



# **Vlth IPA REGIONAL PUBLIC PROCUREMENT CONFERENCE**

## **EU LAW AND DEFENCE PROCUREMENT INTEGRATION**

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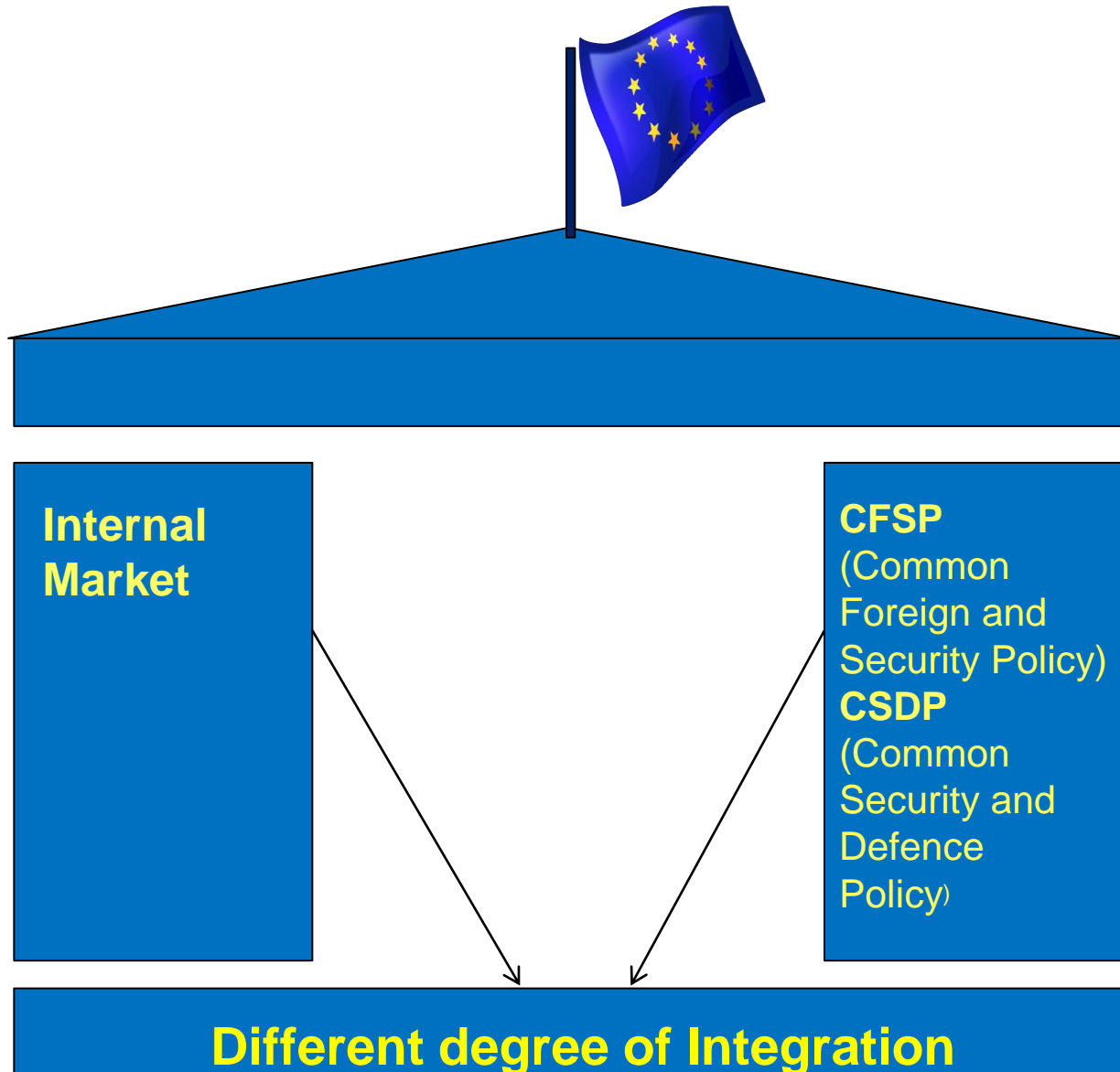
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# Outline

- Preliminary Clarifications – EU Legal Framework
- The ‘Geography’ of Defence Procurement Regulation
- Defence and Security Procurement Directive (DSPD): Field of Application
- The interplay between the DSPD and Article 346 TFEU
- DSPD v Code of Conduct on DP (EDA)
- DSPD (main) Exemptions
- DSPD: Main rules
- Offsets
- In lieu of conclusions: Key Issues to remember

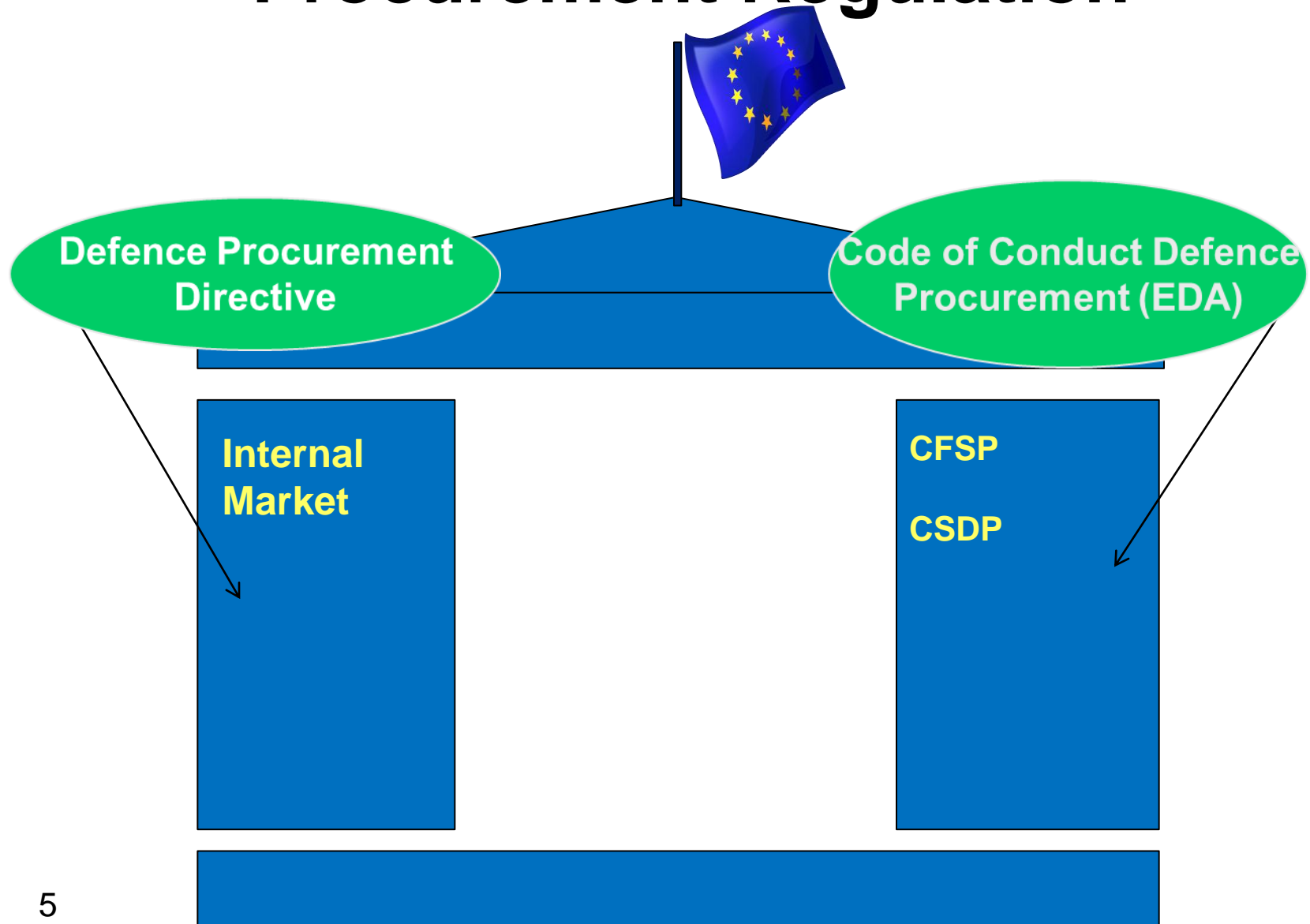
# The EU Legal Framework



# The EU Legal Framework

- This differentiation in the intensity of integration refers primarily to the following:
  - a) Decision making process- instruments
  - b) Role of the European Commission
  - c) Adjudication role of the Court of Justice of the EU
  - d) Role of the European Parliament
- Accordingly:
  - Internal Market -> high degree of intensity of integration (supranational)
  - CSDP -> lower degree of intensity of integration, limited role for Commission, CJEU, Parliament (intergovernmental)

# The 'Geography' of Defence Procurement Regulation



# DSPD: Field of Application

- Contracts covered ('Material Scope' Art. 2):
  - contracts for the procurement of military equipment, and related works and services
  - contracts for the procurement of sensitive equipment and related works and services
  - contracts for the procurement of works, supplies and services which have a security purpose and involve classified information
- 'Military equipment': equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material

# DSPD: Field of Application

- Contracts covered ('Material Scope' continued):
  - Point of reference the list in Council Decision 255/58 of 15 April 1958 (although not exhaustive)
  - The 'material scope' of the DSPD is wider than that of Article 346 TFEU because it includes in addition to 'hard defence' equipment and services:
- Adapted 'civilian' technologies ('dual use') works and services intended for military purposes; AND
- Sensitive equipment, works and services that have a security purpose and involve classified information

# DSPD: Field of Application

- Contracts covered ('Material Scope' continued):

Before DSPD:

**PS Directive 2004/18/EC**

**Article 346 TFEU**

After the DSPD:

**PS Directive 2004/18/EC**

**DSPD 2009/81/EC**

**Article 346 TFEU**

# DSPD: Field of Application

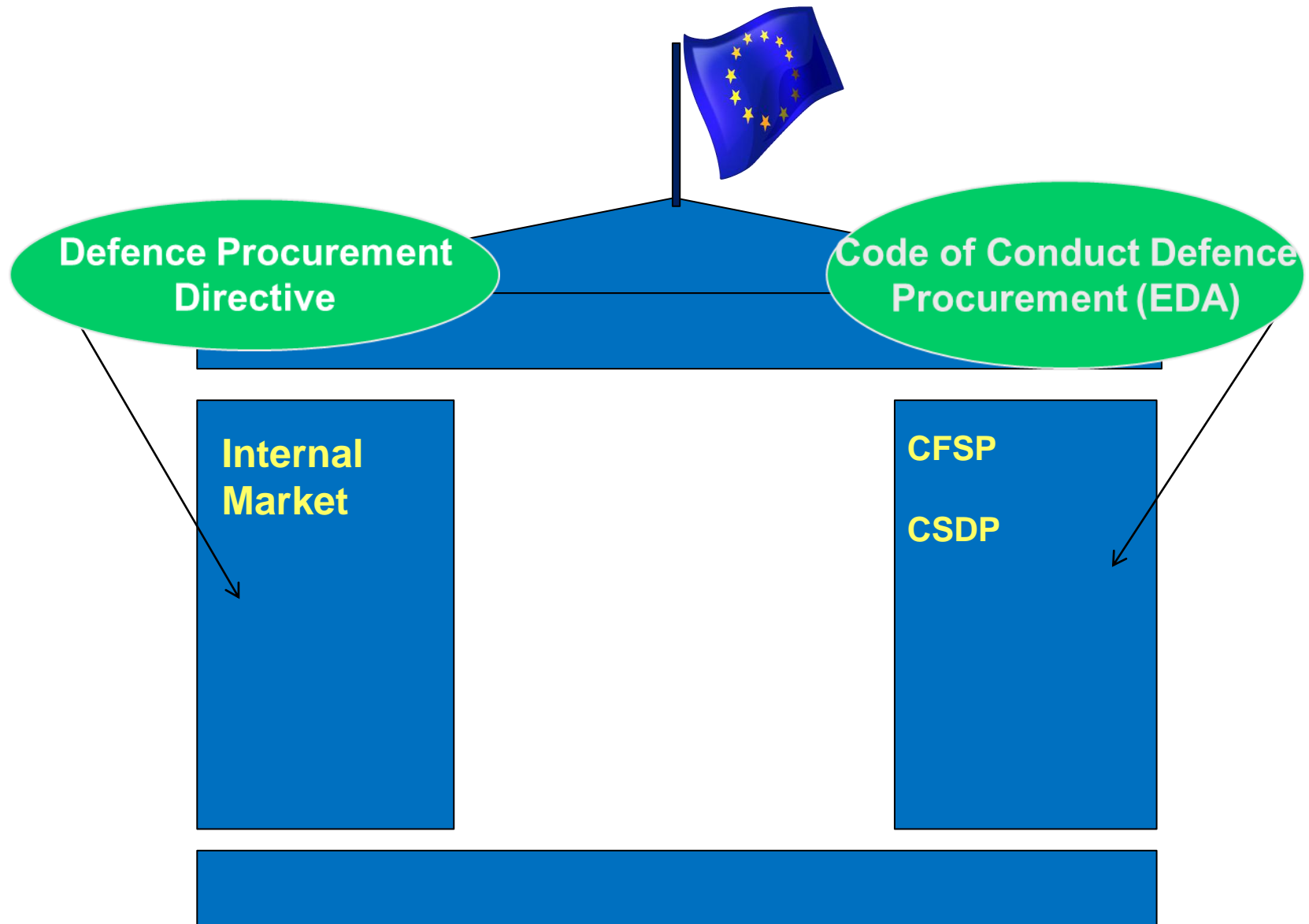
- Contracts covered ('Material Scope' continued):
  - Applicable Thresholds (Art. 8) excluding VAT:
- EUR 412 000 for supply and service contracts
- EUR 5 150 000 for works contracts

# DSPD: Field of Application

- Entities covered ('Personal Scope' Art. 1) :
  - 'Contracting authorities' as defined in Directives 2004/17 and 2004/18
  - This means that the DSPD does not apply only to contracting authorities in the field of defence (it is applicable even to private undertakings that operate on basis of special or exclusive rights in sectors such as energy, water, transport and postal services)

E.g. MoD, Police, border control agencies, airport operators

# DSPD v. Code of Conduct



# DSPD v. Code of Conduct

- Code of Conduct on Defence Procurement of the EDA (2006):
  - Intergovernmental, voluntary, non-legally binding, non-enforceable regime whose aim is to encourage cross-border competition in the field of 'hard defence' procurement (all EU MSs apart from Denmark and Romania plus Norway)
  - Field of application: 'Hard defence' contracts of € 1 million or more that where the conditions for the application of Article 346 TFEU are met
  - Contract opportunities are published online in the Electronic Bulletin Board (EBB)

# DSPD v. Code of Conduct

- Formally the DSPD and the Code of Conduct on Defence Procurement of the EDA are presented as 'complementary' instruments
- In reality they are inherently antagonistic

# The Big Elephant in the Room: Article 346 TFEU

- Article 346 (1b) TFEU:

‘Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security ..... the production of or trade in arms, munitions and war material: such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes’

# The Big Elephant in the Room: Article 346 TFEU

- ‘Commission’s position (Interpretative Communication on Article 346):
  - Article 346 TFEU is subject to a proportionality test i.e. MSs have to show that derogation from the rules of the Treaty in the field of arms trade is *linked* with their *essential security* interests and *necessary* to protect them. This can only be *ad hoc*
- The key questions:
  - How strong is the intensity of judicial review?
  - Classic (strict) Proportionality?
  - Adapted Proportionality (Manifest unsuitability/margin of appreciation to national preferences)?

# The Big Elephant in the Room: Article 346 TFEU

- CJEU's Interpretation of Article 346 TFEU

*e.g.:*

- *Case C- 414/97 Commission v. Spain*
- *Case C-252/01 Commission v. Belgium*
- *Case C-337/05 Commission v. Italy*
- *Case C-409/05 Commission v. Greece*
- *Case C-239/06 Commission v. Italy*

# Another Elephant in the Room?

## DSPD Exclusions

- Exclusions:
  - International rules (Art.12)
  - Disclosure of information (Art. 13(a))
  - Intelligence activities (Art.13(b))
  - Cooperative programmes (Art. 13(c))
  - Contract awards in third countries (Art. 13(d))
  - Government to government sales (Art. 13(f))
- Art. 11: ‘none of the rules, procedures, programmes, arrangements or contracts referred to in [the section on exclusions] may be used for the purpose of circumventing the provisions of this Directive’
- All exclusions are to be construed **narrowly**

# DSPD: Main Rules

- ‘Standard’ Award Procedures
  - Restricted Procedure (Art. 25)
  - Negotiated with prior publication of contract Notice (Art. 26)
- ‘Non-Standard’ procedures
  - Competitive Dialogue (Art. 27)
  - Negotiated without prior publication of a contract notice (Art. 28)

# DSPD: Main Rules

- Security of Information (Art. 22)
  - See also Commission's Guidance Note on Security of Information
- Security of Supply(Art. 23)
  - Security of supply to be considered through the award process and the contract performance
  - See also Commission's Guidance Note on Security of Supply
- Rules on Subcontracting (Art. 21)
  - See also Commission's Guidance Note on Subcontracting
- Subcontracting (lawful alternative to 'Offsets'?)

# Typology of Offsets

- Offsets (working general definition):
  - Practices followed by procuring governments in the field of defence procurement aiming at safeguarding some “return” for their domestic industry through the imposition of certain obligations on foreign prime contractors
  - e.g. The Ministry of Defence concludes a contract of €1 billion and imposes an obligation on the foreign contractor to “return” 30% of the value of the contract back to the procuring country

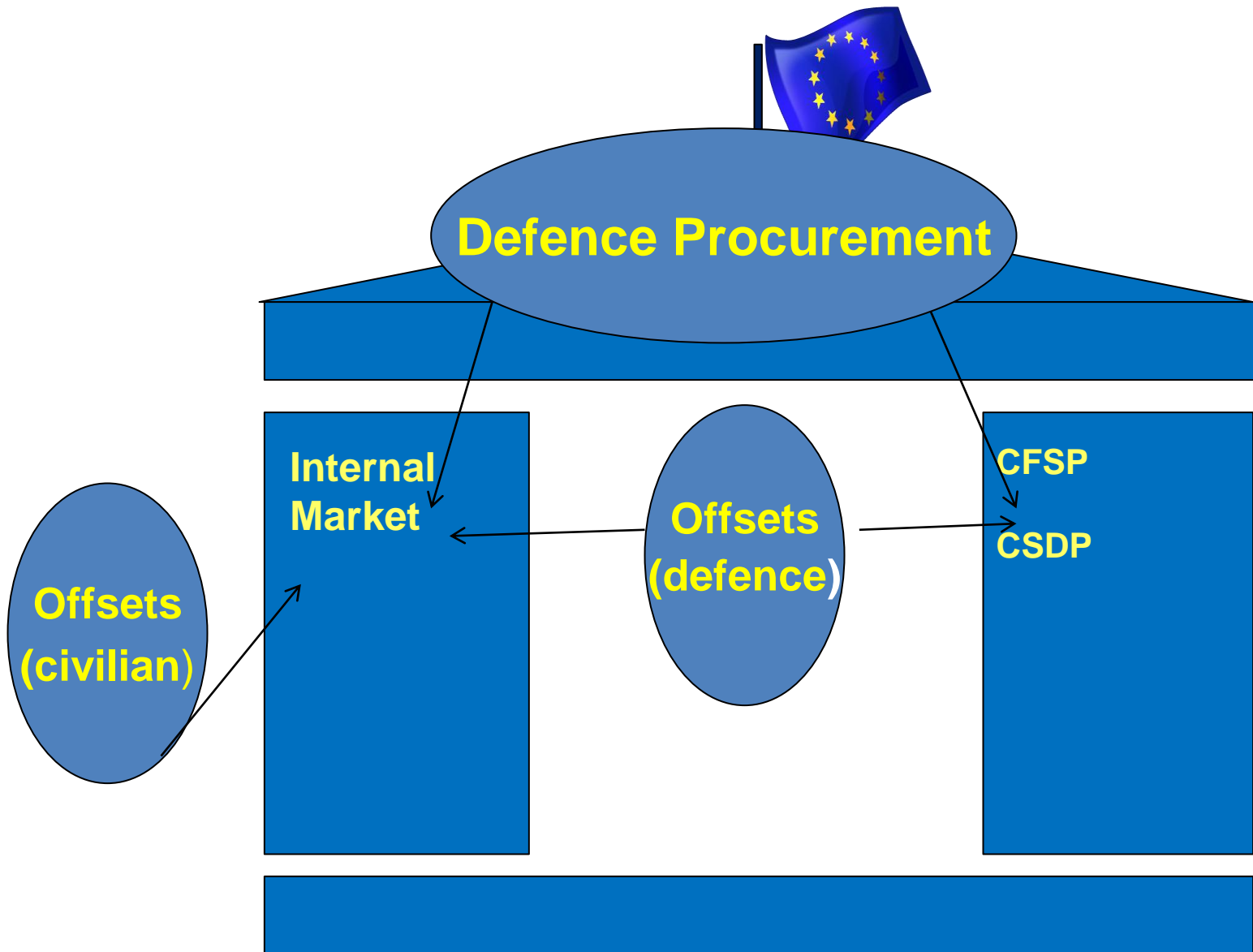
# Typology of Offsets

- Direct defence offsets:
  - Offsets related to a specific defence procurement contract
  - e.g. The defence contractor has an obligation to use as subcontractor in the delivery of the specific defence contract a company based in the procuring country
- Indirect defence offsets:
  - Defence related offsets that are not linked with the specific defence contract
  - e.g. obligation on defence contractor to buy avionics from domestic companies for future AEW platform contracts

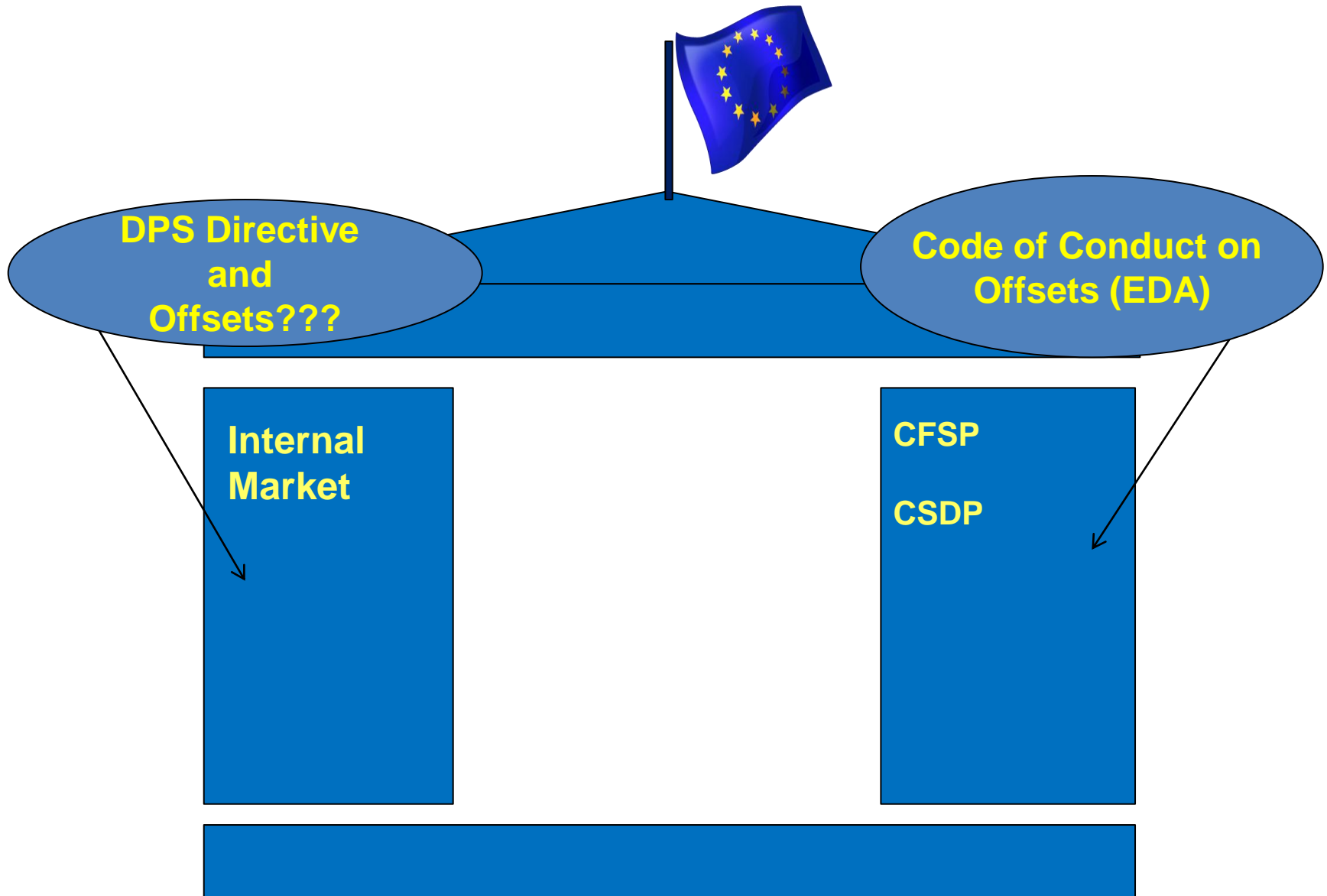
# Typology of Offsets

- Indirect non-defence related – (civilian) Offsets
  - e.g. Obligation on defence contractor to buy olive oil, photocopy machines, gas etc. from the procuring country

# Offsets



# Offsets



# Typology of Offsets

- Offsets in defence procurement appear mainly as:
    - condition for participation of foreign firms in domestic defence procurement processes
- and/or
- award criterion
  - Alternatively they may be included as contractual performance obligations

# Offsets: Compatibility with EU Law?

- Offsets - a barrier to trade between Member States?
  - Yes in principle (C- 8/74 *Dassonville*)
- Can they be justified?
  - Only under one of the Treaty exemptions (e.g. Articles 36 or 346 TFEU)
- !!! The use of these exemptions is subject to specific conditions which are interpreted narrowly by the CJEU

# Offsets: Compatibility with EU Law?

- Offsets and DSPD:
  - No express reference in the text of the DSPD
- However potentially affected by:
  - Provisions “subcontracting”
  - “Non-discriminatory” contract performance conditions (Art. 20)
  - “Non-discriminatory” award criteria (Art. 47)

# Offsets: Compatibility with EU Law?

- Indirect civilian offsets are manifestly unsuitable for securing the essential security interests of a Member State – Article 346 TFEU not applicable

# Offsets: Compatibility with EU Law?

- What about defence related offsets?
- Factors that could play a role:
  - CJEU's Interpretation of Article 346 TFEU
  - Degree of willingness on the part of the Commission to challenge offset practices
  - Challenges by aggrieved contractors against contracts that used 'offsets' as award sub-criteria

# Offsets: Compatibility with EU Law?

- The Commission believes that offsets are not automatically justified under Article 346 TFEU
- However the Commission has been reluctant to institute proceedings (this has changed after the adoption of the DP Directive)
- Relevant Documents:
  - Commission's Interpretative Communication of Article 346 TFEU
  - Guidance Note on Offsets
  - Commission's Report on the Transposition of the Defence and Security Procurement Directive

# Offsets: Compatibility with EU Law?

- !!! The EDA's Code of Conduct on Offsets is an attempt to “contain” offsets in the medium term but **does not legalise** offsets (here potential tension between the two regimes)

# Key issues to Remember

- Despite the adoption of the DSPD there is still **lack of awareness** of fundamental rules and principles of EU law in the defence sector (both on the demand and on the supply side)
- This is due to the **culture of secrecy** of the defence sector and the years of **tolerance** of national rules and practices that were manifestly contrary to EU law
- ‘Negative externalities’:
  - Higher degree of probability for sustained/systemic **protectionist practices** (and similar **mindsets**)
  - Higher degree of probability for **corruption**
  - **Higher prices**

# Key issues to Remember

- Many “**givens**” of arms trade (internal/external) in EU are being **challenged**
- The whole **re-evaluation** of the **EU competences** (Commission, CJEU) in this area can have knock on effects on both the internal and external EU arms trade dimensions
- **Shift of the centre of gravity** of policymaking in the field
- Need for **compliance** for **candidate countries** for accession to the EU

# Key issues to Remember

- Offsets **are not** automatically exempted from EU rules through Article 346 TFEU
- Low level of scrutiny established by Article 346 renders “prosecution” by the Commission of most offsets practices more difficult than usual (but potential impact of the DSPD?)
- The EDA’s Code of Conduct on Offsets is an attempt to “contain” offsets in the medium term but **does not legalise** offsets

# THANK YOU

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