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Application of IED Article 15(4) derogations

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IED Article 13 Forum, 20 December 2017



Presentation overview

- ▶ **Rationale of the project**

- ▶ IED Art. 15(4) derogations: what do and don't we know

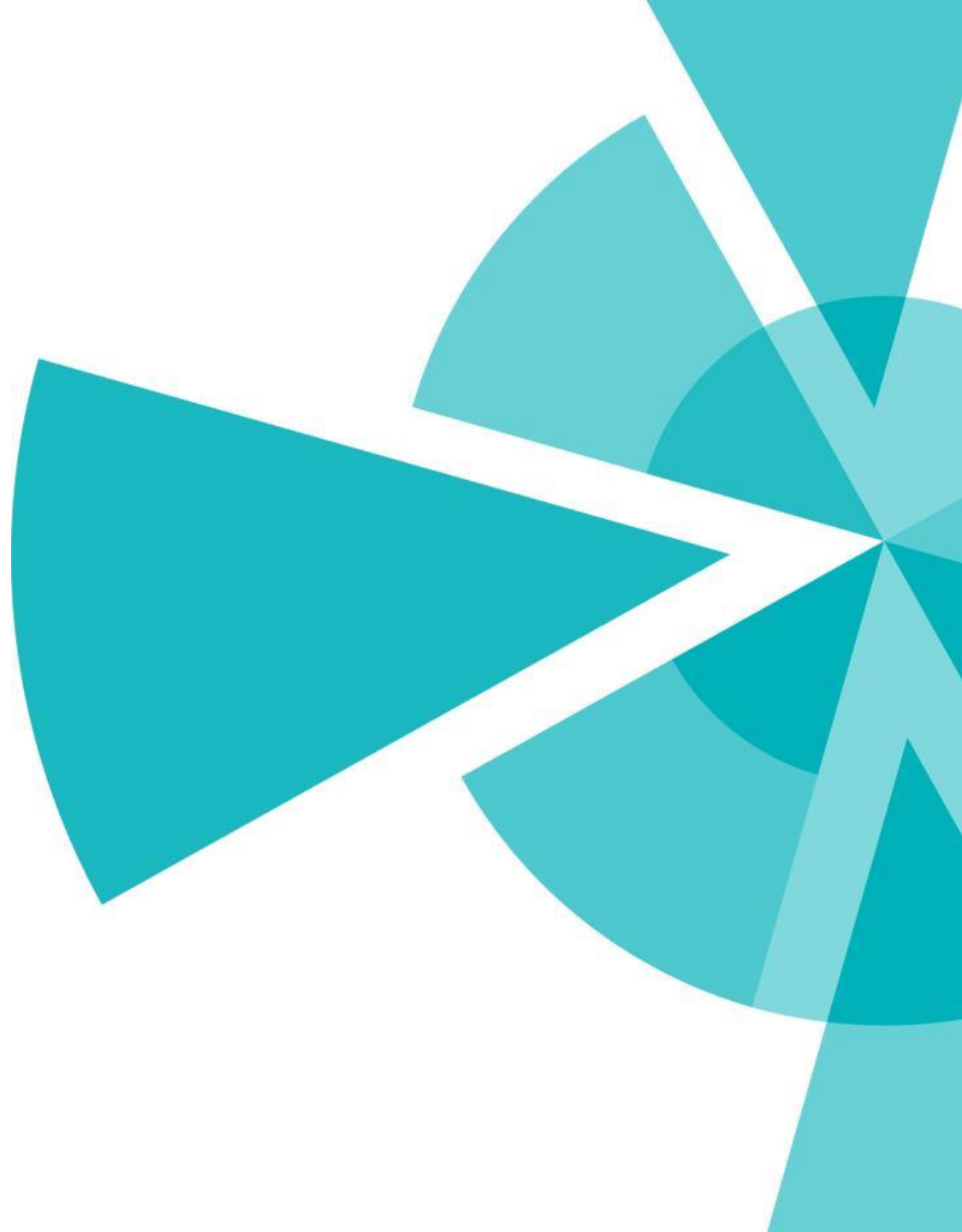
- ▶ **Objectives and methods**

- ▶ **Results**

- ▶ Overview of derogations
- ▶ MS derogations practices and case studies
- ▶ Possible derogation principles and exemplar practices

- ▶ **Next steps**

Rationale of the project



IED Article 15(4) derogations – General principles

- ▶ **IED Article 15(3)** requires the competent authority to set ELVs that, under normal operating conditions, ensure emissions do not exceed the BAT-AELs laid down in the adopted BAT Conclusions.
- ▶ **IED Article 15(4)** allows for derogation from the requirements of Article 15(3) under certain specific circumstances.

Derogations are considered a pivotal component of the IED as the application of Article 15(4) directly affects the effectiveness and relevance of the IED, as well as wider competition in the Single Market.



IED Article 15(4) derogations

*“By way of derogation from paragraph 3, and without prejudice to Article 18, the competent authority may, in specific cases, set less strict emission limit values. Such a derogation may apply only where an **assessment** shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to **disproportionately higher costs compared to the environmental benefits** due to:*

- ▶ *(a) the geographical location or the local environmental conditions of the installation concerned; or*
- ▶ *(b) the technical characteristics of the installation concerned.*

[continues on next slide]



IED Article 15(4) derogations

Further restrictions on derogations

...

The emission limit values set in accordance with the first subparagraph shall, however, not exceed the emission limit values set out in the Annexes to this Directive, where applicable.

The competent authority shall in any case ensure that no significant pollution is caused and that a high level of protection of the environment as a whole is achieved.

...

The competent authority shall re-assess the application of the first subparagraph as part of each reconsideration of the permit conditions pursuant to Article 21.”

IED Article 15(4) refers to derogations from BAT-AELs, which is also the scope of the current project.

IED Article 15(4) derogations

What information is available?

- ▶ MS reporting obligation on IED implementation (Annex I Decision 2012/795/EU)
 - ▶ 3.2: How are derogations from Article 15(3) granted (Article 15(4))?
 - ▶ 3.3: How is the CBA to allow such derogations undertaken and what are considered to be 'disproportionately higher costs compared to the environmental benefits'?
 - ▶ 3.4: Are there any limitations on the magnitude or duration of derogations?

- ▶ IMPEL studies on the experience of derogations from IED BAT-AELs
 - ▶ Phase I: Sharing of draft proposals between MS for implementing derogations from BAT-AELs under IED Article 15(4) and (5)
 - ▶ Phase II: Experience of Derogations from IED BAT-AELs



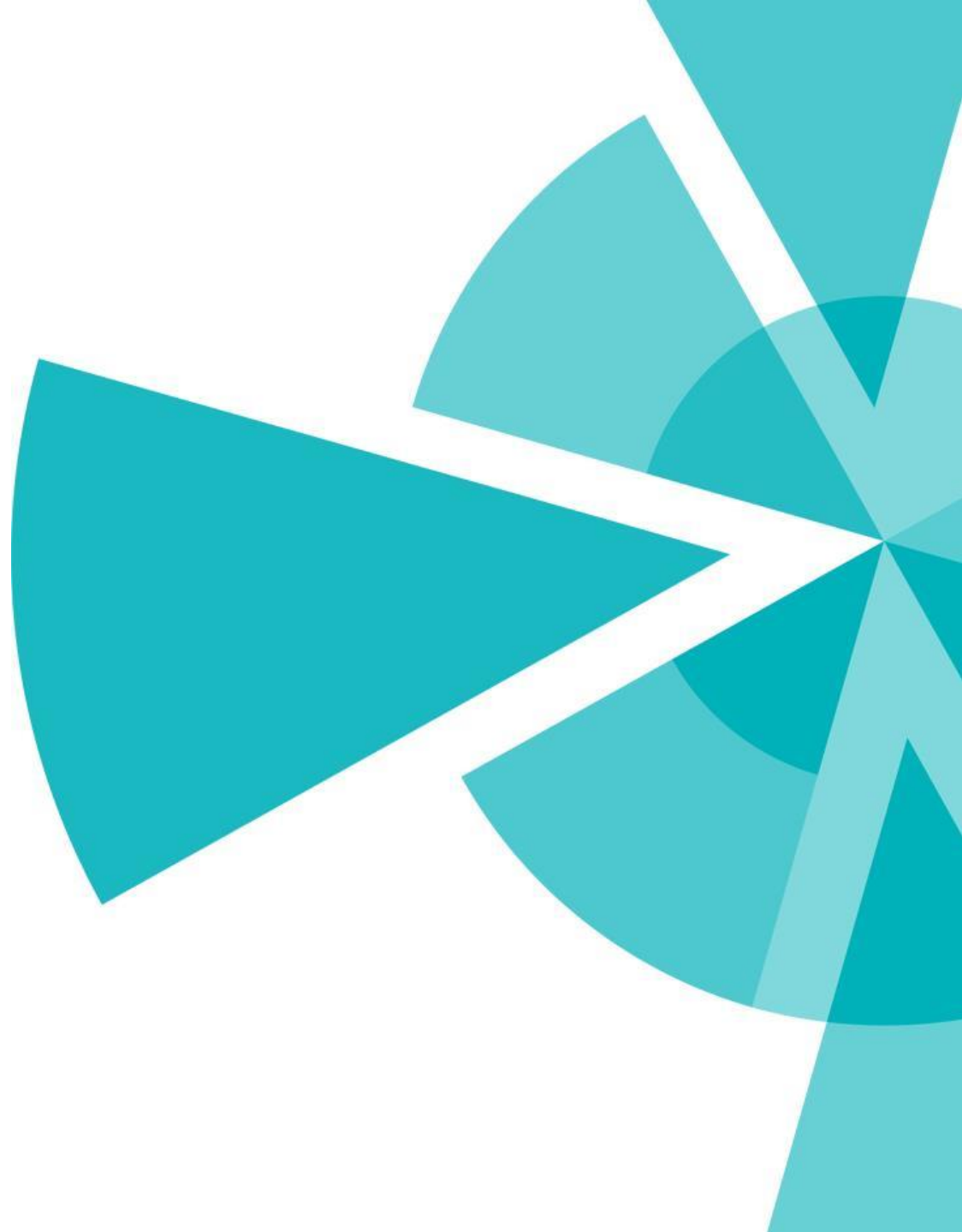


IED Article 15(4) derogations

Limitations of existing information

- ▶ Little insight how the provisions of Article 15(4) are practically implemented
- ▶ Are there any inconsistencies in the application of Article 15(4) by MS?
- ▶ Are there any common issues encountered by MS in their practical application of Article 15(4)?

Objectives and methods



Objectives

- ▶ To compile detailed information on, and analyse the practices for the application and evaluation of IED Article 15(4) in EU Member States:
 - ▶ The three derogation criteria
 - ▶ Calculation of costs and benefits
 - ▶ Methodologies for assessing disproportionality

- ▶ To analyse how the MS derogation practices have been applied in actual derogation case studies; and

- ▶ To identify derogation principles and exemplar practices of MS decision-making procedures in relation to IED Article 15(4) that have the potential for wider EU dissemination.



Overview of approach

Task 1. Compilation of MS practices



Task 2. Analysis of MS case studies



Task 3. Identification of derogation principles and exemplar practices

**IEEG
workshop**

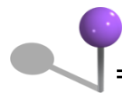
Results

Status: Q4 2017








Member State guidance on derogations

 = MS that have developed guidance on derogations [14]

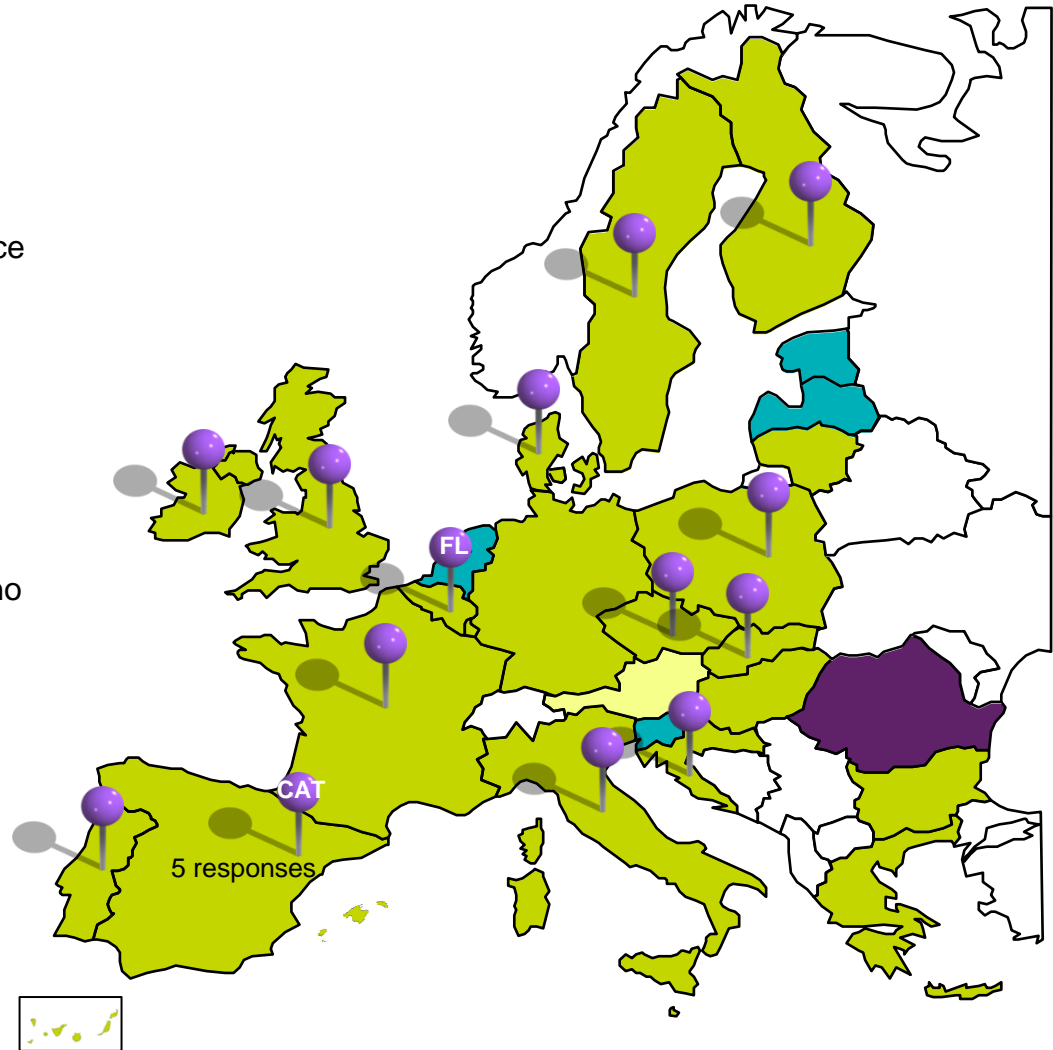
CAT = Catalonia
FL = Flanders

 = MS that have responded to survey [22]

 = MS that responded via email (no experience / info available) [4]

 = MS that did not respond [1]

 = MS expressed no interest [1]



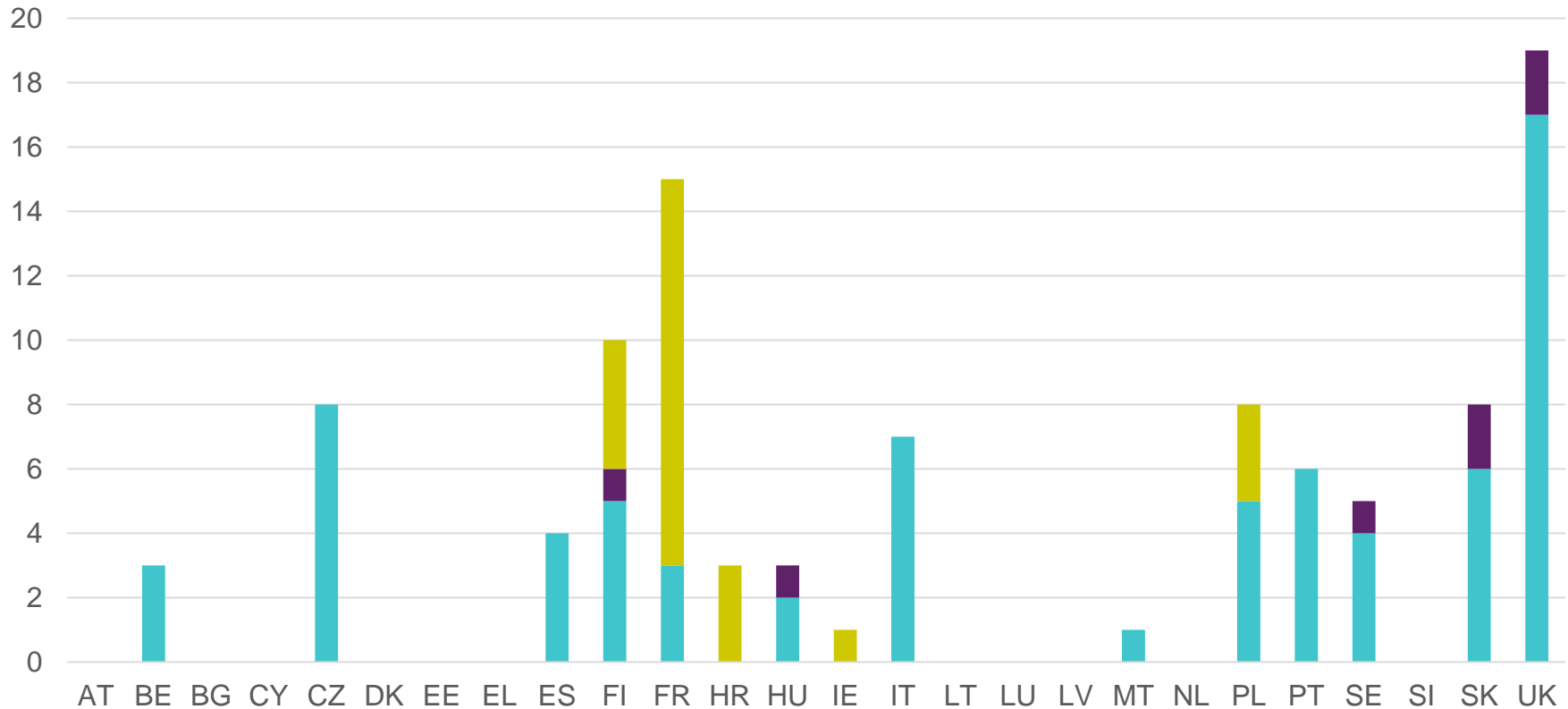


Overview of derogation requests - MS

Number of derogations requested in EU Member States (N° of applications)

MS with no information provided are not shown on the graph

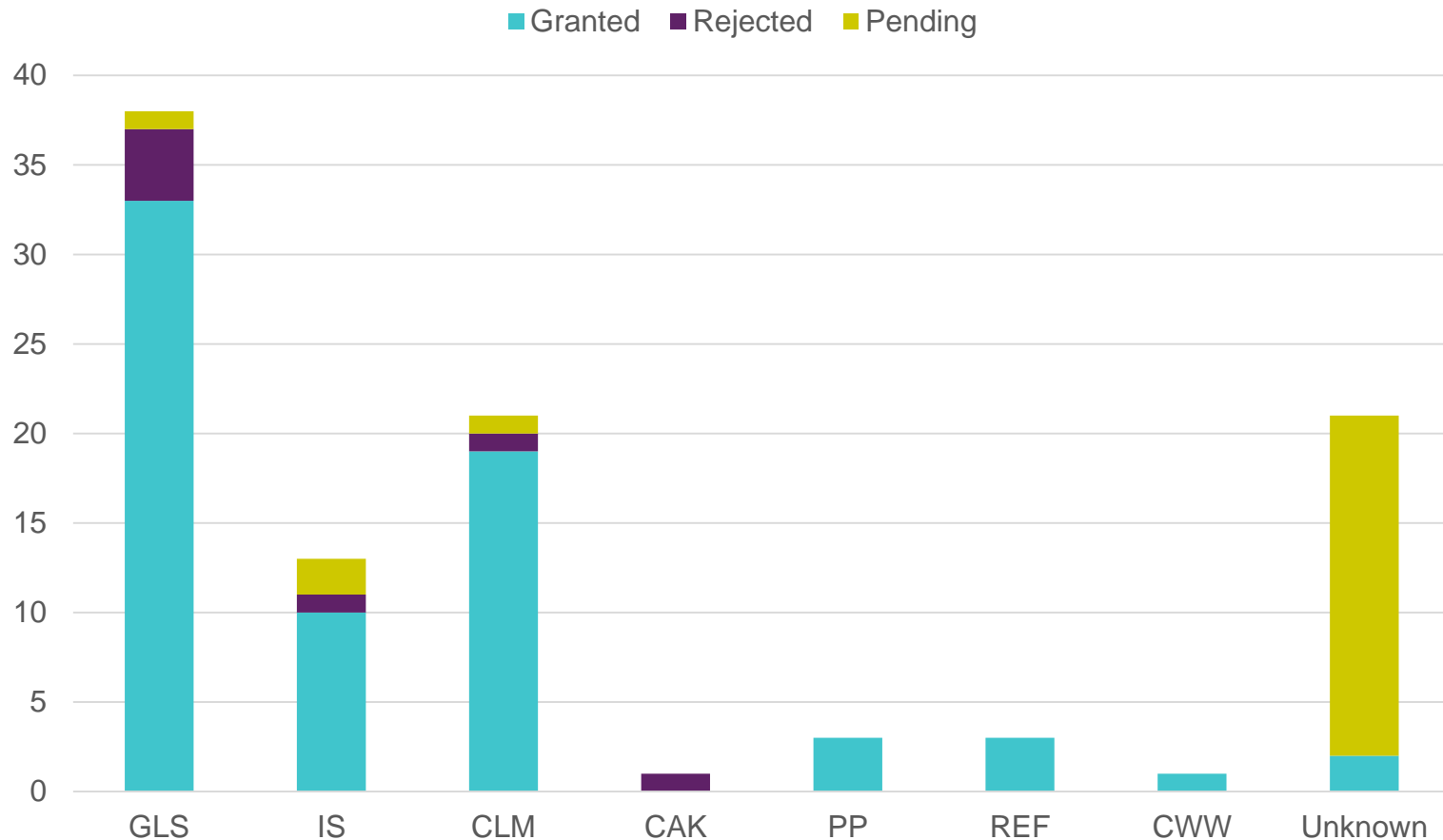
■ Granted ■ Rejected ■ Pending





Overview of derogation requests - BATC

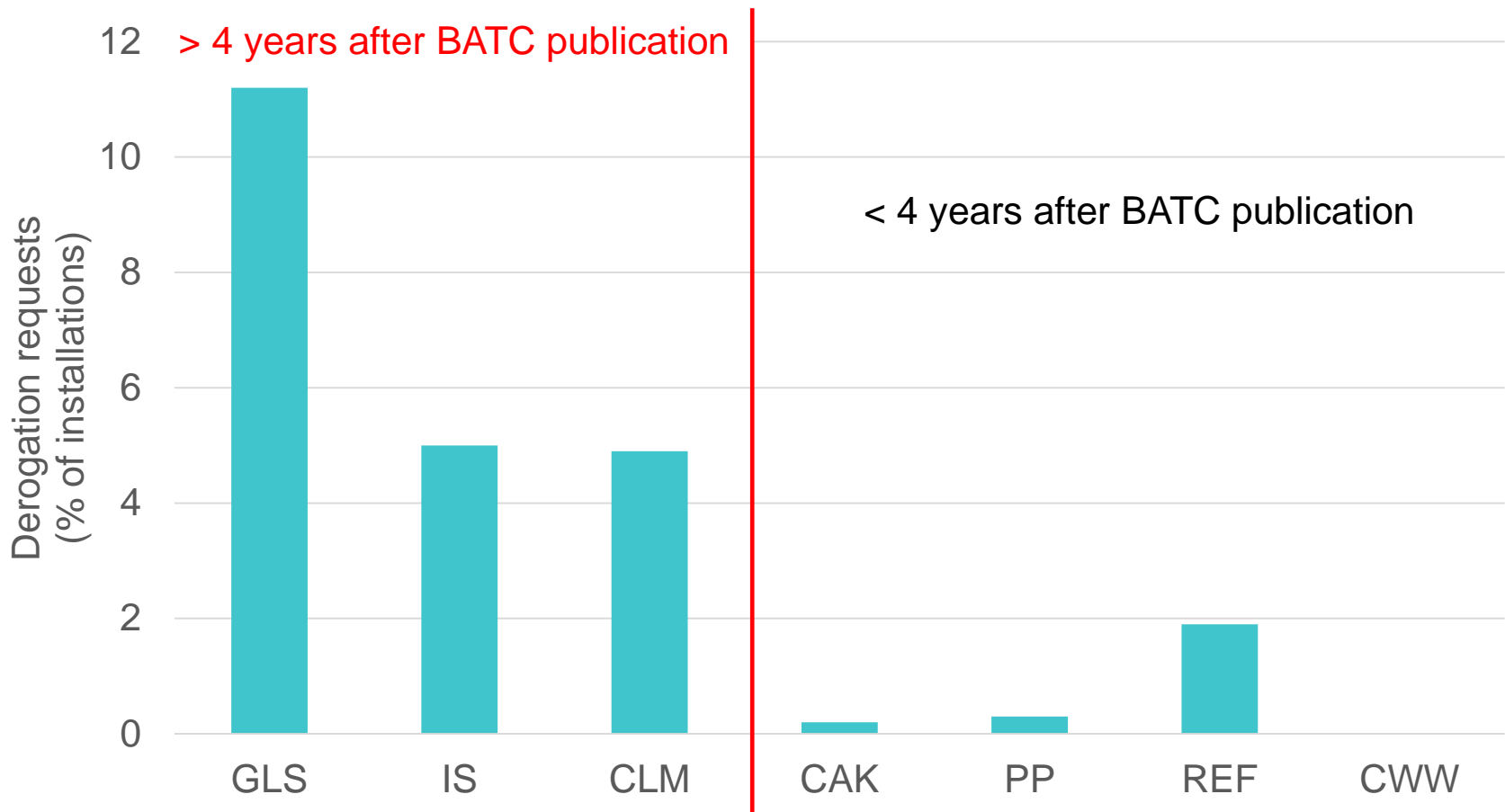
Number of derogations requested (applications) for each BATC





Overview of derogation requests - BATC

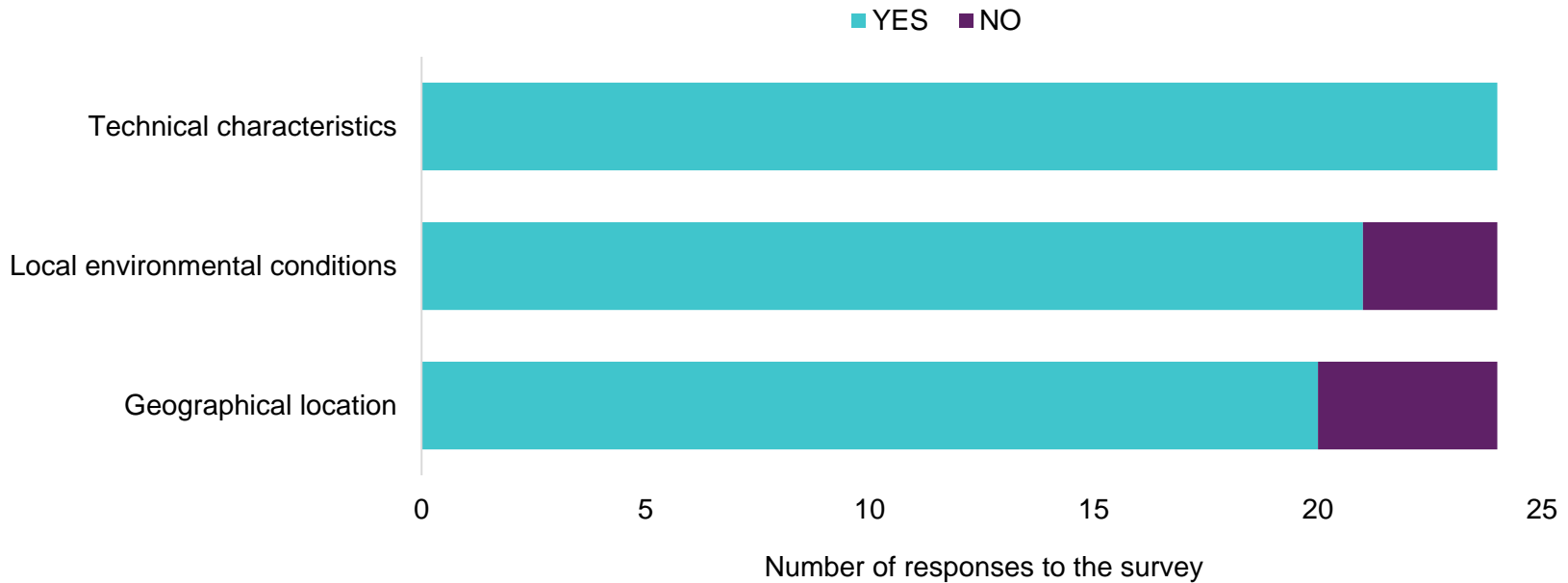
Number of derogations requested (applications) for each BATC
relative to the number of installations





MS derogation practices – derogation criteria

Valid criteria in derogation decisions



MS derogation practices – Calculation of costs

- ▶ CAPEX (new equipment, installation costs);
 - ▶ OPEX (maintenance, training costs, raw materials / utilities);
 - ▶ Other (production loss, insurance costs)
-
- ▶ 8 MS reported to have a standard methodology in place to calculate costs of implementing BAT, e.g.
 - ▶ Bespoke CBA tool and guidance, developed by the UK (also applied by IE, HU)
 - ▶ Cost sheet for providing information (FR, SK)
 - ▶ Reference to the ECM REF (CZ, ESc, PT)
-
- ▶ In other MS no standard cost evaluation methods are in place, each case is investigated on a case-by-case basis.

MS derogation practices – Calculation of benefits

- ▶ 5 MS reported to have a standard methodology in place to calculate the benefits of implementing BAT. Others referred to the use of damage costs.
 - ▶ Bespoke CBA tool and guidance, incl. damage costs (UK)
 - ▶ Dispersion studies (CZ)
 - ▶ Use of damage costs, shadow prices, reference costs, benchmark prices,... (e.g. ESc, IE, FI, FR, PL, PT, SE, SK)

- ▶ Damage costs reported by MS in this study (pollutants and data sources)

Member State	NOx	SOx	PM	NH3	VOC	EEA damage costs	ECM REF damage costs	Other sources/ methods
HU	✓					✓		
FR	✓	✓	✓	✓			✓	✓
UK	✓	✓	✓	✓	✓	✓		✓
ES _c	✓	✓	✓	✓		✓	✓	

MS derogation practices – Disproportionality

Little information is available on the methods to assess disproportionality in IED derogation requests. Examples include:

- ▶ CZ – assessing two semi-independent analyses comparing two or more scenarios
- ▶ FR – comparing three scenarios: BAU, technically feasible techniques, alternative solution suggested by operator
- ▶ SK – Identifying and weighing KPI
- ▶ UK – use of CBA results and final judgement on disproportionality
 - ▶ NRW (Wales) makes use of a benefit cost ratio. A ratio < 0.75 is considered disproportionate
- ▶ Other MS: case-by-case, little information available



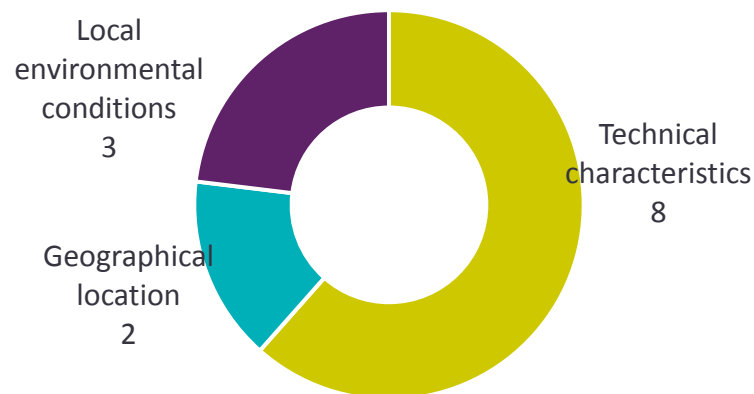
MS derogation case studies

Selection of case studies

Member State (region)	GLS BATC	IS BATC	CLM BATC	REF BATC	PP BATC
BE (Flanders)				BAT 52	
CZ	BAT 17/18				
ES (Catalonia)	BAT 17/18				
FR				BAT 52	
IT	BAT 16, 17, 18, 19, 20				
PL			BAT 17, 21		
SE	BAT 63 (rejected)	BAT 56			
SK			BAT 50 (rejected)		
UK (Wales)		BAT 48/49 (26)			
UK (England)					BAT 40/50

MS derogation case studies

- ▶ Article 15(4) criteria used in the case studies as primary reason for requesting the derogations



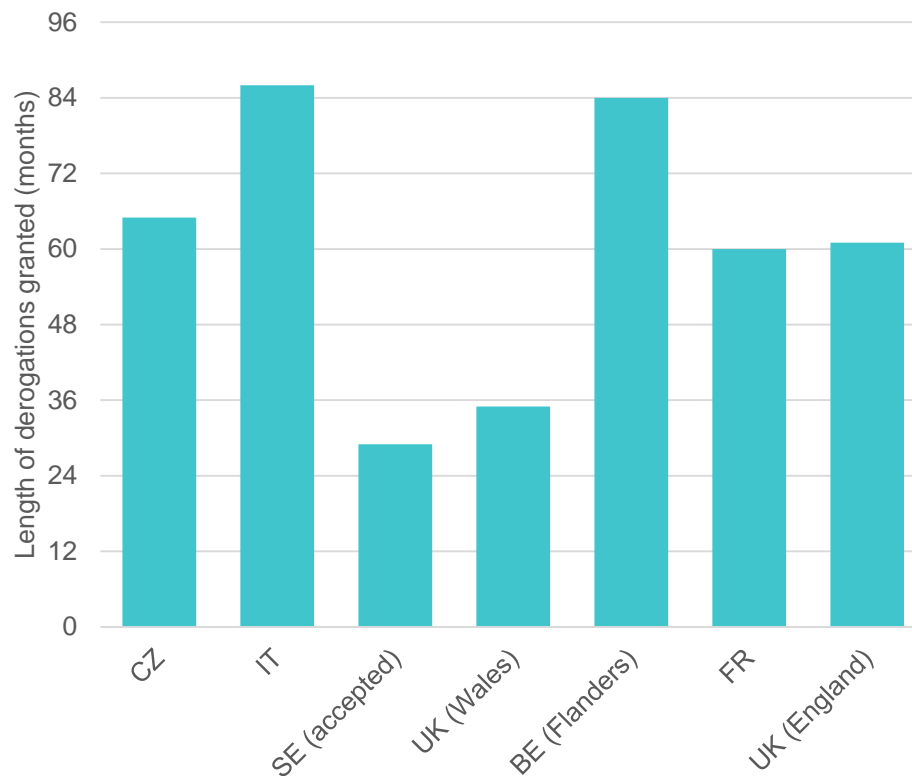
- ▶ From the arguments used by operators in the case studies, it is clear that overall the assessment of costs and disproportionality is the main focus of the application.
- ▶ Only in four of the case studies was the technical argument highlighted by the operator prominently
- ▶ Benefits were only monetised in two of the case studies



MS derogation case studies

Derogation decisions

BATC	Case study	Date of decision	End of derogation period
GLS	CZ	30 June 2016	December 2021
	IT	29 October 2015	December 2022
	SE (rejected)	15 February 2016	N/A
IS	SE (accepted)	7 March 2016	July 2018
	UK (Wales)	20 April 2015	March 2018
CLM	SK (rejected)	24 March 2017	N/A
	PL	9 June 2017	N/A
REF	BE (Flanders)	11 April 2017	April 2024
	FR	5 January 2017	Permit reconsideration
PP	UK (England)	21 November 2016	December 2022



All decisions have been published online (CZ, IT, SE (rejected), SE (accepted), UK-Wales, SK, UK-England) or will be published in the near future (BE and FR and BE).

Derogation principles

Approach

- ▶ First list of principles identified based on information collection
- ▶ Discussion with MS at the IEEG Workshop in Brussels, 19 October 2017
- ▶ Revised list of principles, covering:
 - ▶ General issues
 - ▶ Three derogation criteria (geographical location, local environmental conditions and technical characteristics of the installation concerned)
 - ▶ Calculation of costs
 - ▶ Calculation of environmental benefits
 - ▶ Assessment of disproportionality
- ▶ Legal requirements provided in the IED and wider EU law



Derogation principles

Legal requirements

- ▶ Prior to consideration of the derogation principles, it is first necessary to ensure that the application of Article 15(4) follows the over-riding legal requirements provided in the IED and wider EU law:
 - ▶ A. Scope
 - ▶ B. Safeguards
 - ▶ C. Transparency
 - ▶ D. Process



Legal requirements (* requirement not explicitly from Article 15(4))

A. Scope

- ▶ The IED makes clear that, with regard to their scope, Article 15(4) derogations:
 - i. Apply only to BAT-AELs. They do not apply to BAT conclusions without BAT-AELs.
 - ii. Are of an exceptional nature.
 - iii. Relate only to individual industrial installations. Derogations cannot be granted generically e.g. at the sectoral or national level.
 - iv. Can provide a longer period than 4 years after the publication of BAT conclusions to comply with BAT-AELs.*
 - v. Must be re-assessed each time permit conditions are reconsidered under Article 21.



Legal requirements (* requirement not explicitly from Article 15(4))

B. Safeguards

- ▶ In order to ensure a continued high level of environmental protection, the following safeguards exist when Article 15(4) of the IED is used:
 - i. Derogation applications must respect the Precautionary Principle.*
 - ii. The burden of proof on the need for a derogation lies with the operator of the installation concerned.*
 - iii. A derogation is without prejudice to environmental quality standards.
 - iv. Emission limits set under a derogation must not exceed emission limit values that are set out in the IED Annexes.
 - v. When granting an Article 15(4) derogation, competent authorities must continue to ensure that no significant pollution is caused and a high level of protection of the environment as a whole is achieved.



Legal requirements (* requirement not explicitly from Article 15(4))

C. Transparency

- ▶ Since Article 15(4) derogations are a divergence from the normal application of BAT conclusions, it is important to have public participation in decision-making by:
 - i. Giving the public early and effective opportunity to participate in any proposal to grant an Article 15(4) derogation when granting or updating a permit.*
 - ii. Ensuring that, when an Article 15(4) derogation is granted, there is:
 - an annex to the permit conditions that documents the reasons for the application of Article 15(4), including the result of the assessment and the justification for the conditions imposed; and
 - public access to information, including via the Internet, on the specific reasons for that derogation and the conditions imposed.



Legal requirements (* requirement not explicitly from Article 15(4))

D. Process

- ▶ BAT conclusions are implementing Acts of the European Commission, published in the *Official Journal*.
 - i. Derogation justifications should not be based on the calling into question of the content of the BAT conclusions, nor based on arguments that were discounted during the development of the BAT conclusions themselves.*



Derogation principles

General issues (1/2)

- a. Member States should have an auditable and repeatable procedure in place for assessing Article 15(4) derogation applications. To the extent possible materials relating to such procedures should be made publicly available.
- b. The procedure for assessing derogation applications should ensure consistent decision-making in each Member State i.e. across their geographical regions and across industrial sectors. This decision-making should also be consistent over time.



Derogation principles

General issues (2/2)

- c. Member States should have systems to monitor the application of Article 15(4). This should include key indicators such as the number of applications; the BAT conclusions being derogated and the assessment status (i.e. granted, rejected or pending).

Derogation principles

Three derogation criteria

- a. Fulfilment of the Article 15(4) criteria should be a prerequisite for conducting further assessment of the derogation request, i.e. one of the criteria has to be applicable for the process to start.
- b. Any additional elaboration of the derogation criteria should have a narrow and well defined scope that is consistent with the Article 15(4) text.
- c. Operators and competent authorities should have a common and clear understanding of the scope of the derogation criteria.
- d. The IED does not allow other criteria to justify an Article 15(4) derogation request. For example, there should be no consideration of the wider social or economic impacts of complying with BAT-AELs.



Derogation principles

Calculation of costs (1/2)

- a. The derogation assessment should include an evaluation of the costs from complying with the BAT-AELs. Wider social or economic costs should not be included.
- b. The evaluation of the costs should be quantitative, if possible, and/or supported by a qualitative assessment.
- c. The derogation request should clearly identify the source of cost information and the methods used to calculate costs.
- d. The total cost for complying with the BAT-AELs should include both capital costs (CAPEX) and operating costs (OPEX).

Derogation principles

Calculation of costs (2/2)

- e. Cost information supplied by the operator should be validated as part of the assessment process. Validation may come from alternative quotes (e.g. from technology providers), expert judgement or data from other plants where the technique was recently installed.
- f. In order to allow comparison, a discount rate should be applied to the costs of complying with BAT-AELs. The chosen discount rate should be clearly indicated and justified.
- g. Given potential uncertainties in the information used to calculate costs for complying with the BAT-AELs, realistic ranges of the cost information used and/or various cost scenarios are a good basis for better understanding potential uncertainties in cost parameters.

Derogation principles

Calculation of environmental benefits (1/2)

- a. The derogation assessment should include an evaluation of the environmental benefits from complying with the BAT-AELs.
- b. The evaluation of environmental benefits should be quantitative (in monetary terms), if possible, and/or supported by a qualitative assessment. Established pollutant damage costs should be used, where available (e.g. EEA damage cost estimates).
- c. The derogation request should clearly identify the source of the environmental benefits information and the methods used to calculate the environmental benefits.

Derogation principles

Calculation of environmental benefits (2/2)

- a. Environmental benefits information supplied by the operator should be validated as part of the assessment process. Validation may come from expert judgement or data from other plants where the technique was recently installed.
- b. In order to allow comparison, a discount rate should be applied to any monetised benefits from complying with BAT-AELs. The chosen discount rate should be clearly indicated and justified.
- c. Given potential uncertainties in the information used to calculate environmental benefits for complying with the BAT-AELs, realistic ranges of the information used and/or various benefits scenarios are a good basis for better understanding potential uncertainties in benefits parameters.



Derogation principles

Assessment of disproportionality (1/2)

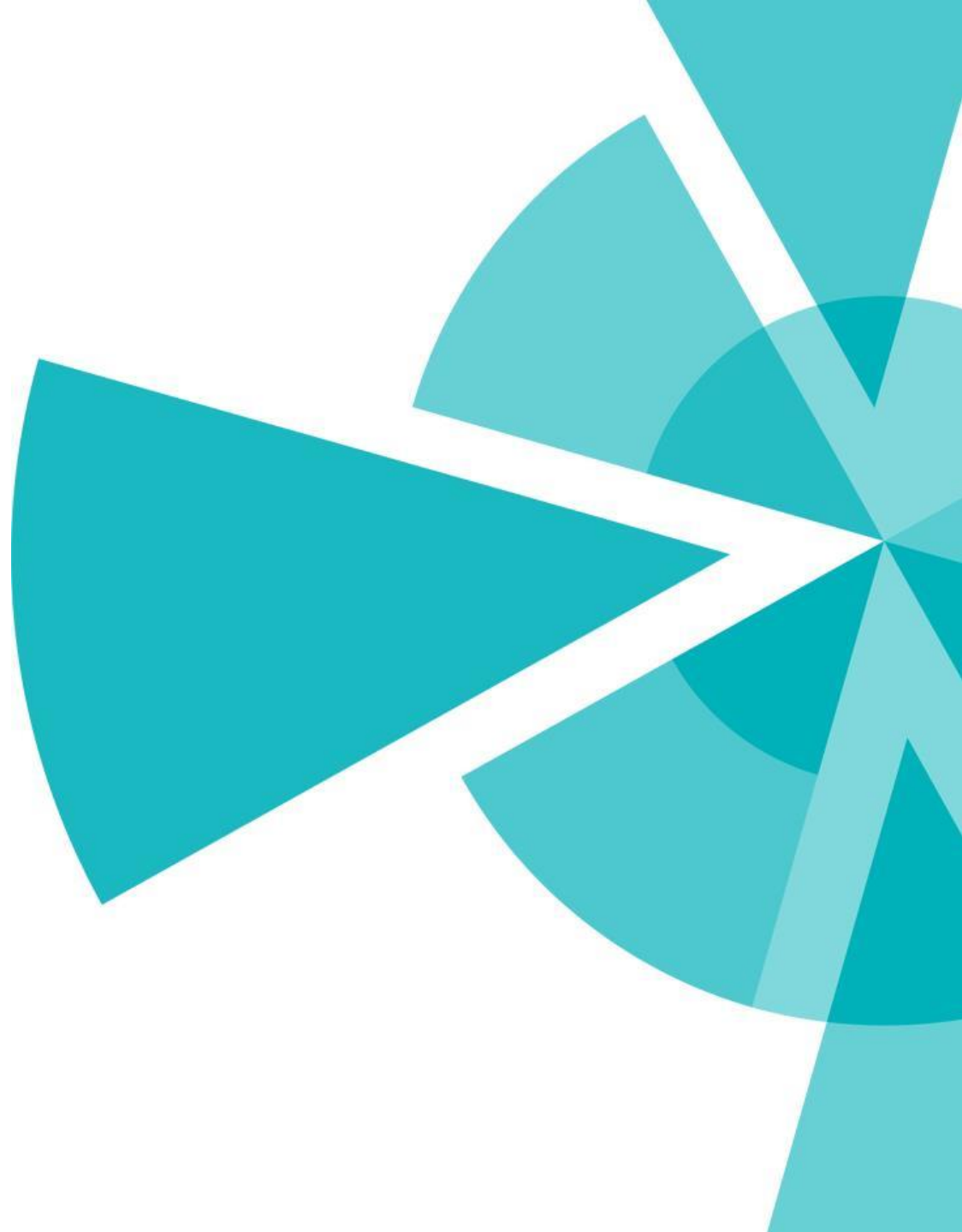
- a. The assessment of disproportionality should compare the costs to the environmental benefits for complying with the BAT-AELs.
- b. There should be an agreed and repeatable mechanism for assessing what are disproportionately higher costs compared to the environmental benefits. This may be assisted by quantitative mechanisms and fixed cut-off levels.

Derogation principles

Assessment of disproportionality (2/2)

- c. The agreed mechanism for assessing disproportionality should have a means to address the inherent uncertainty in costs and environmental benefits for complying with the BAT-AELs.
- d. Additional considerations (e.g. the operator's previous compliance with permit conditions) could contribute to the competent authority's final decision on whether to grant derogation. However, these additional considerations cannot be part of the initial screening.

Next steps



Next steps (Jan – Feb 2018)

Exemplar practices of Member State decision-making procedures

- ▶ The exemplar practices are intended to illustrate the derogation principles with specific examples.
- ▶ The exemplar practices will be identified by mapping the MS procedures to the list of derogation principles, based on the information collected.

Reporting

- ▶ Draft final report – January 2018
- ▶ Final report – February 2018



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