



Workshop on the Active Farmer's provisions

27/10/2015
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Organisation of the workshop – morning session

Introduction

Article 9(1)

Article 9(2)

**Negative list
Tests**

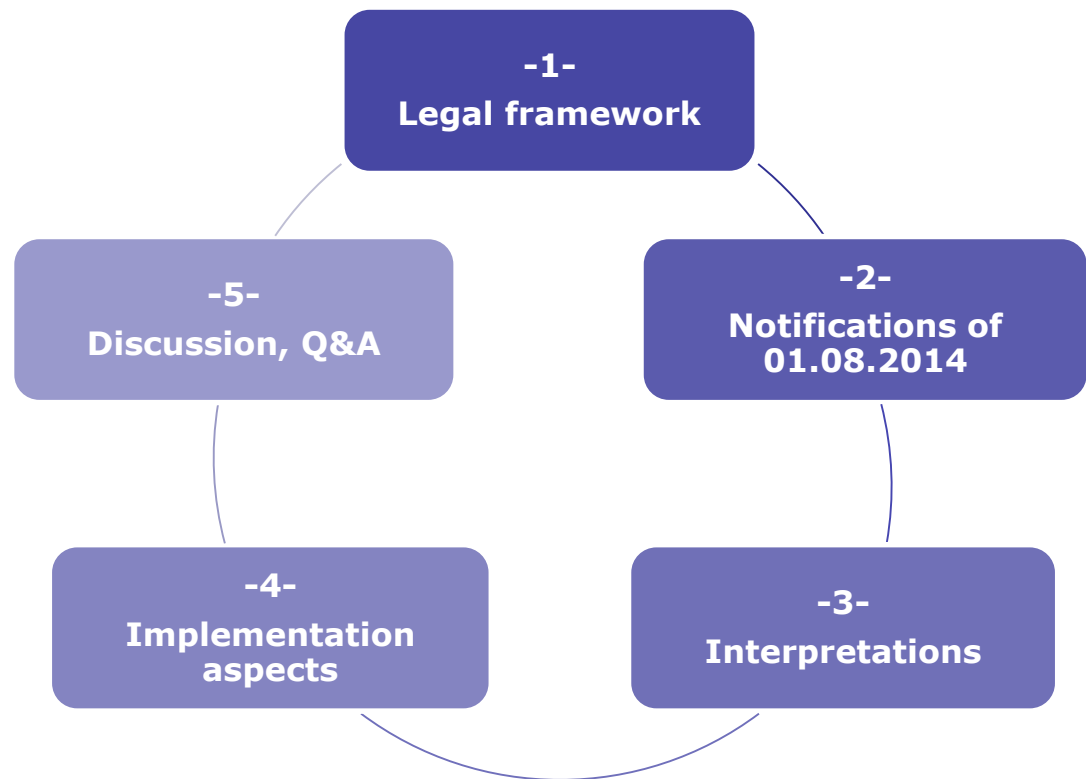
Article 9(3)

Further exclusion

Article 9(4)

Exemption threshold

Article 9(6) – Review



Organisation of the workshop – afternoon session

Discussion on the **implementation aspects** of the Active Farmer's requirements → five round tables.

- 1 – Establishment of the negative list – room 3.05
- 2 – Tests pursuant to Art. 9(2)(b) – room 2A
- 3 – Tests pursuant to Art. 9(2)(c) – room 0.20
- 4/5 – IACS and AF provisions – room 2A and room 3.04



The objective of the active farmer's provisions

- See **Court of auditors special reports** (n° 5/2011 & n° 16/2012):

Support was in a number of cases in the past granted to natural or legal persons whose business purpose was not, or was only marginally, targeted at an agricultural activity.

- Communication from the Commission "CAP towards 2020": need to improve the effectiveness and efficiency of public support to the farm sector by targeting EU support to active farmers.

- the co-legislators decided to better target the support by excluding natural or legal persons whose business purpose is not or only marginally targeted at an agricultural activity.

The targeting is achieved by...

For claimants above a certain amount of DP (see Article 9(4))

Excluding from the support entities whose agricultural areas are mainly "self-maintained" areas and **who do not carry out minimum activity** defined by MS.



**Article
9(1)**

Establishing a **negative presumption** for those entities which have land at their disposal but whose activities are typically not (or only to a marginal extent) agricultural.

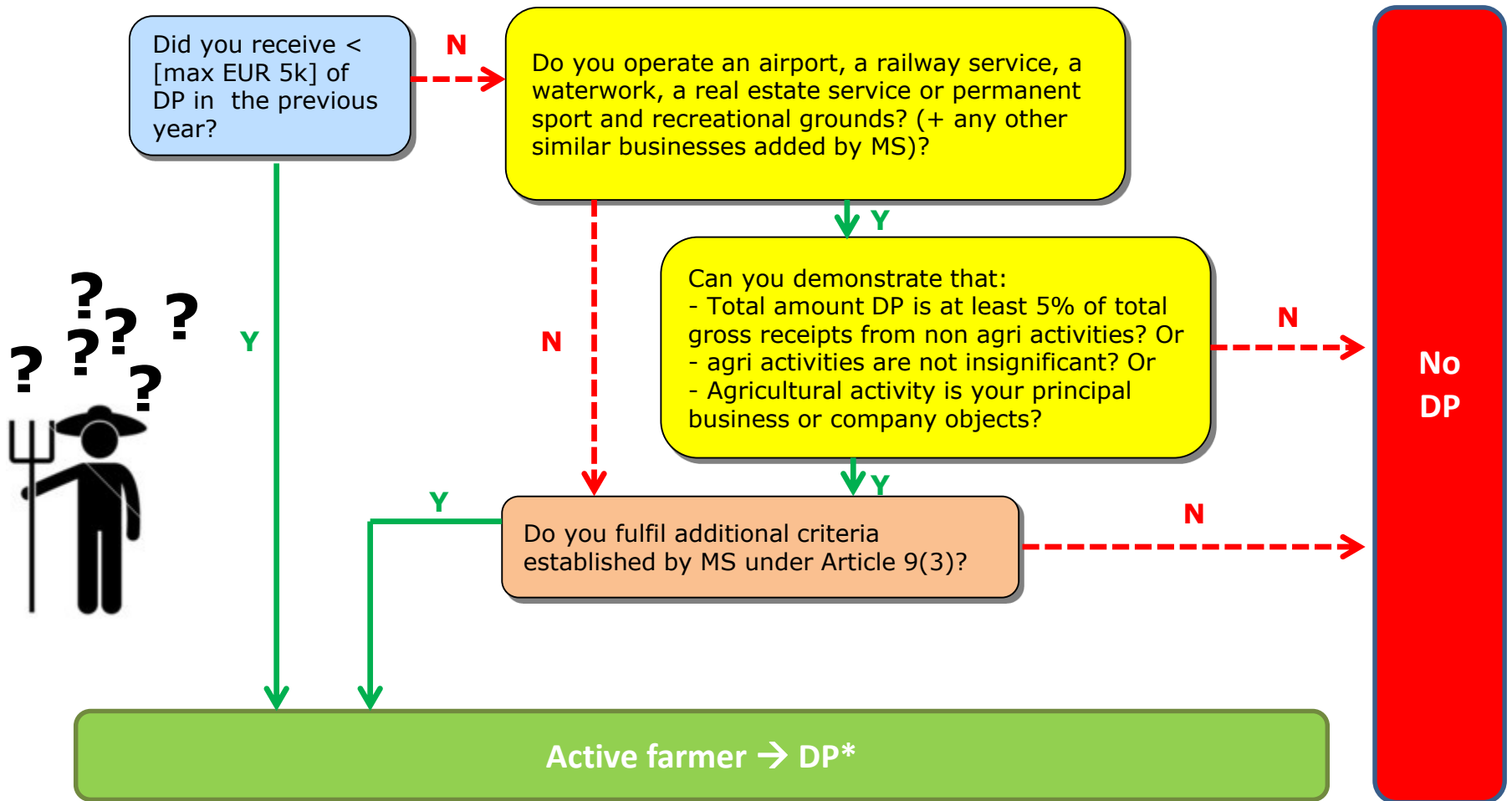


**Article
9(2)**

(opt.) **Further excluding** entities.



**Article
9(3)**



* of course DP are to be granted only if the other eligibility requirements are fulfilled and in the case the active farmer meets the minimum requirements for being granted direct support (art. 10 of Regulation (EU) N° 1307/2013).

Nota bene: Article 9(1) is not represented in the slide.

Disclaimer

This presentation is established on the understanding that, in the event of a dispute involving Union law, it is, under the Treaty on the Functioning of the European Union, ultimately for the European Court of Justice to provide a definitive interpretation of the applicable Union law.

The statistics presented are preliminary and partial. They are based on the replies given by Member States to date to the questionnaire on the implementation of the active farmer's provisions (ISAMM).



Article 9(1)

Objective and legal framework of Article 9(1)

(Recital)

MS should refrain from granting direct payments to natural or legal persons whose agricultural areas are mainly areas naturally kept in a state suitable for grazing or cultivation and who do not carry out a certain minimum activity.

Article 9(1) of Regulation (EU) No 1307/2013:

*"No direct payments shall be granted to natural or legal persons, or to groups of natural or legal persons, whose agricultural areas are mainly areas naturally kept in a state suitable for grazing or cultivation **and** who do not carry out on those areas the minimum activity defined by Member States in accordance with point (b) of Article 4(2)."*

Article 10 of Regulation (EU) No 639/2014

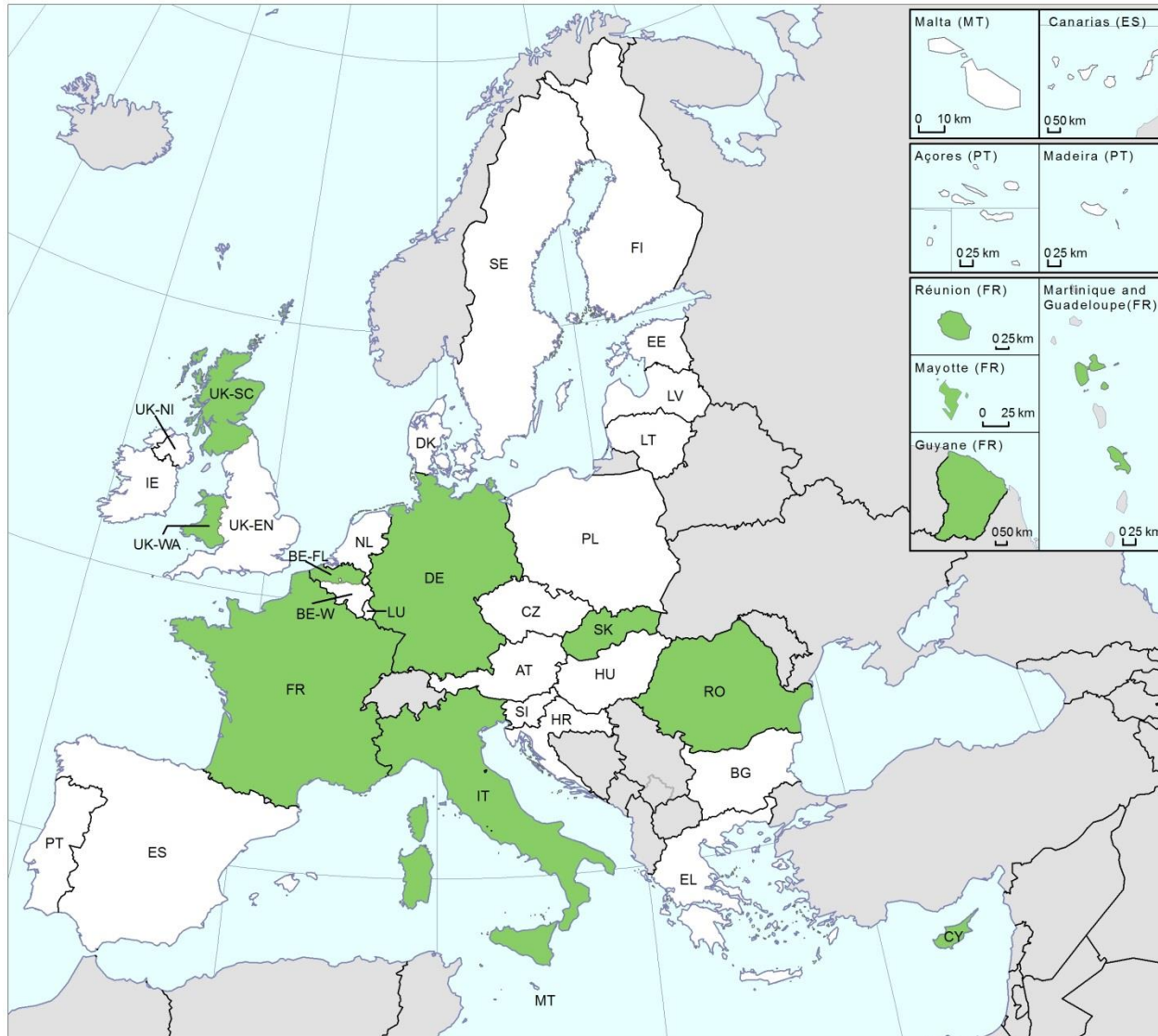
*"[...] where such areas represent **more than 50% of all agricultural area declared [...]**".*

Article 9(1) [...] shall not apply to [...] who carry out [...] an agricultural activity within the meaning of point (i) of Article 4(1)(c) of Regulation (EU) No 1307/2013."

9 MS/Regions with self-maintained areas



European Commission

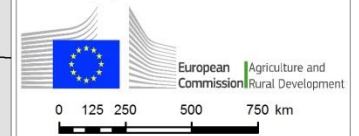


Presence of self-maintained areas?

Yes
 No

BE-Flanders,
DE
FR
IT
CY
RO
SK
UK-Scotland
UK-Wales

Source: ISAMM
 Year: 2014
 Calculations: DG AGRI - D1
 Cartography: DG AGRI GIS-Team 10/2015
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Control requirements of Article 9(1)

Identifying applicants with more than 50% of areas naturally kept in a state suitable for grazing or cultivation

Checking if the applicant performs agricultural activity in accordance with Art 4(1)(c)(i) of R 1307/2013

Y

AF*

N

Check minimum activity requirement

Checking if the minimum activity is performed

Y

AF*

N

Non-AF

* Does not prejudice possible exclusion via Article 9(2) and 9(3).

Procedures used for Article 9(1)

Replies to the questionnaire show that MS:

- Used the single application and the LPIS (administrative checks) to identify beneficiaries concerned by this provision.
- Used OTSC to check the minimum activity requirement.



Discussion in relation to Article 9(1)

Article 9(2)

The negative list

Article 9(2) of R. (EU) 1307/2013 - 1st and 2nd subparagraphs

Entities operating...



AIRPORT



WATERWORKS



**REAL ESTATE
SERVICES**



**PERMANENT
SPORT &
RECREATIONAL
GROUNDS**



RAILWAY SERVICES

NEGATIVE LIST

Addition of similar activities/businesses to the negative list

→ second subparagraph of Article 9(2) of R. (UE) No 1307/2013: MS may add other **similar** non-agricultural businesses or activities to the negative list, on the basis of **objective and non-discriminatory criteria**.

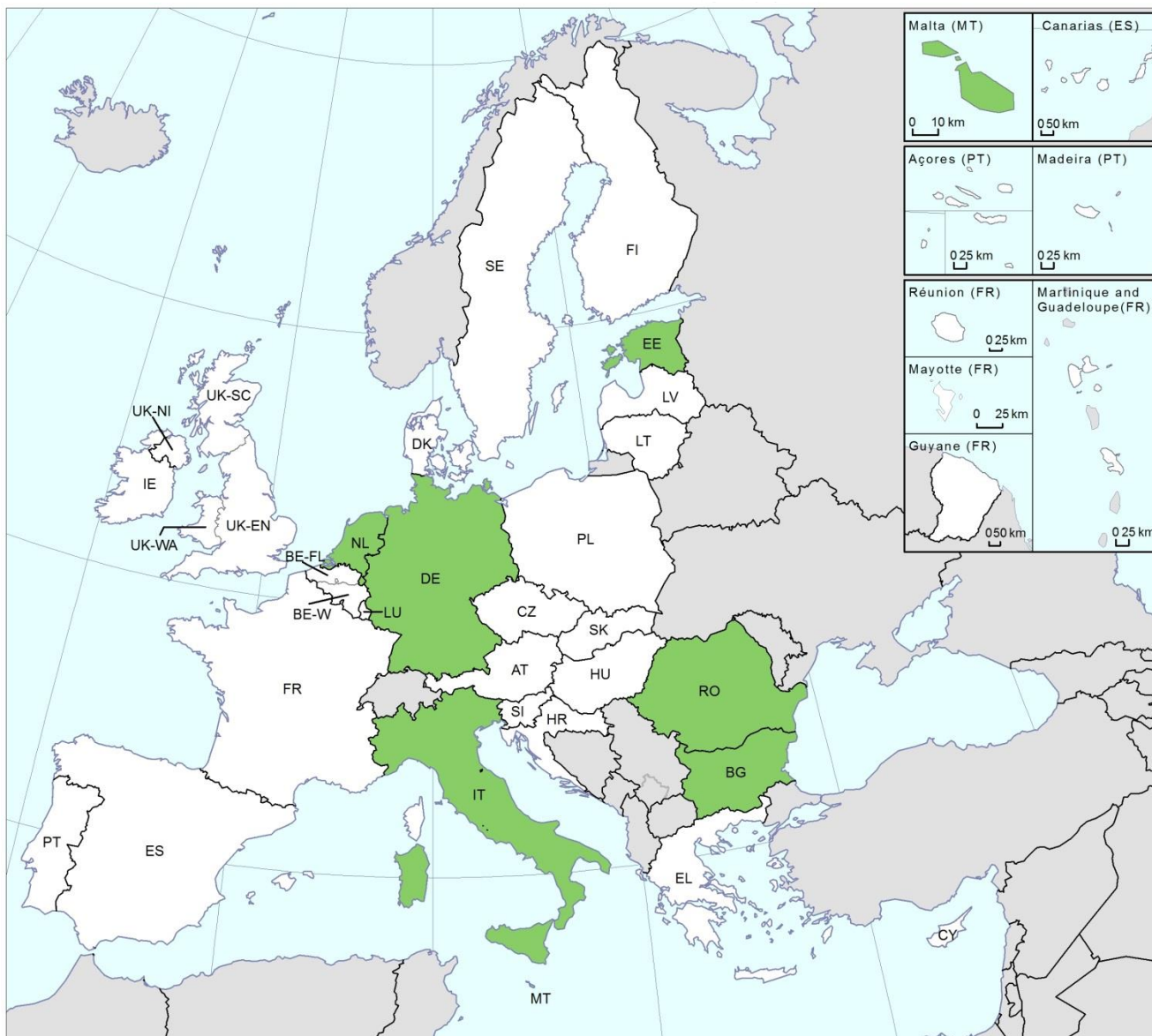
→ "**Similar**": businesses can be added to the negative list only if they are "similar" in nature to the activities of entities already included in the negative list, i.e. entities operating those businesses potentially have agricultural land but whose activities are typically not agricultural (or only marginally).

→ Such addition shall be justified on the basis of the **business purpose** of the entities concerned (those entities exercise activities which are typically not agricultural); by contrast, not solely on the basis of criteria that relate to farmer's individual circumstances or formal status.

7 MS decided to extend the negative list



European



Addition of similar businesses or activities?

Yes **No**

**BG
DE
EE
IT
MT
NL
RO**

Source:

ISAMM

Year:

2014

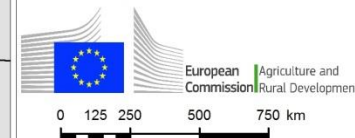
Calculations:

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Cartography:

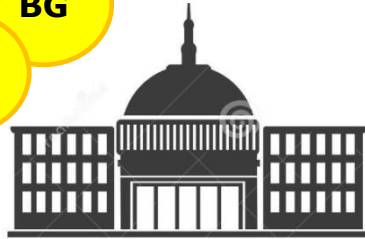
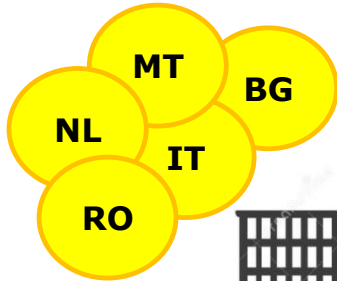
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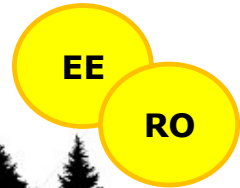


European Commission



Government

PUBLIC ADMINISTRATION

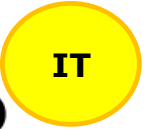


FOREST MANAGEMENT



BANKING

Extension of the negative list (7 MS)



BROKERAGE BUSINESS



CONSTRUCTION



PRISON



INSURANCE



MINING

How to establish the negative list at MS level?

The Commission was not given by the legislator the power to further define the negative list; it is **for the Member States to implement that provision** in compliance with the purpose of the active farmer provisions and the general principles of EU law.

However, **guidance from the Commission** on specific points:

- scope of the negative list: see guidance document
- who should be looked at and how should affiliated companies be taken into account: see examples in next slides

On the scope of the negative list (guidance document DSCG/2014/29):

→ Assessment should not be based on criteria such as whether it is private or public entity, ownership status, size or significance of the "negative" activity operated by the entity at stake.

→ Real estate services and PSRG?



REAL ESTATE

- Professional property developers,
- real estate agencies
- natural/legal persons managing real estate **on a fee or contract basis**



**PERMANENT
SPORT &
RECREATIONAL
GROUNDS**

Specialised operators of permanently existing areas of land with **permanent fixtures and/or permanent artificial structures for spectators that are being used for a purpose of sport and recreational activities**, e.g. golf courses, race courses, or permanent football pitches.

Regarding who should be looked at when establishing the negative list:

→ Claimant is to be looked at.

→ If the claimant is part of a group of different legal entities (mother and/or daughter companies):

- **it has to be assessed whether such group operates an activity/business of the negative list.**
- **In such case, the claimant is presumed non-active and the group is considered for rebutting the negative presumption.**

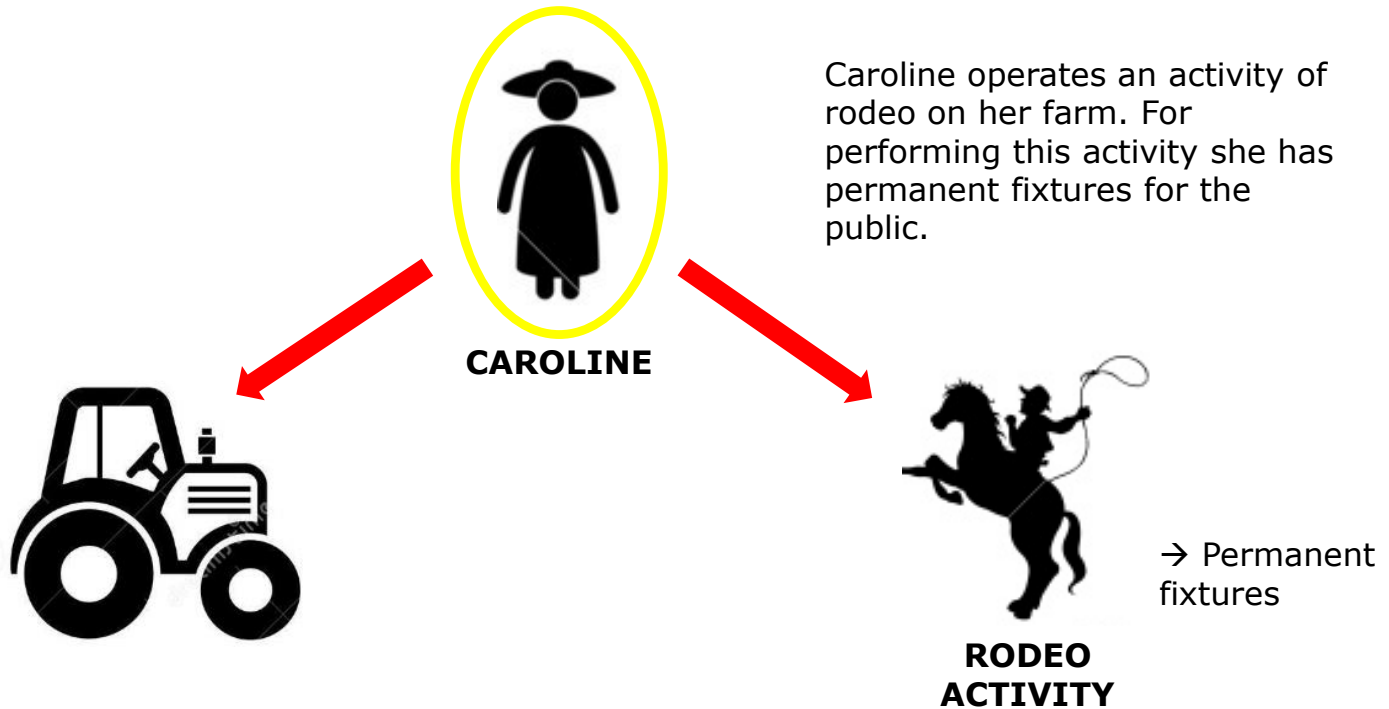
→ "Operating" = having decision-making power over the activity/business & bearing benefits and financial risks.

Does the claimant operate himself an activity/business of the negative list?

Is the claimant part of a group operating an activity/business of the negative list?

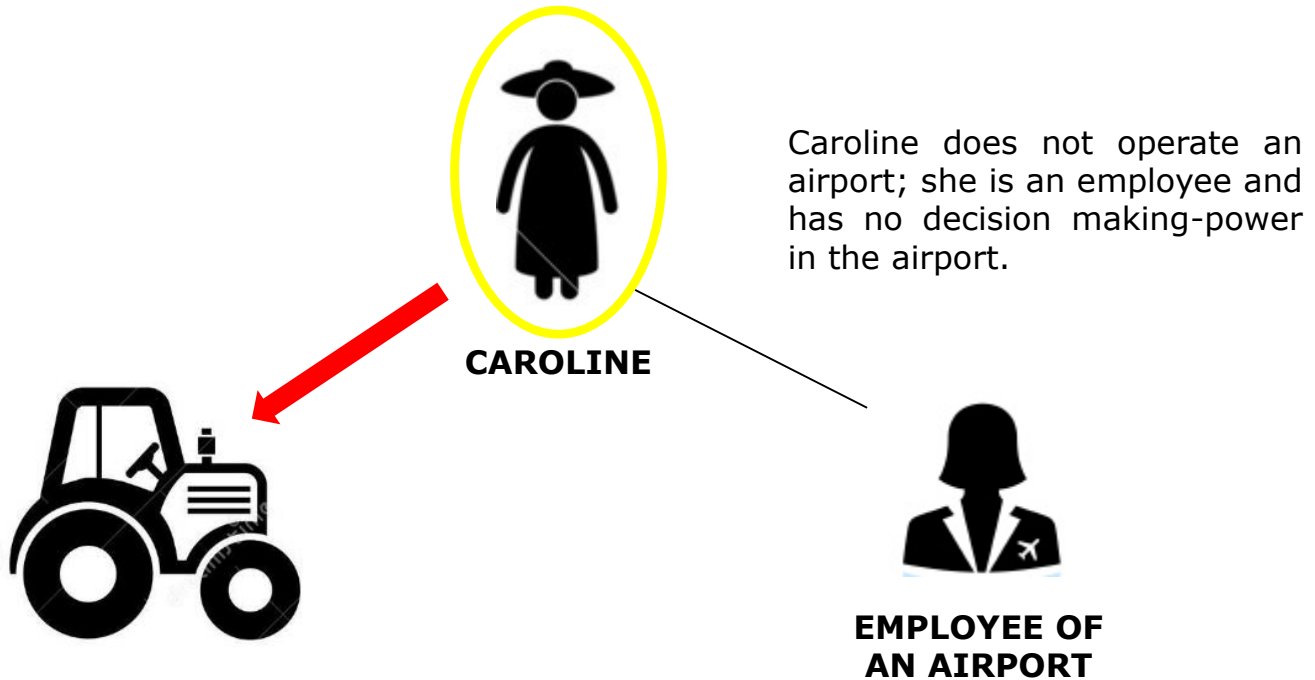
If yes, the claimant is on the negative list

EXAMPLE 1



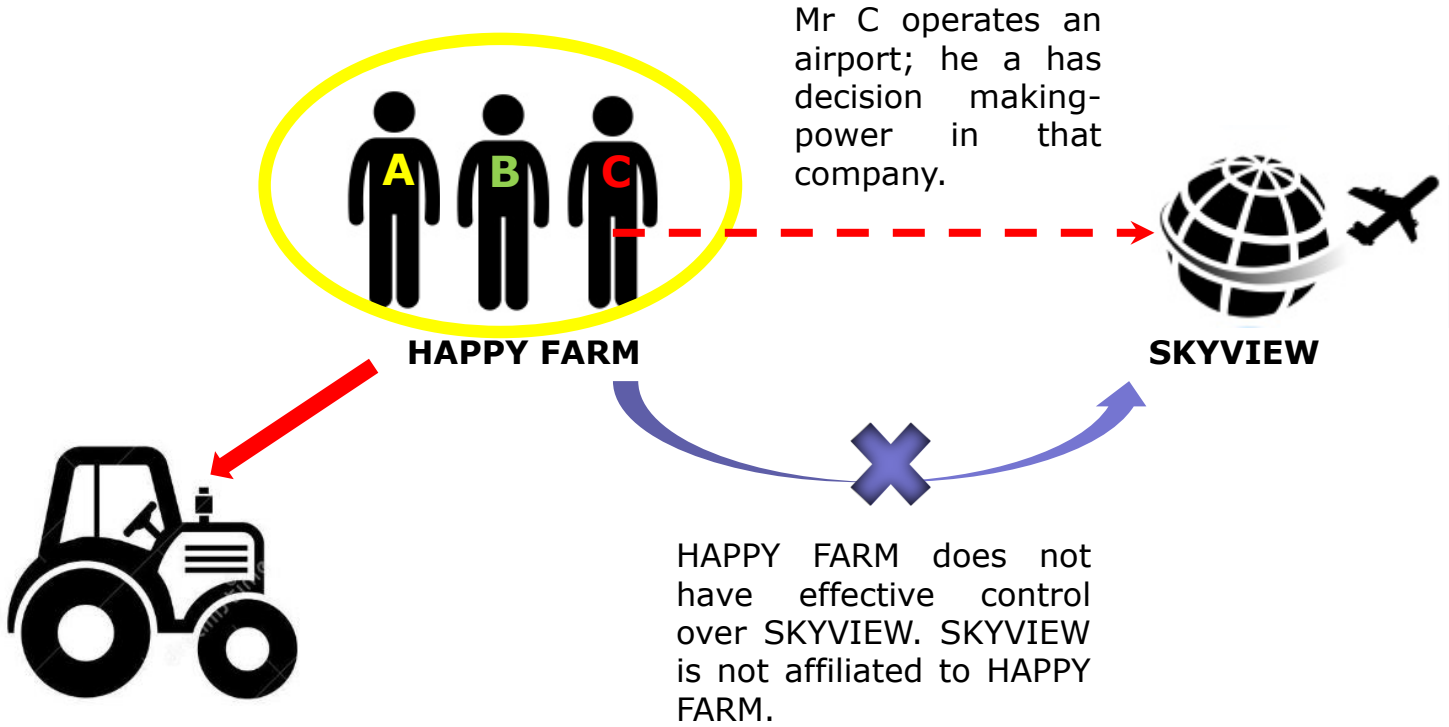
In the **NEGATIVE LIST**

EXAMPLE 2



NOT on the NEGATIVE LIST

EXAMPLE 3



NOT on the NEGATIVE LIST

EXAMPLE 4



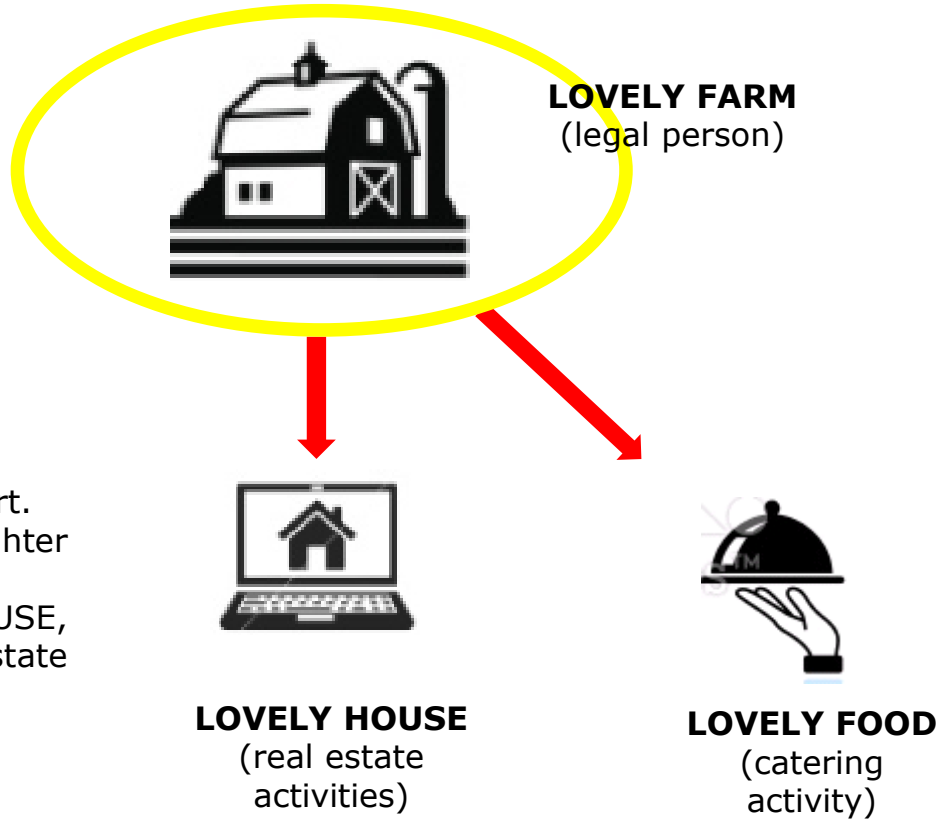
SMALL AIRPORT controls three different companies. One of them is FARM MY LAND, in charge of the agricultural activity of the agricultural land acquired by SMALL AIRPORT.



FARM MY LAND has a mother company which operates an activity on the negative list.

In the NEGATIVE LIST

EXAMPLE 5

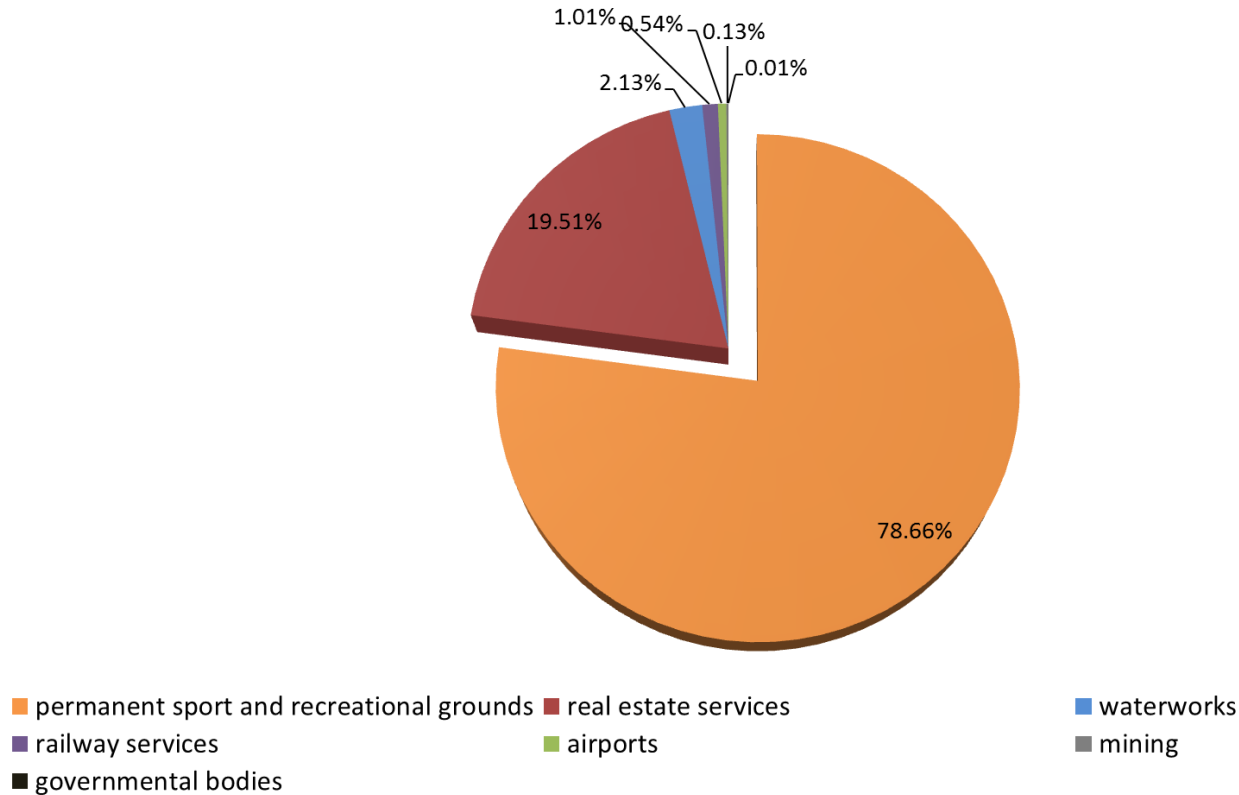


LOVELY FARM claims for support.
LOVELY FARM has two daughter companies.
One of them, LOVELY HOUSE, operates an activity of real estate service.

In the NEGATIVE LIST

Composition of the negative list at EU level (selected EU MS)

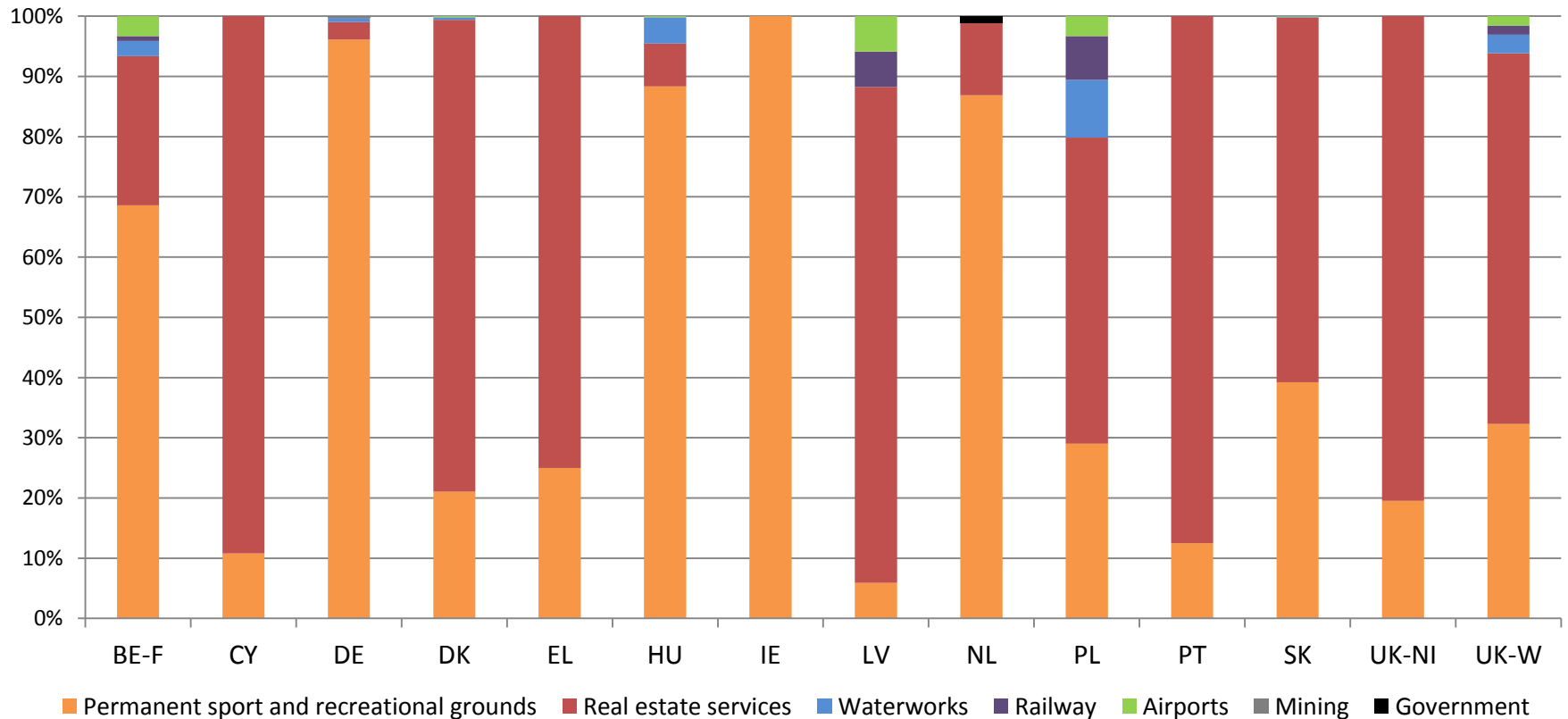
Share on the negative list in selected EU countries



Note: based on data from Belgium-Flanders, Cyprus, Germany, Greece, Denmark, Hungary, Ireland, Latvia, the Netherlands, Poland, Portugal, Slovakia, UK-Northern Ireland and UK-Wales. Some entities may belong to more than one category

Composition of the negative list at MS level (selected EU MS)

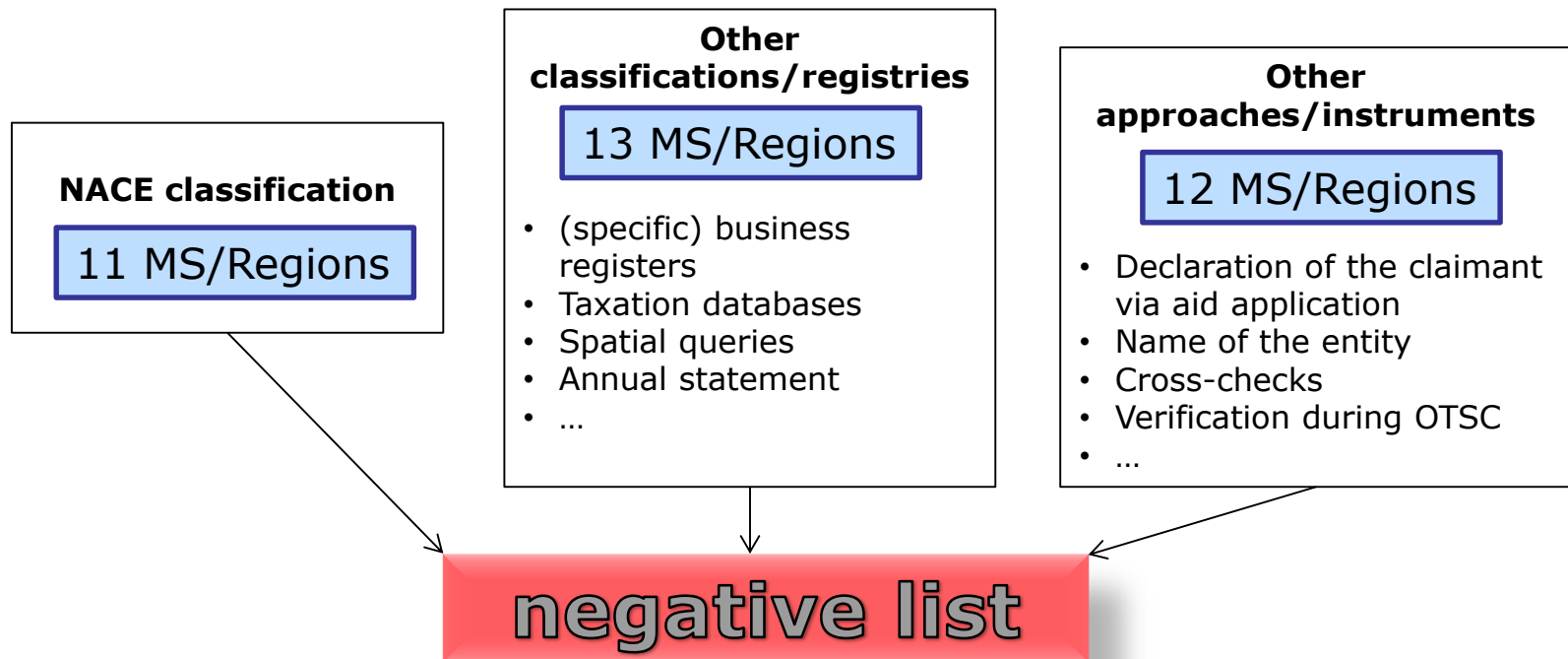
Negative list composition by Member State, in % of entities



Procedures and evidence used (1/2)

1- Establishment of the negative list

→ In most cases, combination of different means, depending of the activity considered or legal status of the entity.



Procedures and evidence used (2/2)

2- Identification of entities concerned by the negative list - Timing

- BEFORE the opening of the application period – identification of potentially concerned entities
- DURING the application process (application form + supporting documents)
- AFTER the application period (follow-up through administrative checks and OTSC)

3- Concerns:

- Risk of circumvention
- Difficulties in communicating the provisions to farmers
- Administrative burden



Discussion in relation to the negative list

The tests under Article 9(2)



European
Commission



CAROLINE

AGRICULTURAL
ACTIVITY



RODEO
ACTIVITY

NEGATIVE LIST

Are my direct
payments of last
year at least 5%
of my receipts
from my rodeo
activity?

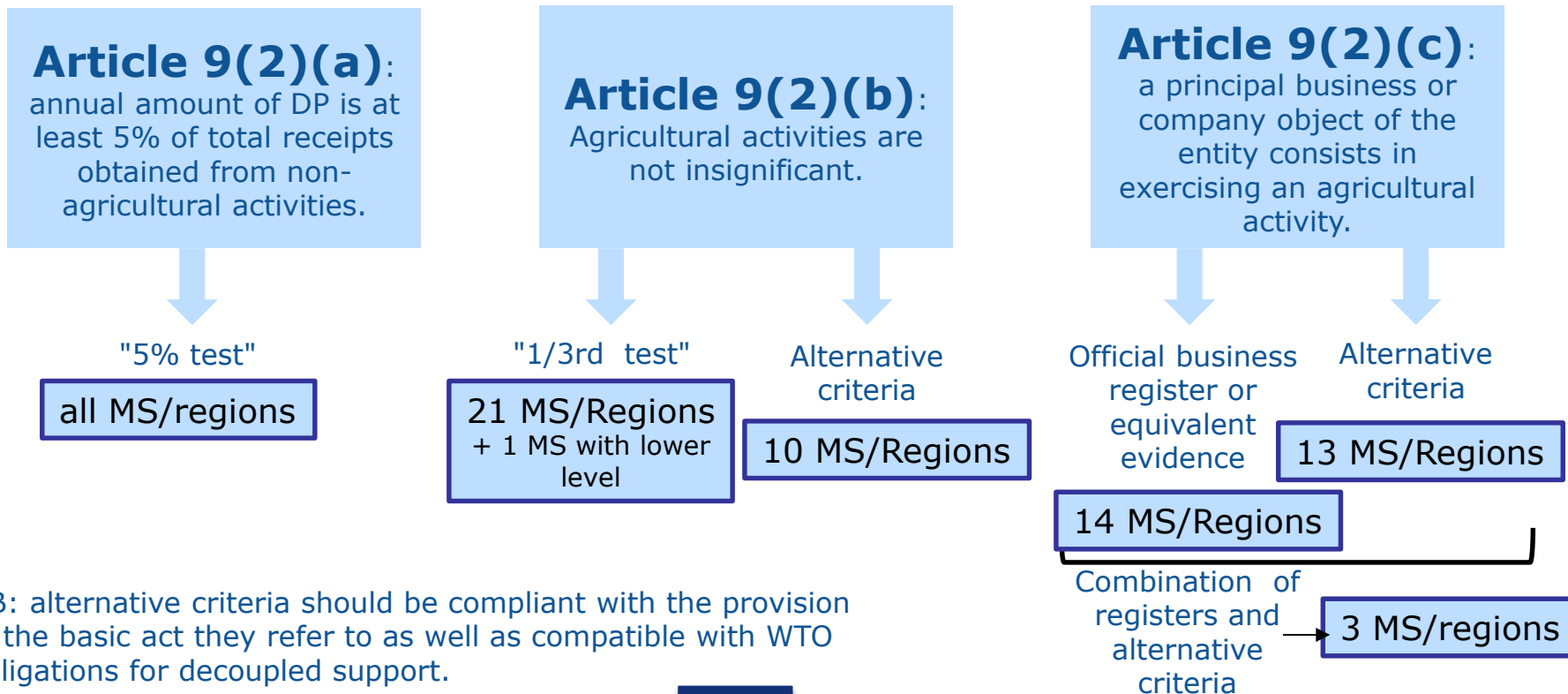


Is my agricultural
activity one of my
principal
business?

Is my agricultural
activity not
insignificant?

How to rebut the negative presumption?

Three possibilities for an entity to rebut the negative presumption by providing verifiable evidence, in the form requested by the MS, that:



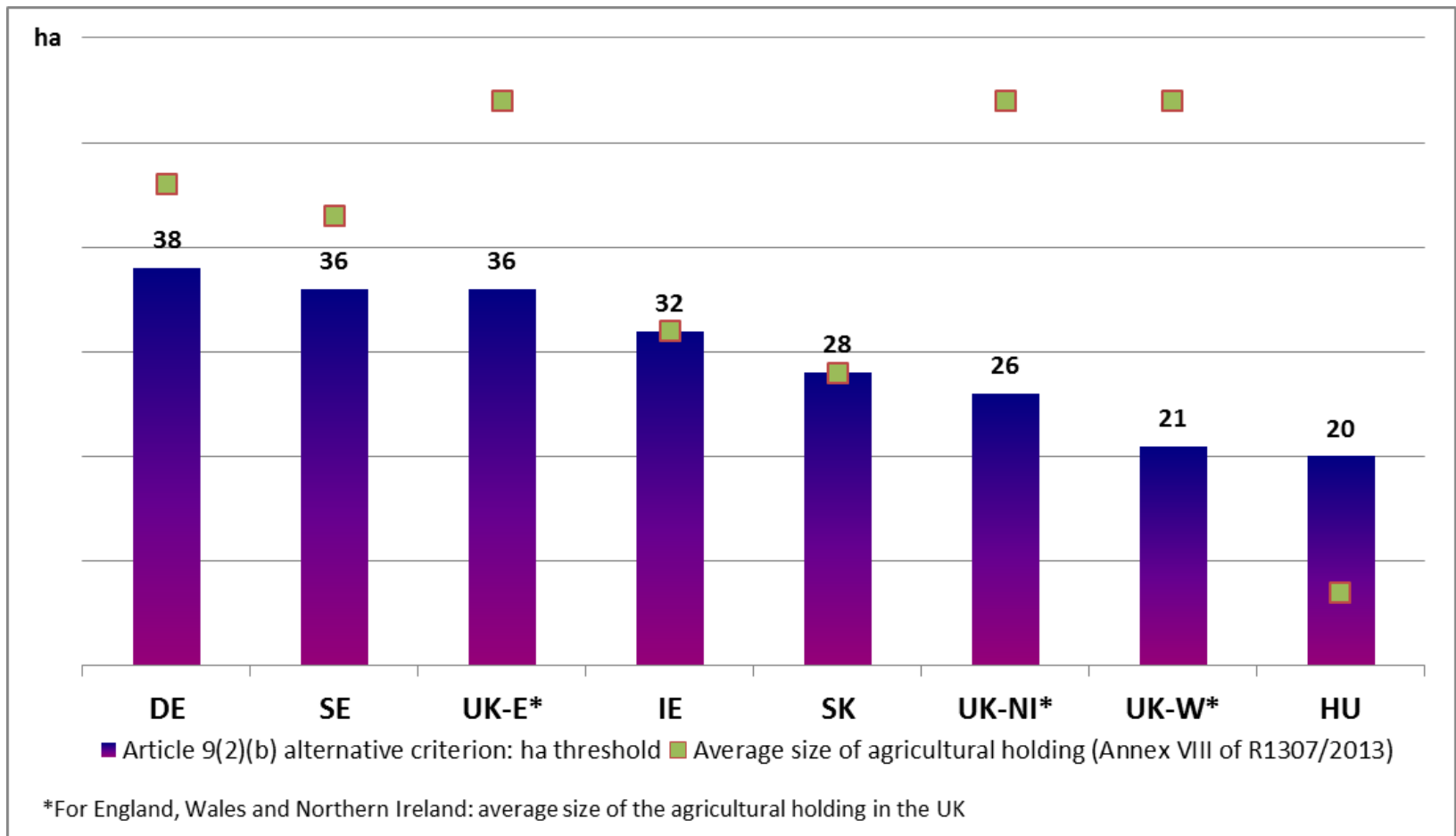
NB: alternative criteria should be compliant with the provision of the basic act they refer to as well as compatible with WTO obligations for decoupled support.

Article 9(2)(b) - Examples of alternative criteria

Agricultural activity considered as not insignificant if:

- **Number of eligible hectares declared by the entity is above a certain threshold:**
 - Eligible hectares
 - No requirements in term of production (compliance with WTO requirements for decoupled support)
 - Appropriate level of the threshold for Article 9(2)(b): shall not be too demanding (below the threshold, agricultural activity is deemed insignificant) + shall reflect that the agricultural activity is not insignificant above the threshold

Level of the hectare thresholds chosen pursuant to Article 9(2)(b)



Article 9(2)(c) - Examples of alternative criteria (1/2)

Agricultural activity considered as being one of the principal business or company objects if:

- **At least X% of the assets of an entity can solely be used for the exercise of an agricultural activity:**
 - WTO requirements for decoupled support should be respected (no production requirement).
 - MS shall ensure that the level of the threshold (X) is appropriate for 9(2)(c) (cases where an entity operates more than two different activities).

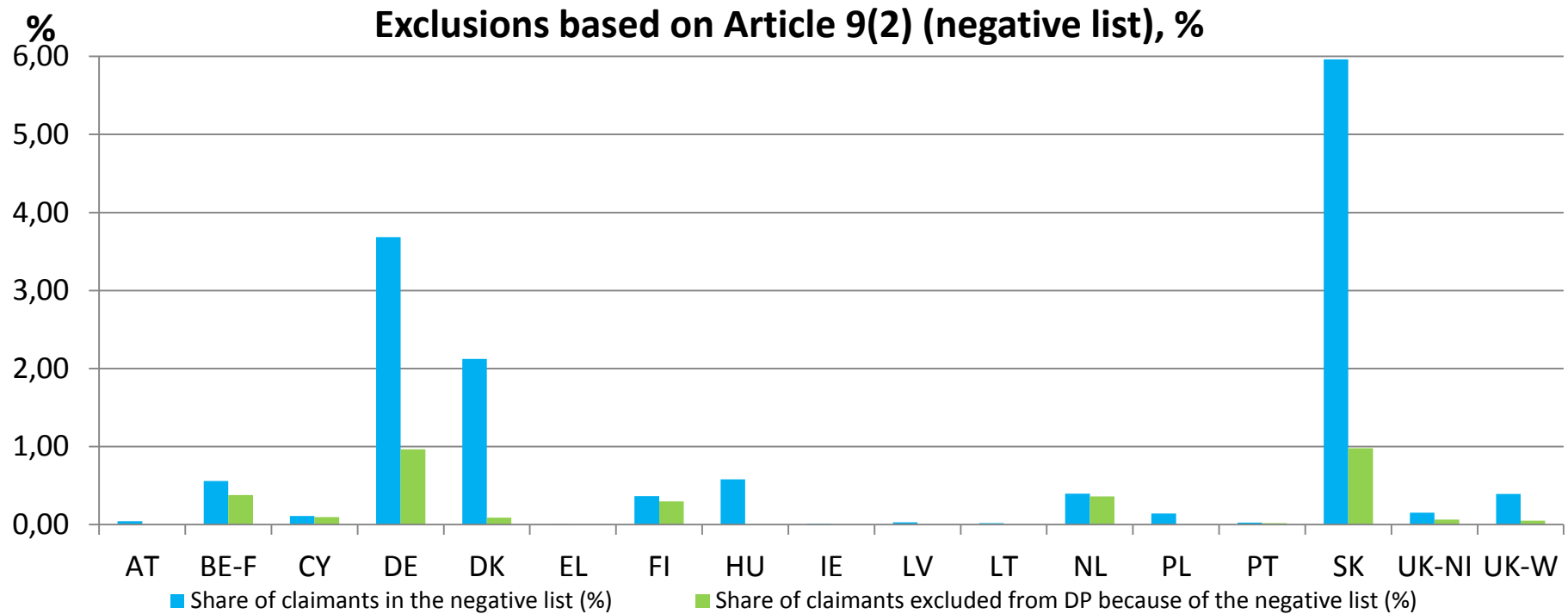
- **Receipts from agricultural activity represent at least Y% of the total receipts:**
 - MS shall ensure that the level of the threshold (Y) is appropriate for 9(2)(c).
 - Only possible where the "1/3rd test" is not implemented pursuant to Article 9(2)(b) (otherwise, Article 9(2)(c) loses its effectiveness).

Article 9(2)(c) - Examples of alternative criteria (2/2)

Agricultural activity considered as being a principal business or company objects if:

- Affidavit/statutes of the company
- Average total receipts obtained from agricultural activities in the X previous years exceeds Y% of the total receipts obtained by the entity for the same period.

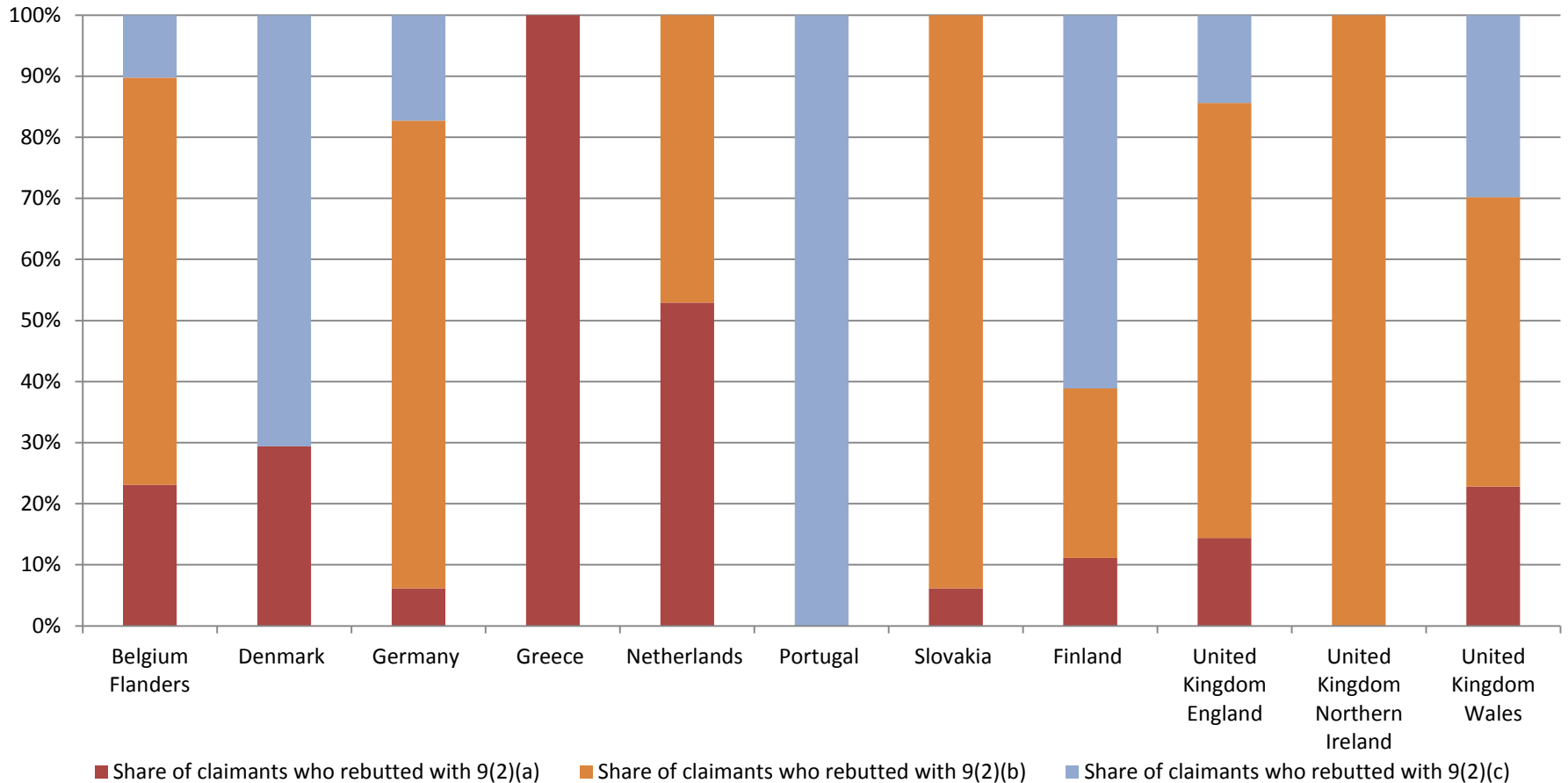
Share of entities in the negative list & share of entities excluded from direct support because of Article 9(2)



Number of claimants in the negative list

AT	BE-F	CY	DE	DK	EL	FI	HU	IE	LV	LT	NL	PL	PT	SK	UK-S	UK-NI	UK-W
47	121	37	11898	887	24	193	1038	14	17	26	198	1924	40	1092	18	41	65

Tests used by the entities on the negative list



Evidence used for demonstrating the activity under Art. 9(2)

1. Accountant certificates

- Certified accountants
- Based on most recent (verified) tax declaration or audited annual accounts
- Templates often prepared by the administration
- Mostly used for 9(2)(a) and (b)

2. Copies of book keeping

3. Data from the single application

- E.g. declared ha in MS applying an area threshold for 9(2)(b)

4. Evidence on principal business

- Used for 9(2)(c)
- E.g. extract from the activity register (NACE based and other national registers)
- Declaration of the applicant (combined with other evidence)

5. Cross-checks with registers

- Used for all tests
- E.g. information of the PA for establishing the amount of DP in 2014
- E.g. information from tax authorities and customs for 9(2)(a) and (b)
- E.g. register of business activities for 9(2)(c)

!!! Type of evidence used for the tests was linked to the criteria set at MS level and the reliability of registers available to PA.

Procedures used – Example 1

1. Applicants submit evidence for the chosen rebuttal option (test) in the form of supporting documents to the single application

2. Administration decides on a case-by-case basis if the evidence given gives sufficient assurance

3. If necessary, additional documents (copies of bookkeeping records) are requested + hearing organised

4. Final decision on farmer status (active or not)

Procedures used – Example 2

0. Threshold chosen by MS in accordance with 9(4) is applied. If below the threshold, the farmer is considered active.

1. If above the threshold, administrative cross-checks of information provided in the beneficiary identification form (database) against the national classification of economic activities for legal persons (register) are done. If necessary, additional documents are required by the beneficiary (based on tax declaration).

- The applicant has to fill in/ update the beneficiary identification form by the deadline for applications. Entities not performing any agricultural activity in the national classification cannot enter the system.
- The register (national classification of economic activities) includes verified information on primary and secondary activities.

Procedures used – Example 3

1. Entities concerned by the negative list are identified and informed about it.

2. When submitting the single application, a declaration rebutting the presumption had to be submitted. Supporting documents had to be attached.

3. Administrative control of declarations and supporting documents.

4. If non-active status is confirmed, the entity is informed and an appeal procedure is set off. Additional supporting documents may be provided.

Procedures used – Example 4

1. Entities concerned by the negative list are identified.

2. Entities are informed about this and the various possibilities to rebut the presumption.

3. Evidence submitted by applicants (balance sheets, annual accounts etc.).

4. Administrative and cross-checks done. If evidence not clear, applicant was contacted to provide additional documents.

5. Claimant informed about the decision.

Observations on implementation of the rebuttal tests (1/2)

- Depending on the criteria set at MS level it was easy (or not) to perform the tests (for farmers and the administration)
- *When designing the procedure (and criteria), MS took into account the administrative burden*
- Applicants choose the easiest option/ test
- *Communication issue highlighted by some MS: difficult for farmers to understand the rules*
- Different procedures applied for natural and legal persons
- *Supporting documents to perform the tests were mostly required by the deadline for applications*

Observations on implementation of the rebuttal tests (2/2)

- Where criteria set by the MS to test 9(2)(b) included an area threshold, the test appears to be easy to apply
- *Where registers of the main activity provide reliable information, test 9(2)(C) seems to be easy to apply*
- Administrative checks mostly used to check the AF provisions
- *OTSC more rarely (e.g. used for checking area in cases where area thresholds are used to test 9(2)(b))*



Discussion in relation to the tests under 9(2)

Further exclusion Article 9(3)

The objective of Article 9(3)

- to provide MS with the possibility of not granting DP to natural or legal persons whose **agricultural activity is marginal** by the use of **objective and non-discriminatory criteria**.
- **Optional** implementation: MS may decide to apply:
 - Only (a) → claimants whose agricultural activity is insignificant compared to other economic activities are excluded.
 - Only (b) → claimants whose agricultural activity is not one of their principal businesses or company objects are excluded.
 - (a) and (b) → claimants excluded are those whose agricultural activity is insignificant compared to other economic activities AND whose agricultural activity is not one of their principal businesses or company objects (cumulative conditions for being excluded).

Guidance on Article 9(3)

Guidance document:

→ where a Member State decides to apply Article 9(3), an entity able to demonstrate one of the criteria in the third subparagraph of Article 9(2) might still be excluded from support on the basis of Article 9(3).

→ When applying Article 9(3), Member States need to comply with general principles of EU law, including the principle of non-discrimination. This would as a general rule exclude that only specific types of businesses are targeted under that provision, all the more as such a possibility is already foreseen in the second subparagraph of Article 9(2).

Article 9(3)(a)

On the basis of objective and non-discriminatory criteria, MS may decide that no direct payments are to be granted to claimants whose agricultural activities form only an insignificant part of their overall economic activities.

Article 13 of Regulation (EU) No 639/2014

5% test: annual amount of DP is less than 5% of total receipts obtained from non-agricultural activities

1/3rd test: receipts obtained from agricultural activities represent less than (1/3rd) of total receipts

Alternative criteria according to which agricultural activities are considered as insignificant in overall economic activities

NB: Should reflect the relativity of the provision at stake.

Article 9(3)(b)

On the basis of objective and non-discriminatory criteria, MS may decide that no direct payments are to be granted to claimants whose principal activity or company objects do not consist of exercising an agricultural activity.

Article 13 of Regulation (EU) No 639/2014

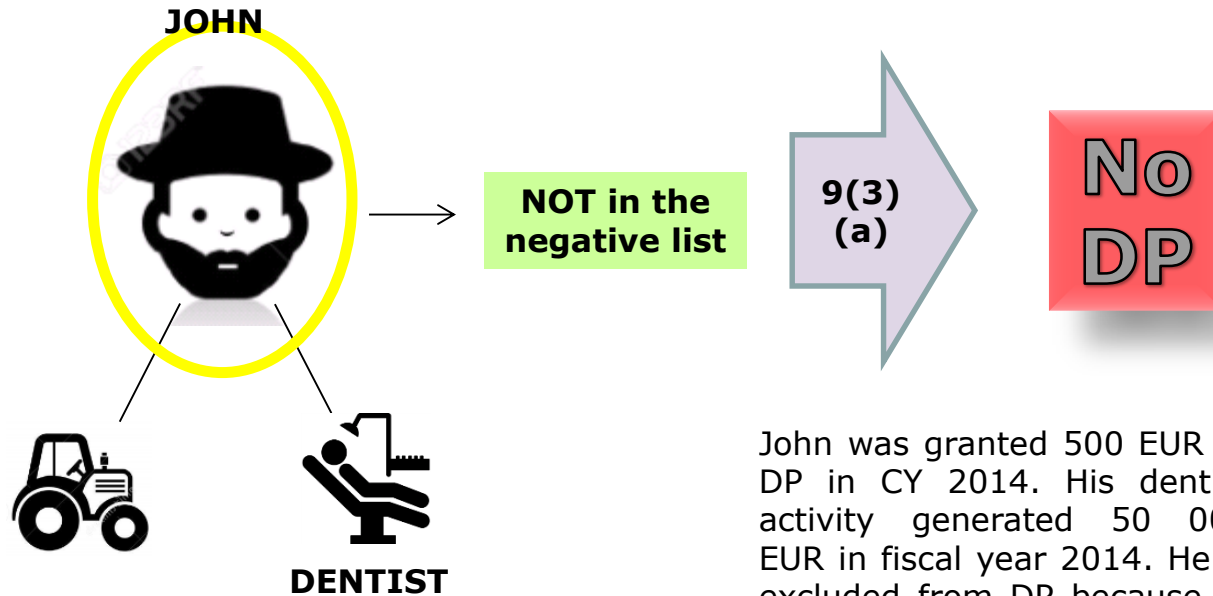
**Official business or
equivalent
evidence**

Alternative criteria
according to which
agricultural activity is not
one of the principal
business or company
objects

EXAMPLE 1



- John is a dentist and has also 2 ha of eligible land on which he grows vegetables.
- The holding is in a MS applying a 100 EUR threshold pursuant to Article 9(4).
- **Article 9(3)(a) is applied in that MS:** claimants with insignificant agricultural activity compared to other activities are excluded.
- Test applied in this example: 5% test → **exclusion if DP < 5% other economic revenues**

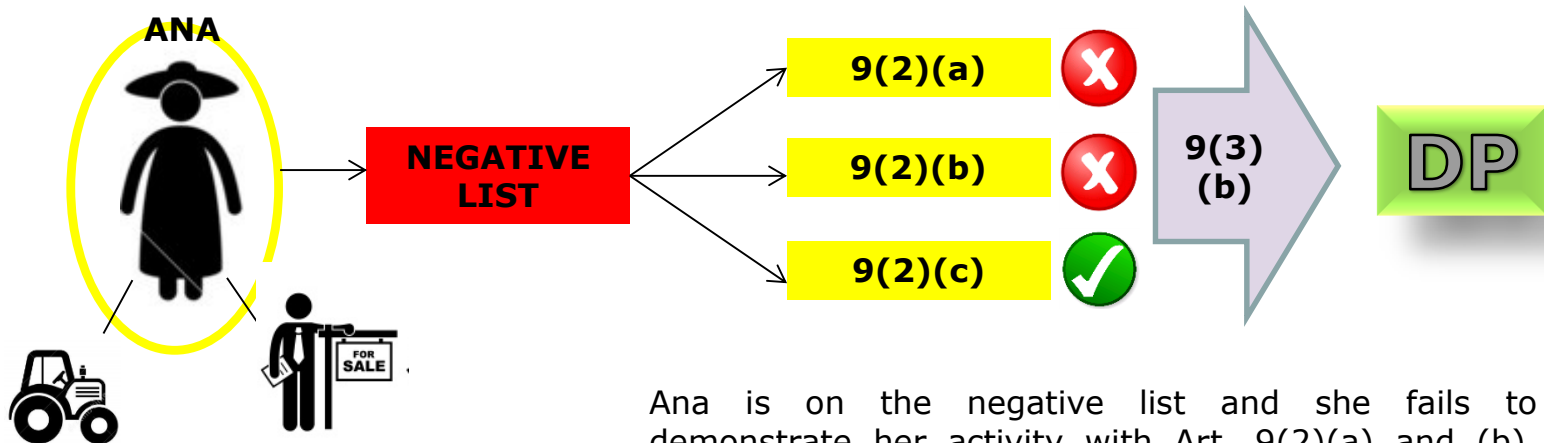


John was granted 500 EUR of DP in CY 2014. His dentist activity generated 50 000 EUR in fiscal year 2014. He is excluded from DP because of 9.3.a.

EXAMPLE 2



- Ana is a farmer and operates a real estate service.
- In the MS in which her holding is located:
 - Article 9(4) threshold: 1000 EUR → Ana is not exempted.
 - Article 9(2)(b): 1/3rd test
 - Article 9(3)(b) is applied: claimants whose agricultural activity is not one of their principal businesses or company objects are excluded. Evidence used in this example: **official business register (as for 9(2)(c))**.

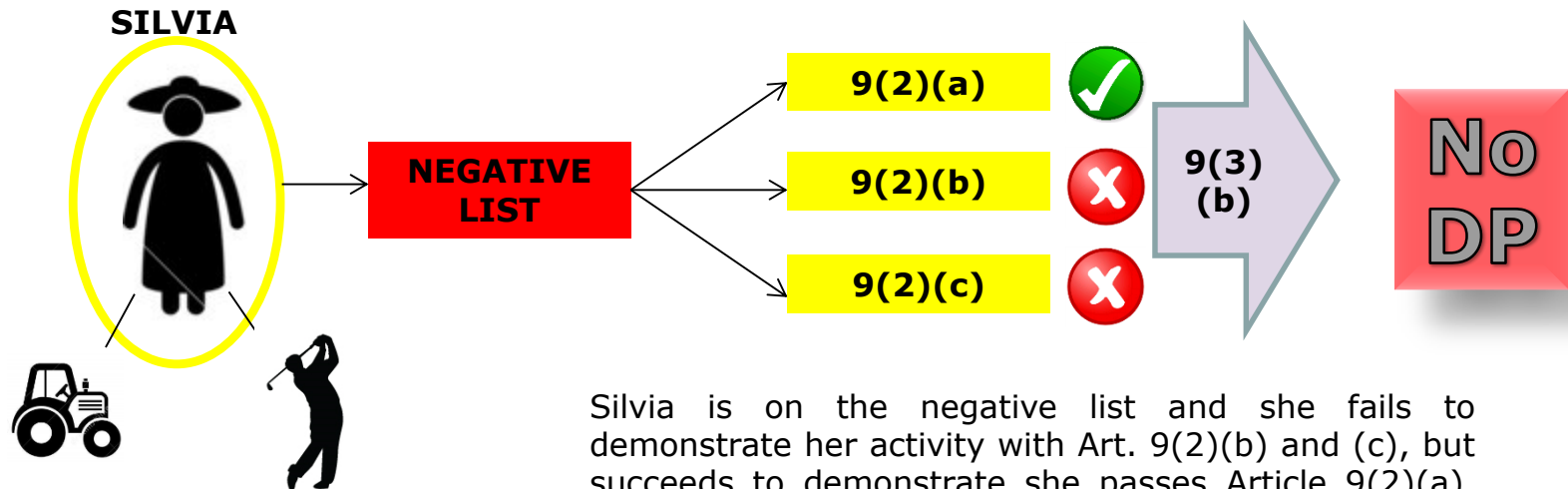


Ana is on the negative list and she fails to demonstrate her activity with Art. 9(2)(a) and (b). However, her agricultural activity is registered as her principal business in the official business register. She rebuts the negative presumption and she is not excluded because of Article 9(3)(b).

EXAMPLE 3



- Silvia is a farmer and operates a golf.
- In the MS in which her holding is located:
 - Article 9(4) threshold: 1000 EUR → Silvia is not exempted.
 - Article 9(2)(b): 28 ha (alternative criterion)
 - Article 9(3)(b) is applied: claimants whose agricultural activity is not one of their principal businesses or company objects are excluded. Evidence used in this example: **official business register (as for 9(2)(c))**.

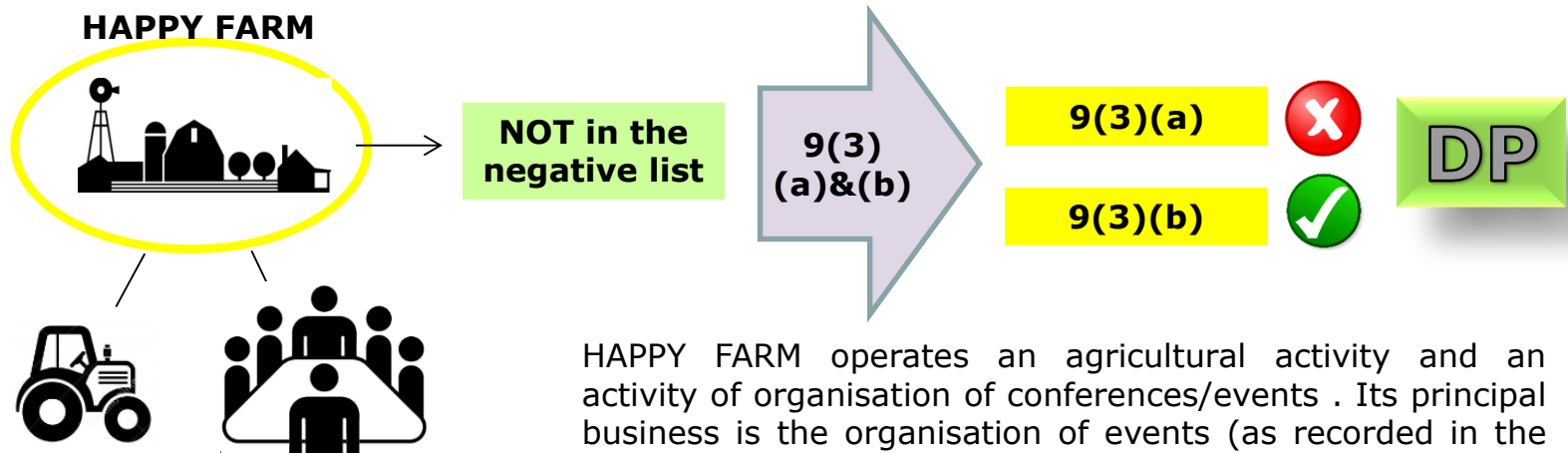


Silvia is on the negative list and she fails to demonstrate her activity with Art. 9(2)(b) and (c), but succeeds to demonstrate she passes Article 9(2)(a). She is however excluded because of Article 9(3)(b).

EXAMPLE 4



- both **Article 9(3)(a) and Article 9(3)(b) are applied**: claimants excluded are those whose agricultural activity is insignificant compared to other economic activities **AND** whose agricultural activity is not one of their principal businesses or company objects.
- Test applied in this example for 9(3)(a): 5% test → **exclusion if DP < 5% other economic revenues**
- Evidence used in this example for 9(3)(b): **official business register**

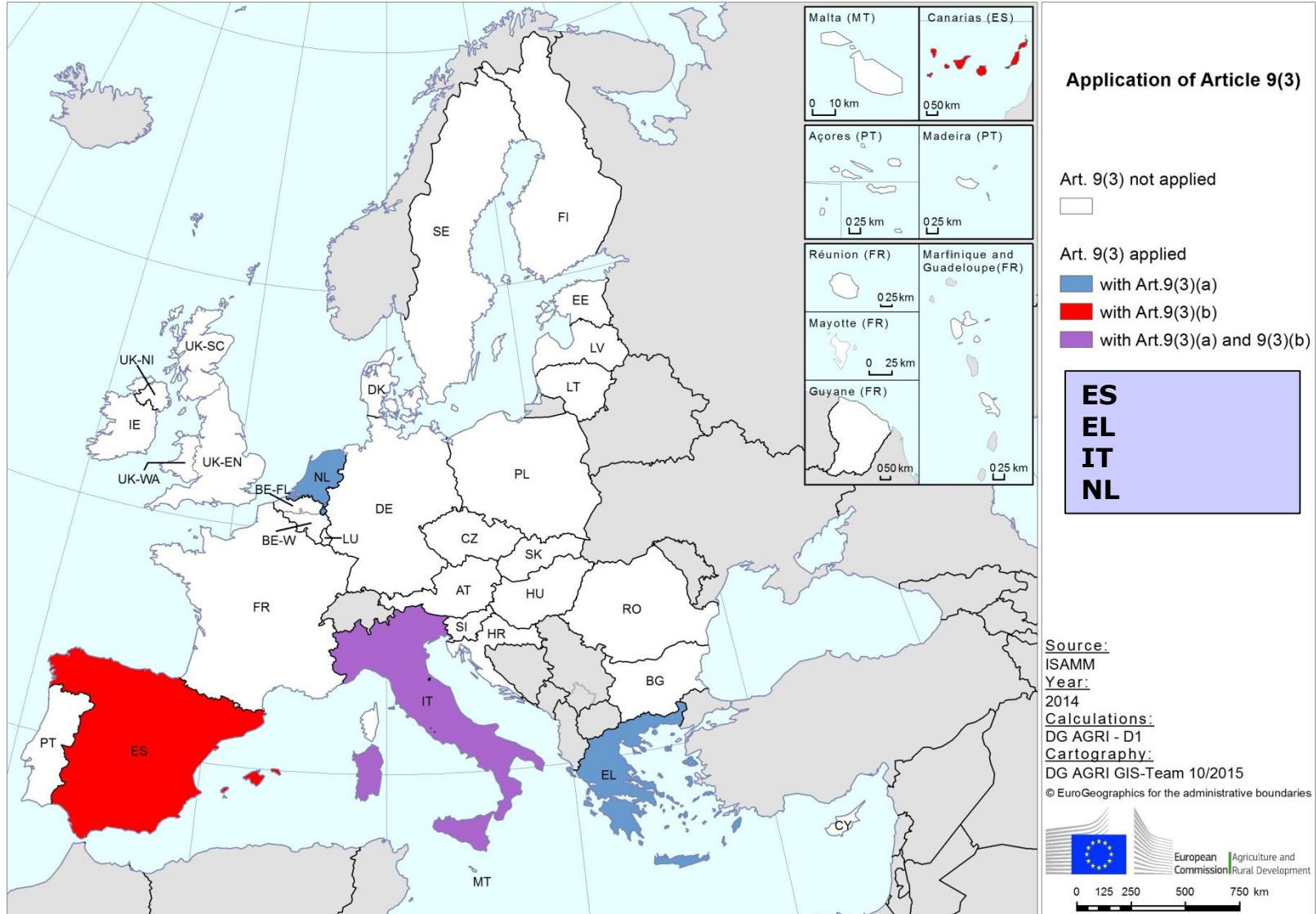


HAPPY FARM operates an agricultural activity and an activity of organisation of conferences/events . Its principal business is the organisation of events (as recorded in the official business register). However, DP of HAPPY FARM exceeds 5% of its receipts from event planning (HAPPY FARM is not excluded because of 9(3)(a)).

4 MS decided to make use of Article 9(3)



European Commission



Procedures and evidence used

In the MS applying the provision the implementation model is in principle similar to the one applied for Article 9(2).

Comment made by several MS:
applying the provision would mean additional administrative burden.



Discussion in relation to Article 9(3)



The exemption threshold Article 9(4)

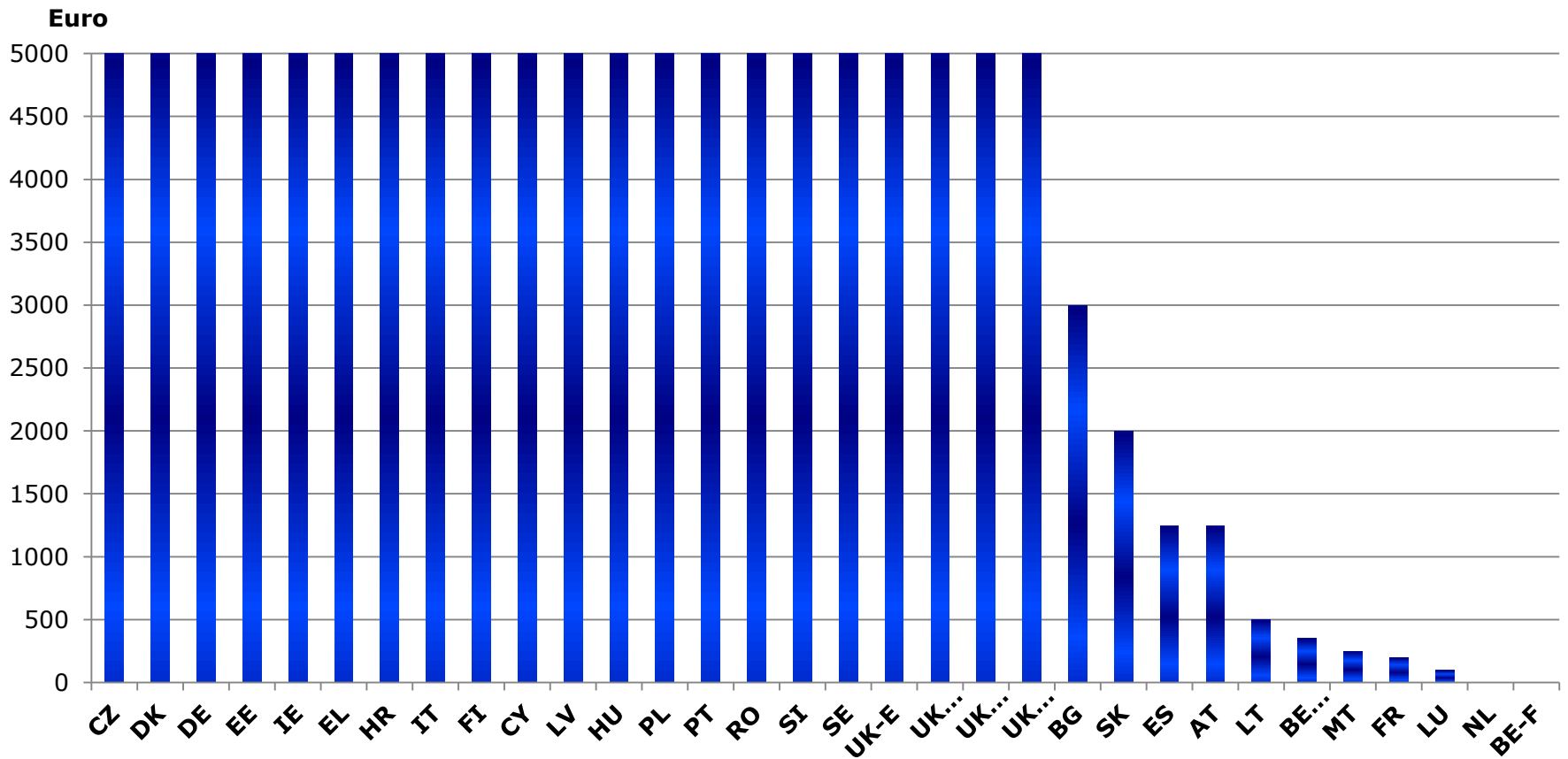
The objective of Article 9(4)

- MS should be allowed to grant DP to smaller part-time farmers, since those farmers contribute directly to the vitality of rural areas

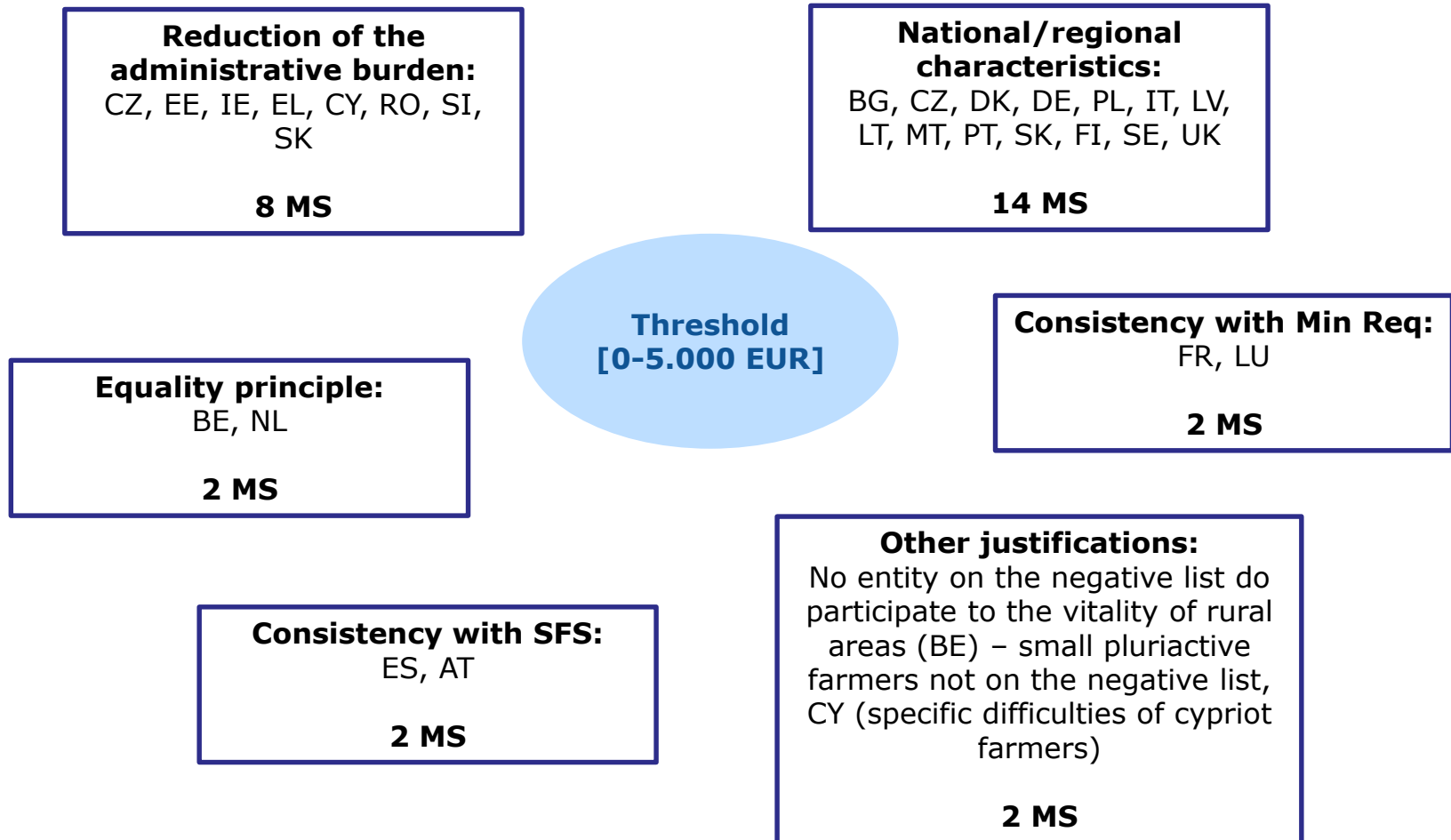
Interpretations related to Article 9(4)

- Level of the threshold is to be **justified** by objective and non-discriminatory criteria, **such as** national or regional characteristics.
- **Low thresholds** might contradict the primary objective of the provision to exempt smaller part-time farmers from some of the active farmer's provisions. The risk for the decision taken by the MS to be challenged in Court should be assessed by the MS.
- If justified by objective and non-discriminatory criteria such as regional characteristics, **differentiated thresholds** might be considered.

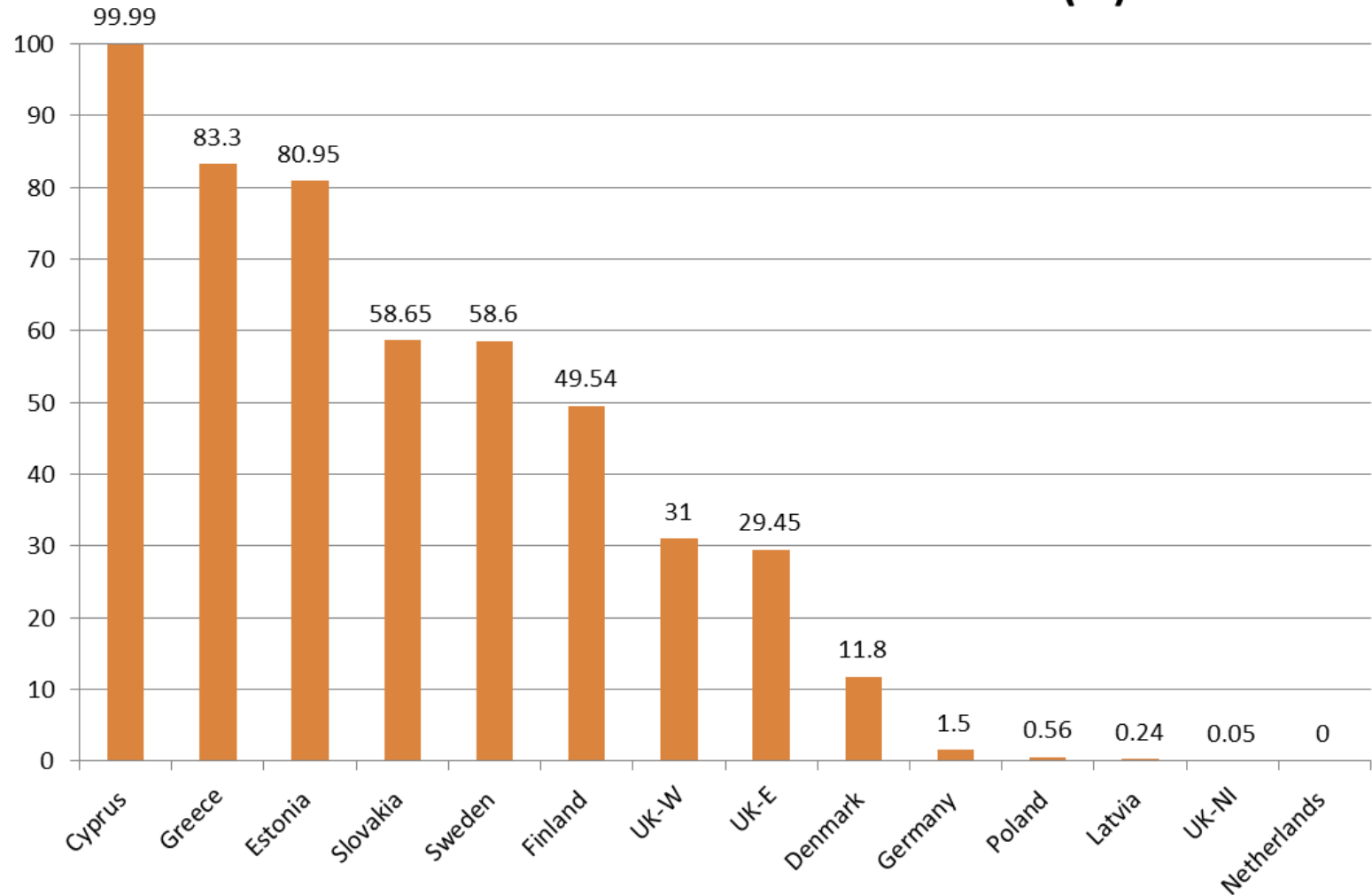
Thresholds applied pursuant to Article 9(4)



Level of the exemption threshold: main justifications provided



Share of claimants under the threshold (%)



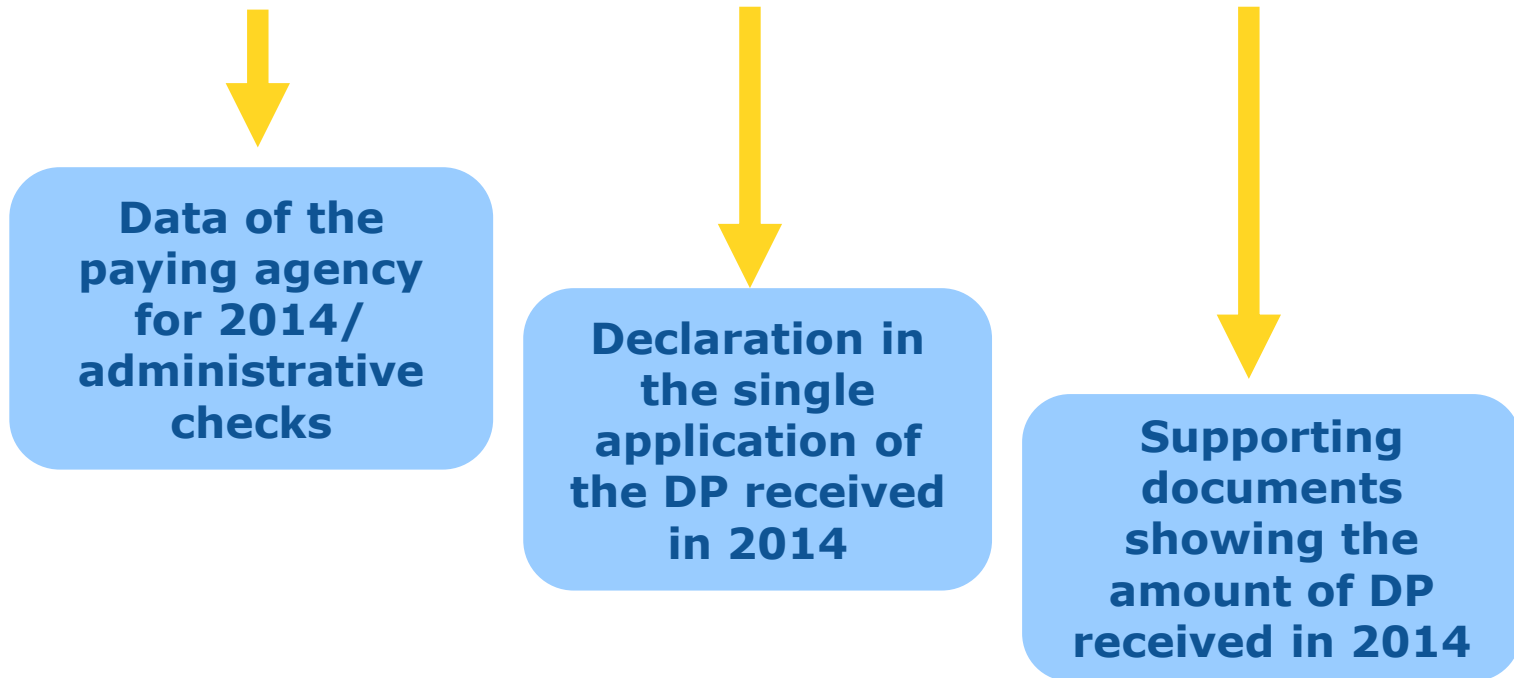
Using the 9(4) threshold

Two main implementation models:

1. Use the threshold as a first step in assessing applicants (applicants below the threshold were considered active farmers)

2. Identifying entities potentially concerned by the negative list and then using the threshold to identify those who should not be subject to additional tests/ checks

Establishing whether Direct Support in 2014 CY are lower than the 9(4) threshold





Discussion in relation to Article 9(4)



Review Article 9(6)

Principles

Review may concern **any decision** related to the Active Farmer's provisions.

Review has to be **notified** to the Commission **within two weeks** after the decision to review is taken.

→ specific ISAMM form

→ to be asked to the Commission

Review **shall respect EU general principles:**

→ Any review of the measures taken for the implementation of the active farmer provisions need to respect the applicable legal framework and should be in line with the general principles of EU law such as non-discrimination, legal certainty and legitimate expectations, both as regards the substance and the timing.

→ As regards the timing, any review shall be announced sufficiently in advance to the farmers.



Discussion in relation to Article 9(6)



**Thank you for your
attention**