governance

Industry Principles, Ethical
Codes and Committees

Soft-Law

OECD, G7, UN, UNESCO;
G20

National initiatives: voluntary

Technical standards

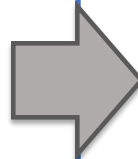
ISO/IEC, IEEE, C2PA, others

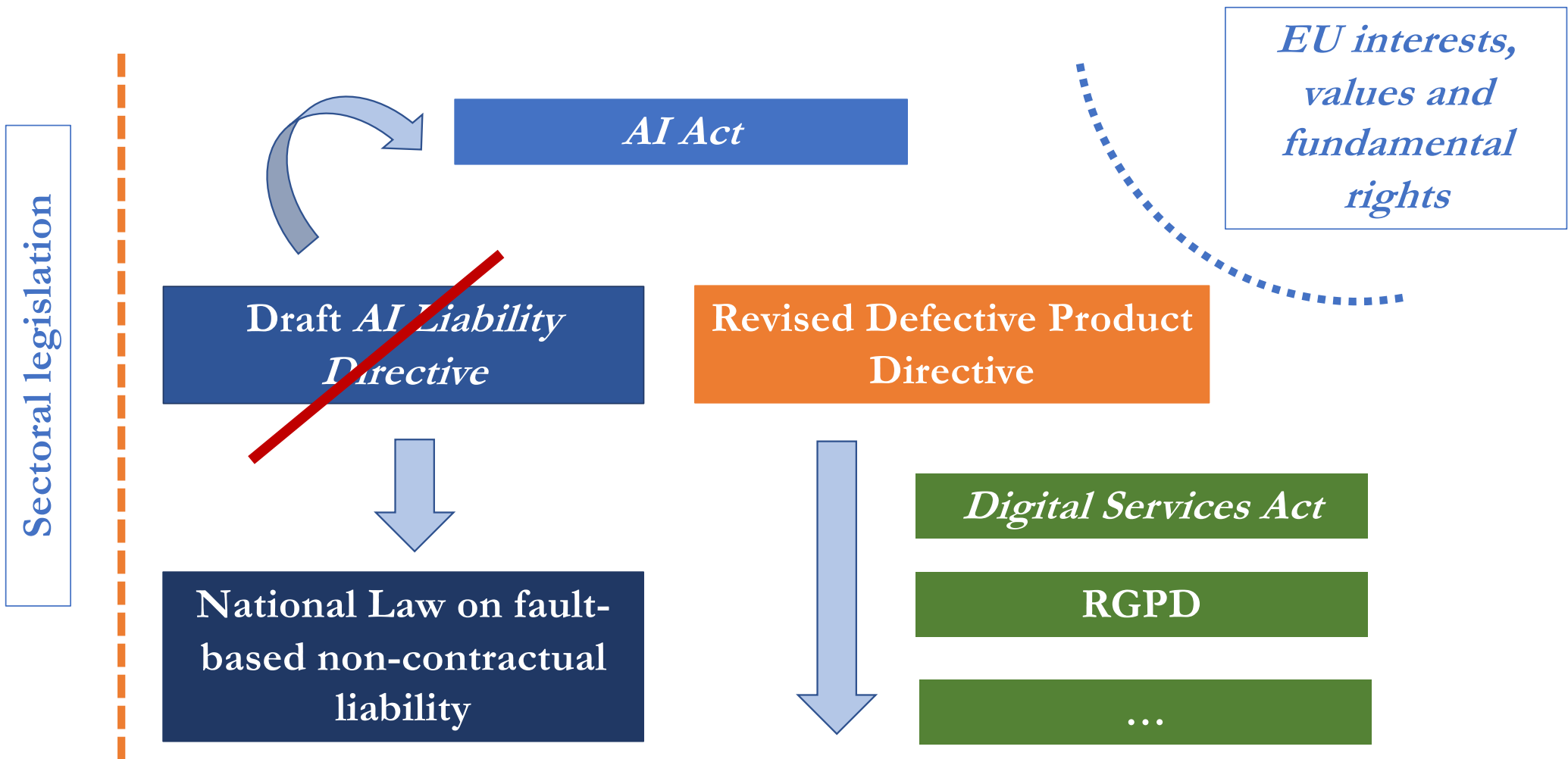
Hard-law

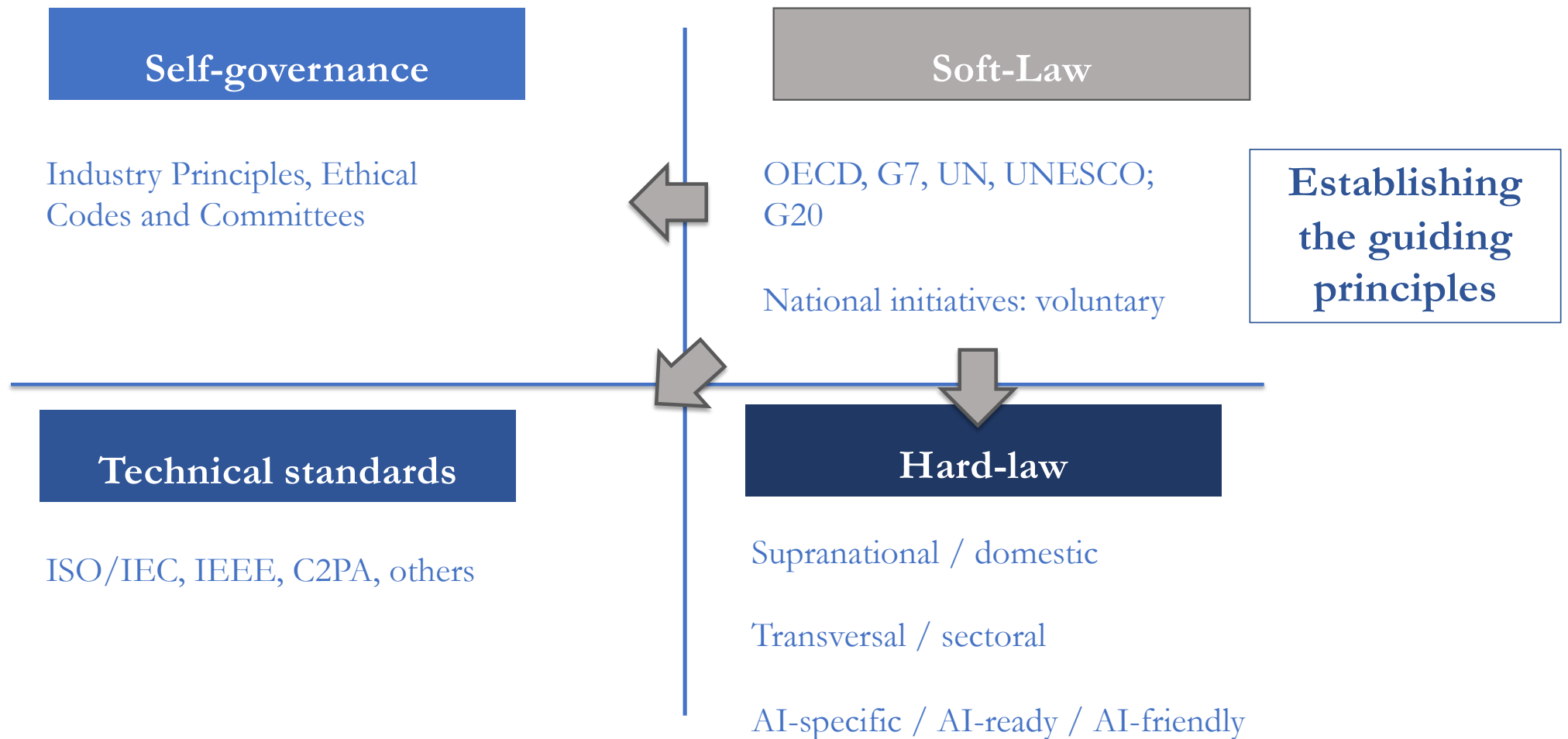
Supranational / domestic

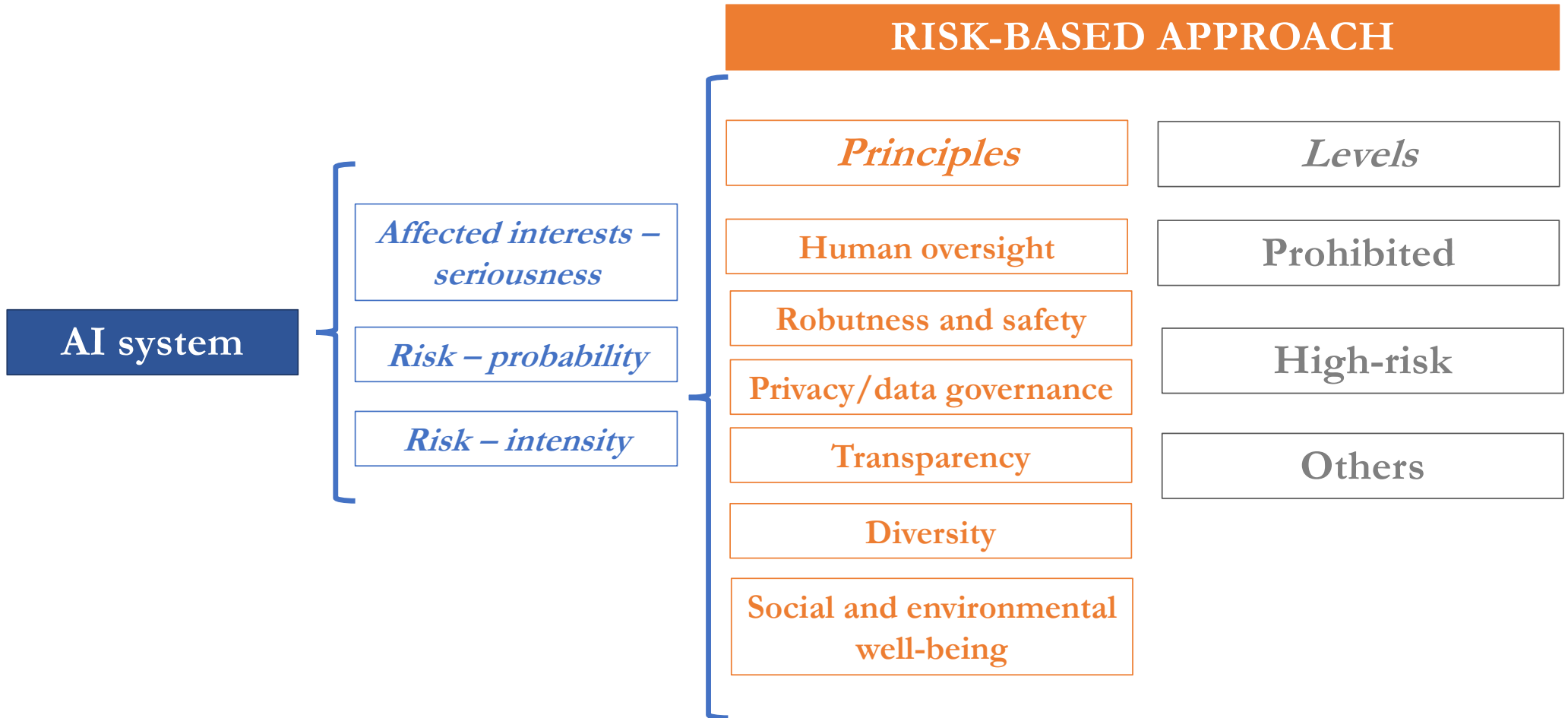
Transversal / sectoral

AI-specific / AI-ready / AI-friendly







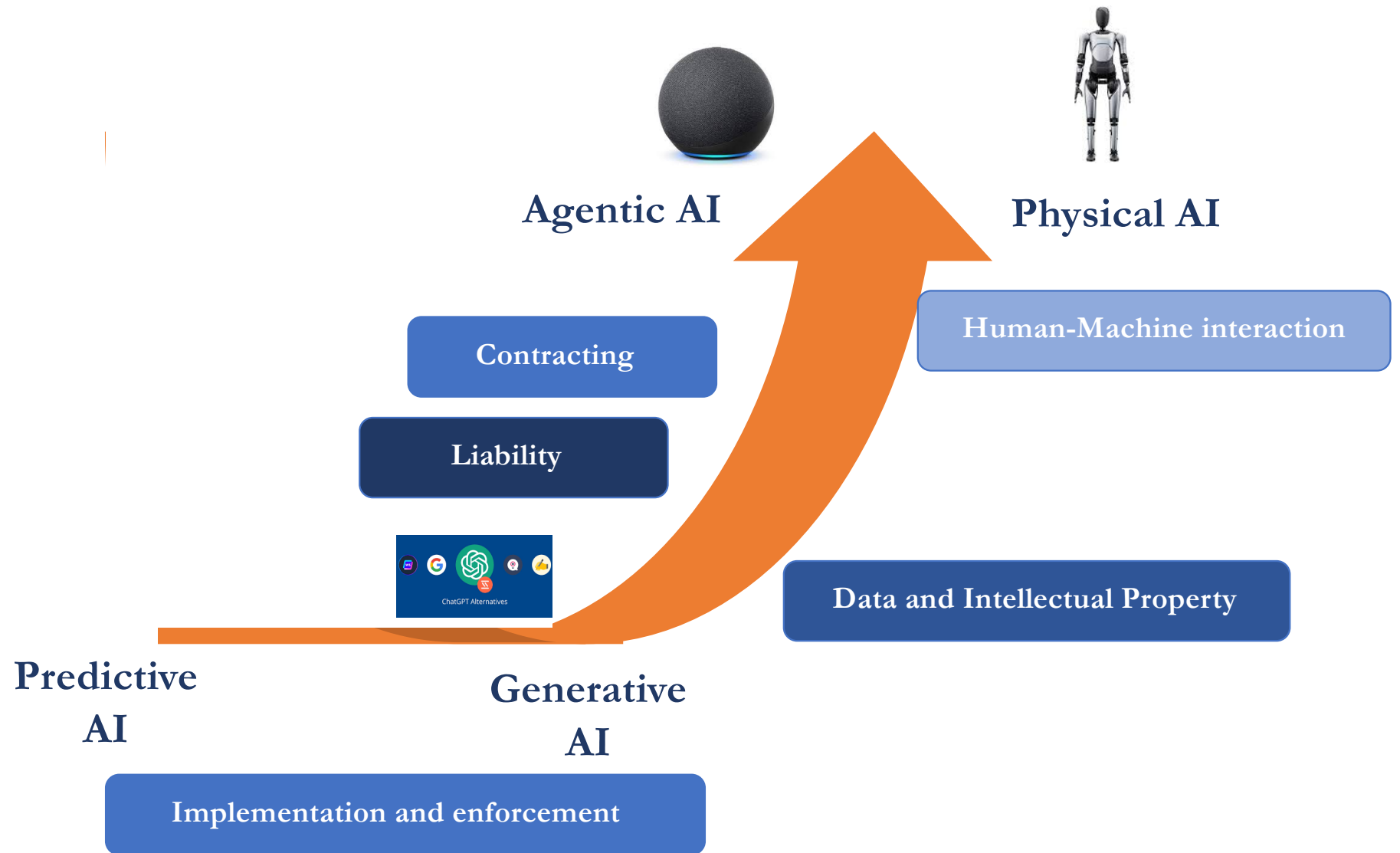


The Role of Soft Law:

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I.1.- AI Governance and Regulation

I.2.- AI Liability



DISTINCTIVE FEATURES OF AI AND EMERGING DIGITAL TECHNOLOGIES: DISRUPTIVE POTENTIAL

INCREASING AUTONOMY

Unpredictability

DATA- DEPENDENCE

OPENNESS

VULNERABILITY

Cybersecurity

COMPLEXITY

Design and operation

*Multiple actors
(ECOSYSTEMS)*

*Plurality of parts and
components*

OPACITY

“Black Box” effect



The Role of Soft Law:

I.- Artificial Intelligence

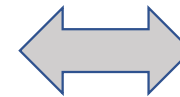
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**Vendor /
lessor**



**Data
Provider**

Buyers – smart store

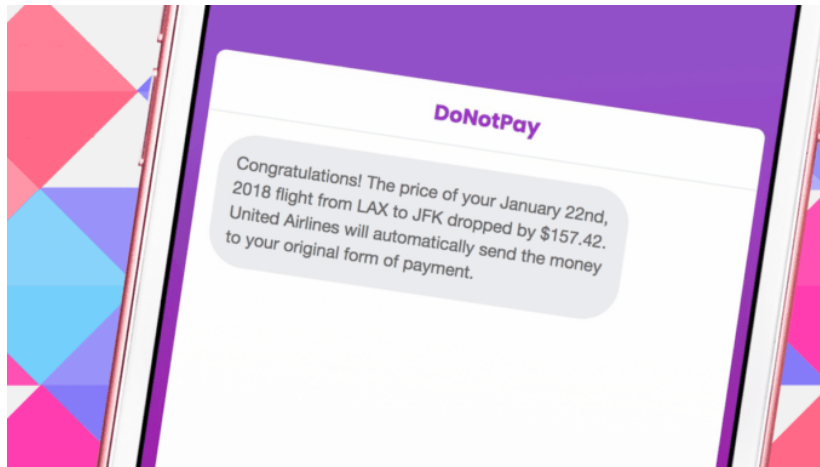


**Sellers – smart
warehouse**



Operator





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OECD, G7, UN, UNESCO;
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Hard-law

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ELI Guiding Principles on ADM in Europe



UNCITRAL WG IV on E-Commerce
Use of AI in international trade



EU Proposals

AI Liability Directive
Revised Directive on Defective Product
Pilot project on Novel forms of contracting

- Guiding Principle 1: Law-compliant ADM.
- Guiding Principle 2: Non-discrimination against ADM.
- Guiding Principle 3: Attribution of decisions adopted by ADM
- Guiding Principle 4: Disclosure that the decision-making is automated.
- Guiding Principle 5: Traceable decisions.
- Guiding Principle 6: Reasoned decisions
- Guiding Principle 7: Allocation of risks to the operator
- Guiding Principle 8: No limitations to the exercise of rights and access to justice
- Guiding Principle 9: Human oversight/action
- Guiding Principle 10: Human review of significant decisions
- Guiding Principle 11: Responsible ADM
- Guiding Principle 12: Risk-based approach for ADM



**ELI Model Rules on Digital Assistants
and Consumer Law**
ADM-readiness test on B2C



ELI Guiding Principles and Model Rules on Digital Assistants for Consumer contracts (2025)

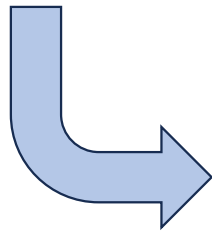


United Nations



Model Law on Automated Contracting July 2024

UNCITRAL WG IV on E-Commerce
Use of AI in international trade



- 1). Legal recognition rules, validity and enforceability
- 2). Rules and mechanisms for attribution
- 3). Risk allocation rules: error / malfunctioning / unexpected actions



ELI Guiding Principles on ADM in Europe

Principle 1: Law-compliant ADM.

...

Principle 4: Disclosure that the decision-making is automated.

Principle 5: Traceable decisions.

Principle 6: Reasoned decisions

...

Principle 8: No limitations to the exercise of rights and access to justice

Principle 9: Human oversight/action

Principle 10: Human review of significant decisions

Principle 11: Responsible ADM

...



United Nations

UNCITRAL WG IV on E-Commerce
Use of AI in international trade

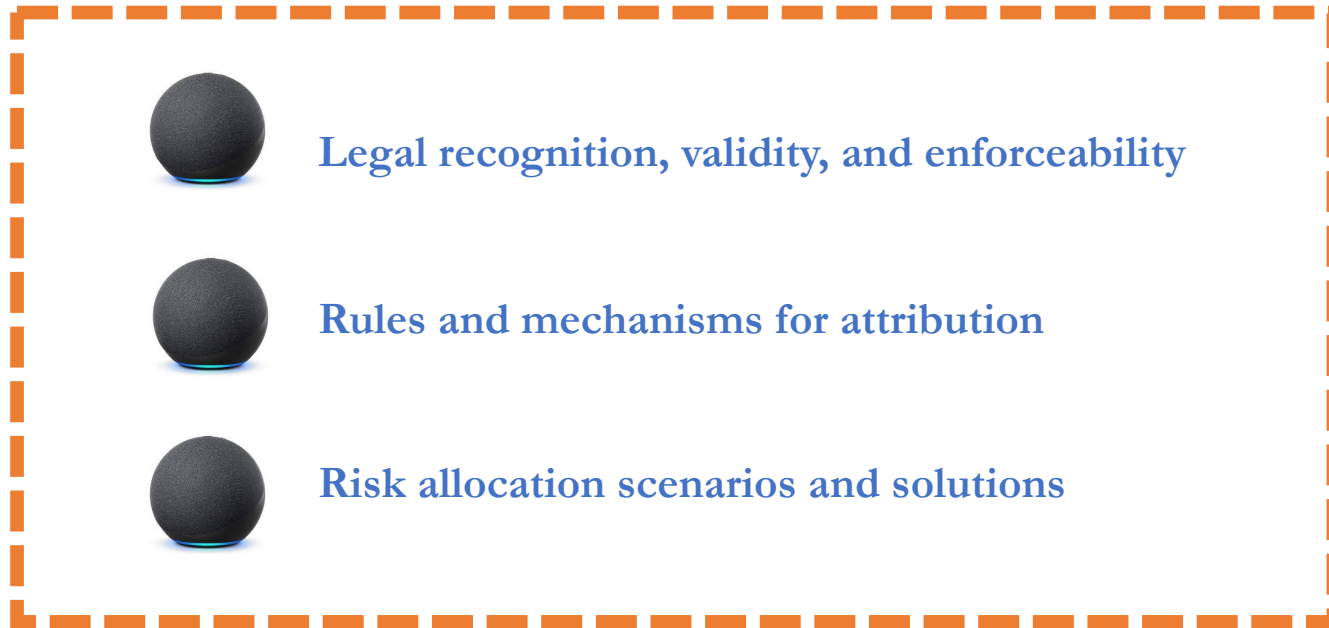




Law compliance



Good faith and general principles



Technology neutrality



Information requirements

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II.- Data Contracts and Data Sharing



Data Act

MCT for B2B Data Sharing



United Nations

UNCITRAL Default rules for Data provision
contracts



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ALI-ELI Principles for Data Economy



1.- MCT in the Data Act

Article 41

Model contractual terms and standard contractual clauses

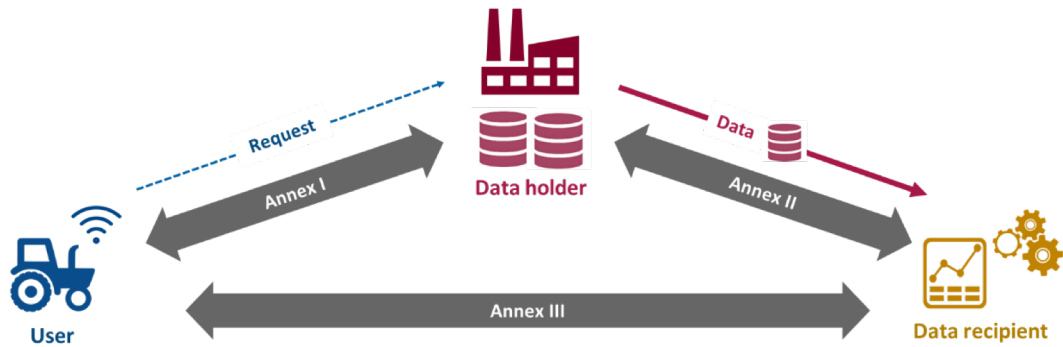
The Commission, before 12 September 2025, shall develop and recommend non-binding model contractual terms on data access and use, including terms on reasonable compensation and the protection of trade secrets, and non-binding standard contractual clauses for cloud computing contracts to assist parties in drafting and negotiating contracts with fair, reasonable and non-discriminatory contractual rights and obligations.

Recital (111) In order to help enterprises to draft and negotiate contracts, the Commission should develop and recommend non-binding model contractual terms for business-to-business data sharing contracts, where necessary taking into account the conditions in specific sectors and the existing practices with voluntary data sharing mechanisms

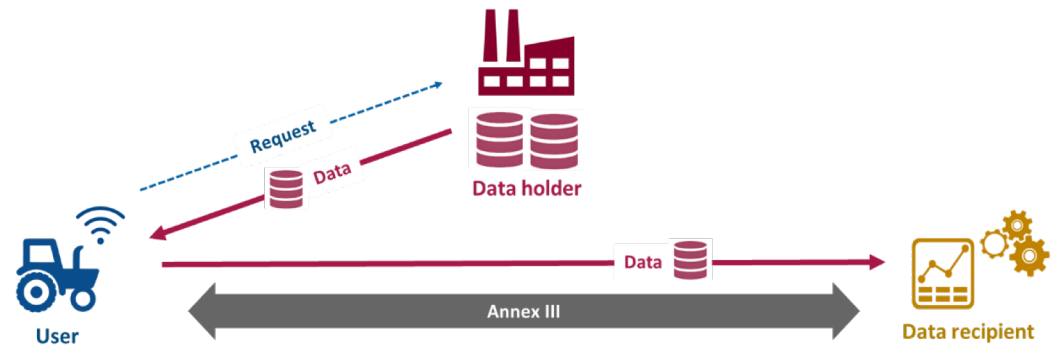


Expert Group on B2B data sharing and cloud computing contracts (E03840)

Trilateral data sharing scenario (mandatory for data holder)



Retrieve-and-transfer via Article 4



Bilateral (voluntary) data sharing scenario





2.- MCT and unfairness

2.1. Why unfairness risk in B2B Data sharing

*Study on model contract terms and fairness control in data sharing and in cloud contracts and on data access rights**

Fairness problems

Market failures

lack of competition, data monopoly situation, gatekeeping-enabling value chain, non-disputable ecosystems/markets

Transaction costs

searching, negotiating, drafting, expertise, valuation, monitoring, performing, termination

Fairness challenge: role in the data ecosystem *over* economic size



2.- MCT and unfairness

2.2. How MCT deal with unfairness: possible roles and limitations

Study on model contract terms and fairness control in data sharing and in cloud contracts and on data access rights

*promoting voluntary data sharing through recommended model contractual clauses that are **presumed to achieve certain fairness objectives**. Model clauses are only useful in situations where the data holder and the data recipient have identified compatible business purposes and are convinced of the mutual benefit of data sharing*

***Recital (111)** - Those model contractual terms should be primarily a **practical tool to help** in particular SMEs to conclude a contract. When used widely and integrally, those model contractual terms should also have the beneficial effect of **influencing the design of contracts** regarding access to and the use of data and therefore **lead more broadly towards fairer contractual** relations when accessing and sharing data.*

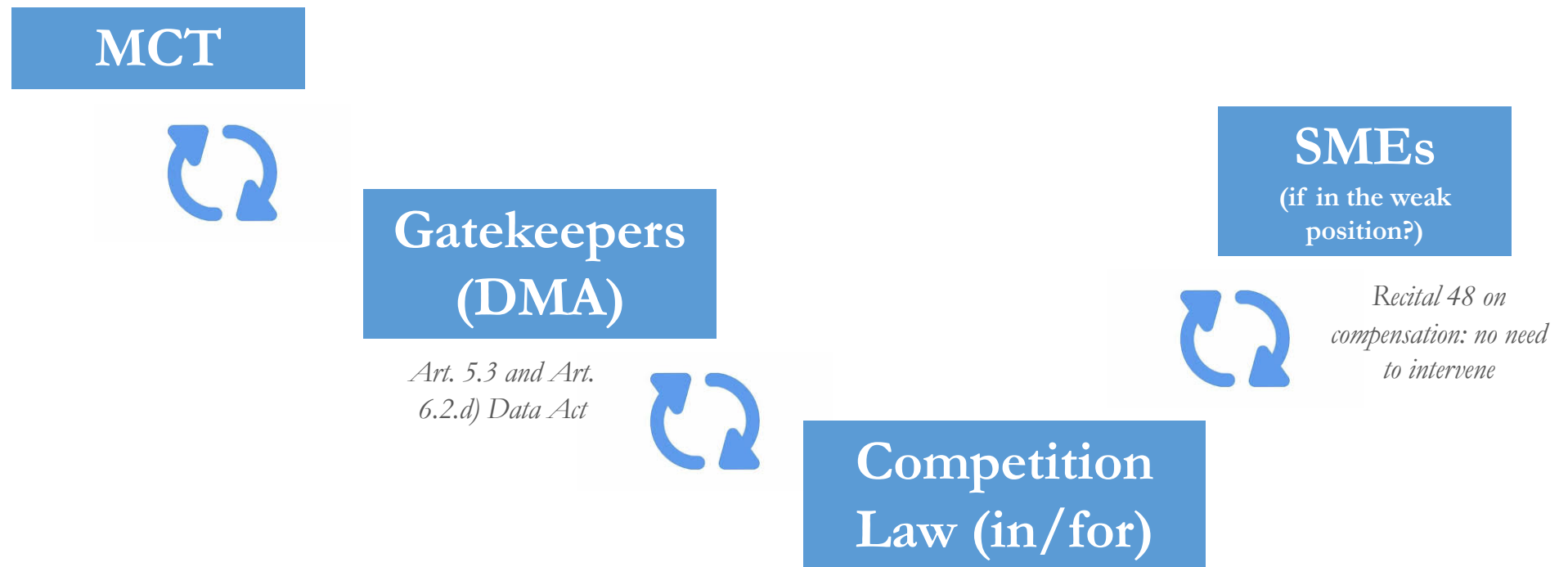


Art. 13.3 Data Act: good commercial practice



2.- MCT and unfairness

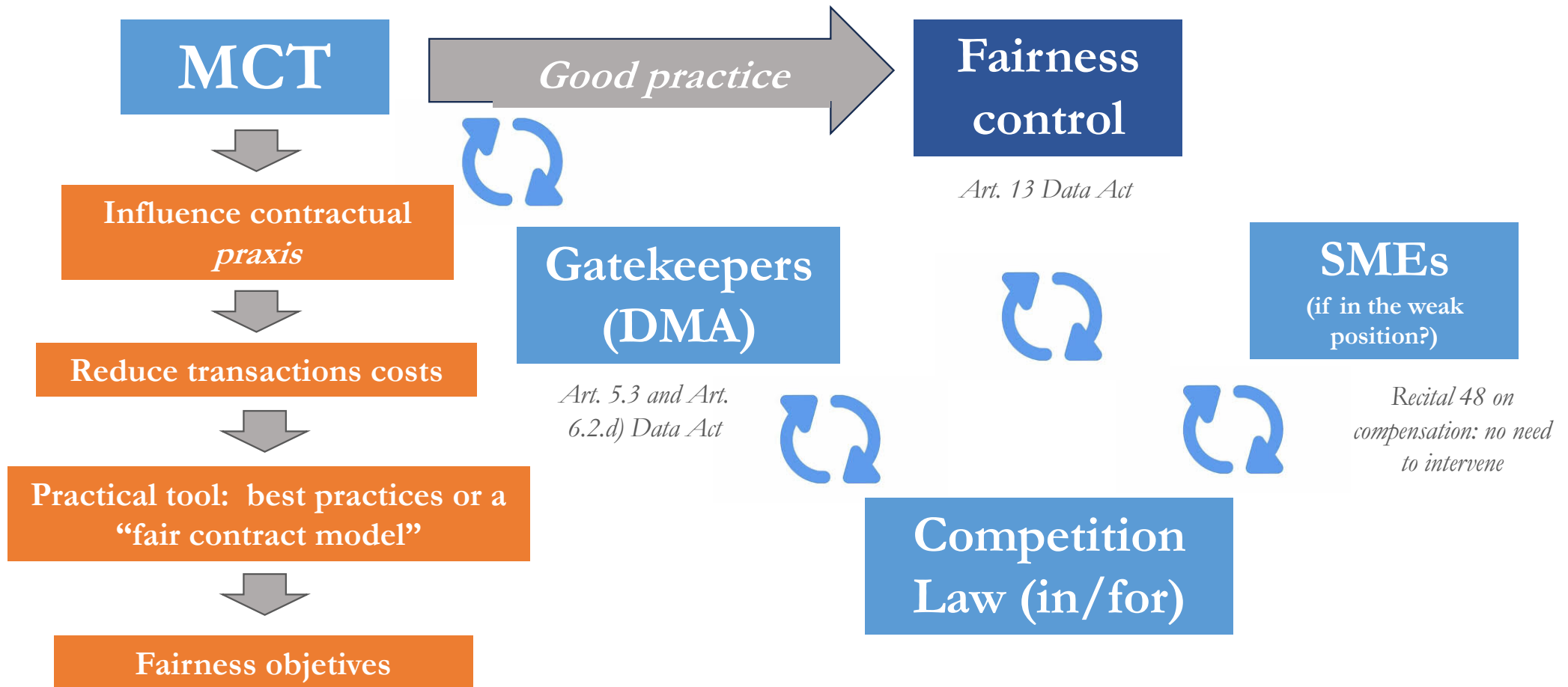
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UNIDROIT

International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

UNIDROIT DAPL *Digital Assets and Private Law*

UNIDROIT *Best Practices on Effective Enforcement*



**United
Nations**

UNCITRAL toolkit on *civil asset tracing and recovery
in insolvency proceedings*

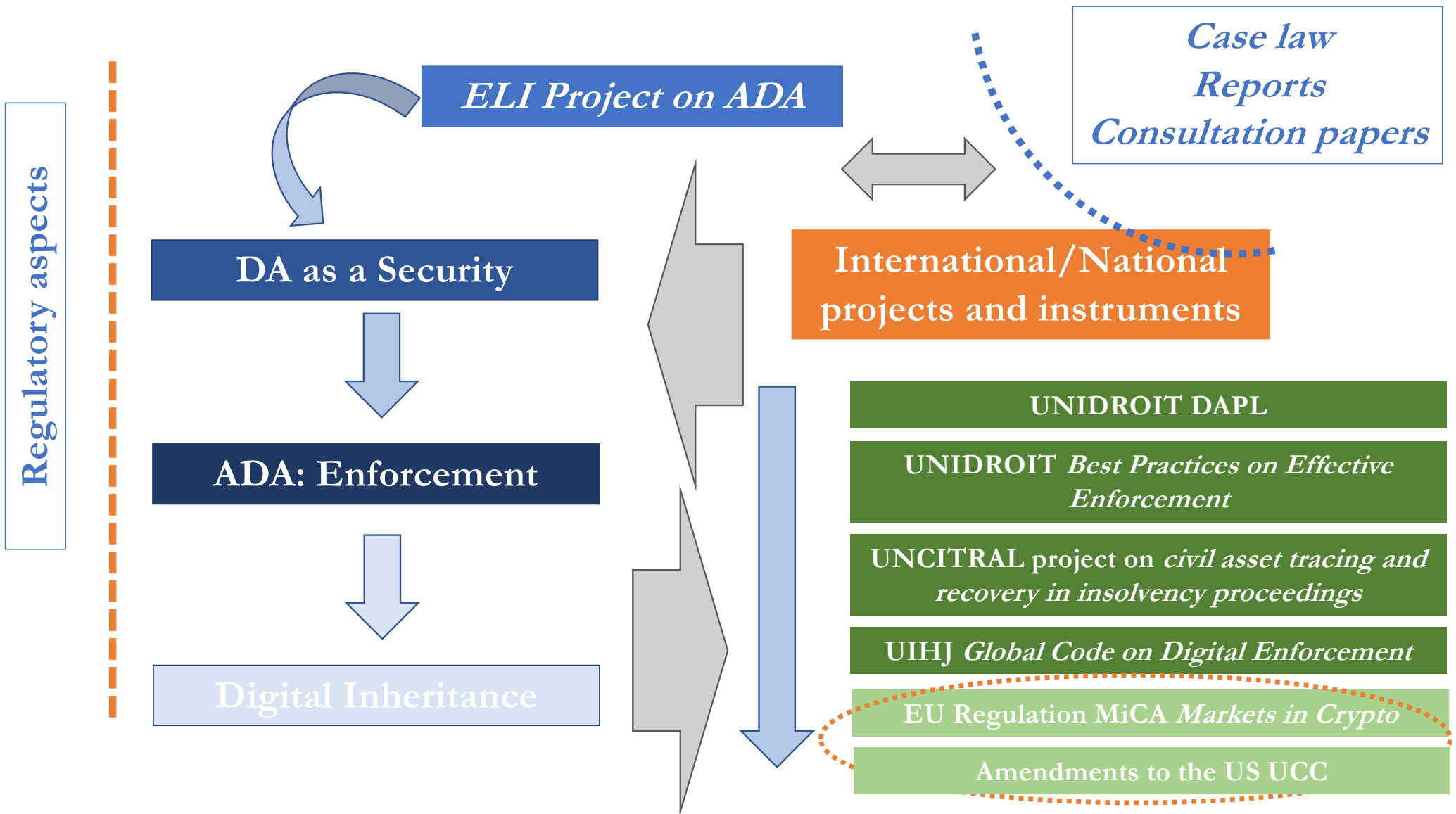


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ELI DA as a Security

ADA: Enforcement against Digital Assets



ELI Principles and Guidance for Implementation on Enforcement against Digital Assets

A.- Structure and aims

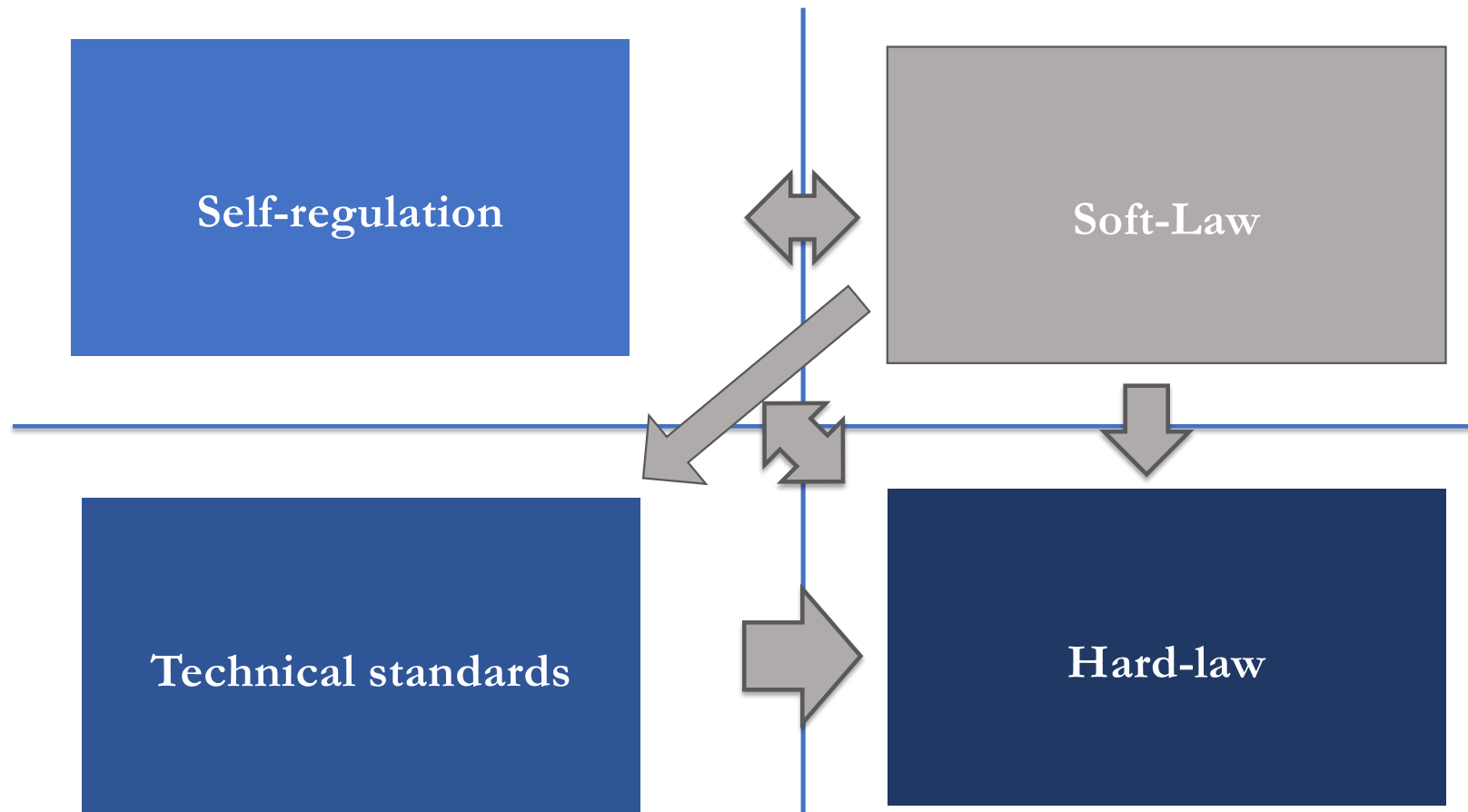
Principles and Guidance for Implementation
lawmakers / organizations / courts / enforcement agents

B.- Definitions

Digital asset
an electronic record that represents a value, a right, or a legally protected interest and which is capable of being subject to control
Enforcement / Third Parties

C.- Scope

Digital Assets / DA linked to other assets
Enforcement / no self-enforcement
Civil / insolvency / criminal / financial regulation



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