

Ten Years of REACH litigation

by

Marc van der Woude

ECHA

24 May 2017

Introduction

What is meant by litigation ?

- Internal to ECHA itself
- External
 - Appeals before EU Courts
 - Proceeding before national courts with preliminary reference to Court of Justice

Purpose of presentation:

- Quantitative and Qualitative aspects
- Comparison with other agencies
- Position of General Court

Introduction

Outline of Presentation:

- The reform of the General Court
- Quantitative data
 - Incoming and outgoing cases
 - Results
 - Comparison with EMA and EUIPO
- Some qualitative comments

I. The reform: background

General Court

- created in 1989 at Court of Justice with a view to :
 - ✓ Discharging the Court of Justice from a growing number of cases involving economic litigation, which requires a detailed appreciation of complex facts, and
 - ✓ Setting up a two-tier jurisdiction
- 12 judges
- Two areas of law at the time
 - ⇒ Competition law
 - ⇒ Staff cases
- Ever since increase in competencies : Nice and Lisbon

I. The reform: background

Treaty of Nice

- Possibility for specialised courts
 - Civil Service Tribunal established in 2005
- One institution, three jurisdictions
- Possibility of transferring jurisdiction over preliminary references to General Court
- At least one judge per Member State at General Court

I. The reform: background

Developments at General Court

- Increasing workload and reasonable delay issues
- 2009 General Court draws attention to issue
 - Idea of a specialised trade mark court
 - Application of Nice structure
- Court of Justice proposes different solution
 - Increase in number of judges
 - First 12 then 9
- Appointments become political issue
- Solution :
 - Doubling of number of judges and
 - Integration of Civil Service Tribunal (21 + 7)

I. The reform: implementation

Regulation 2015/2422

- Objective => volume of and duration (Recital 5)
- From 28 to 56 judges at General Court in three steps
- Integration of the Civil Service Tribunal
- 26 December 2017 : report on possibility of transferring preliminary reference cases to General Court
- 26 December 2020 : report on the General Court's efficiency, the necessity of the increase and structural changes (specialised chambers)

I. The reform: implementation

New structure

- Cruise speed first
 - experiments later
 - no specialisation
- Nine chambers of 5
 - with working units of 3
 - facilitating exchange of information
- Legal consistency concern : role of vice-president
- Appeal chamber kept in place to deal with pending staff cases

I. The reform: implementation

Advantages of reform

- Reduced duration of proceedings :
 - From 27.7 months in 2007 to 18.7 in 2016
 - Further reductions possible
- Real time case management
- Increased use of extended formations

Wider debate

- Impact on Court of Justice

II. Quantitative aspects of REACH litigation

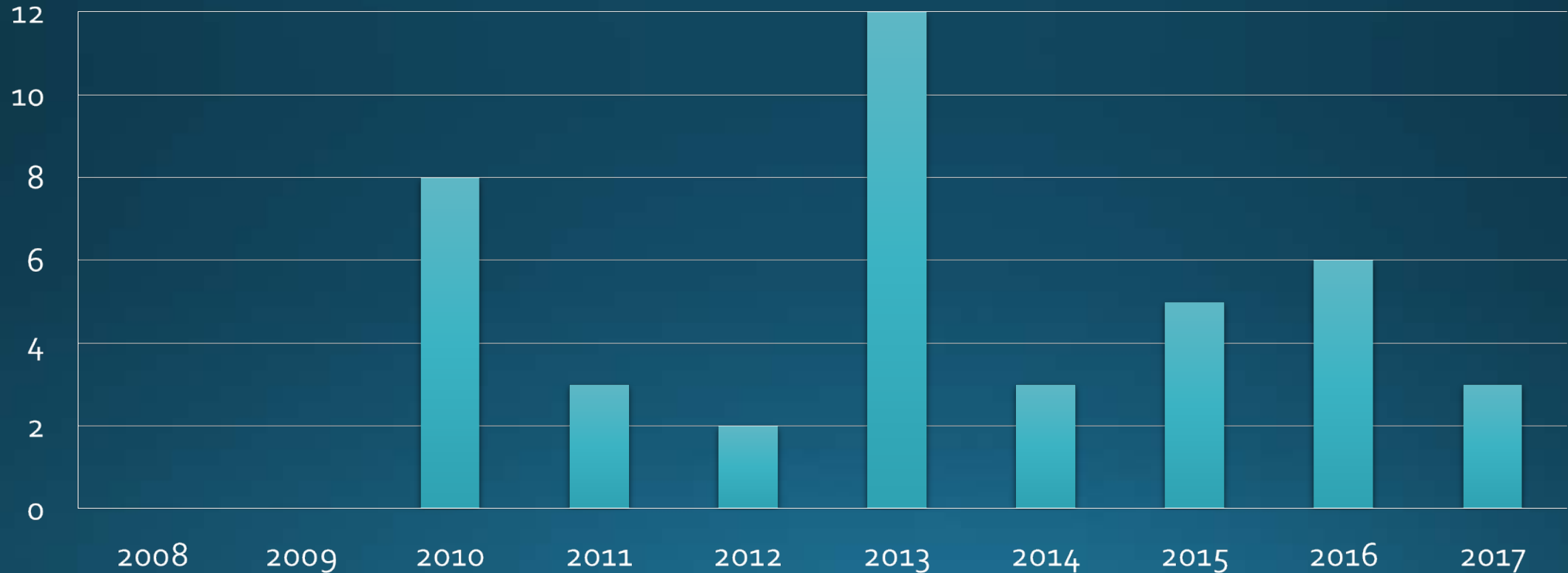
Initial concerns

- Complex area
- Reluctance on the side of the industry
- Influx of litigation

Data do not (yet) reveal significant number of appeals

II. Quantitative aspects : REACH cases before the General Court

Cases introduced (2008-31 March 2017)

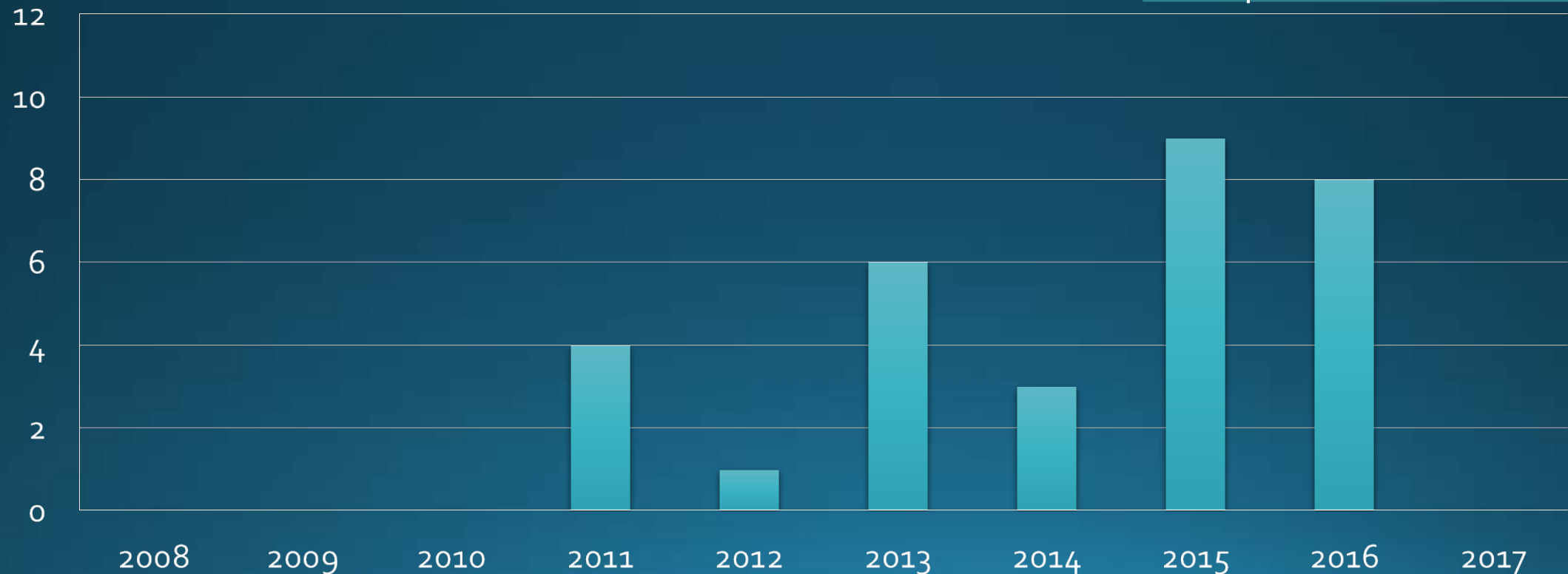


II. Quantitative aspects : REACH cases before the General Court

Waves of often related cases:

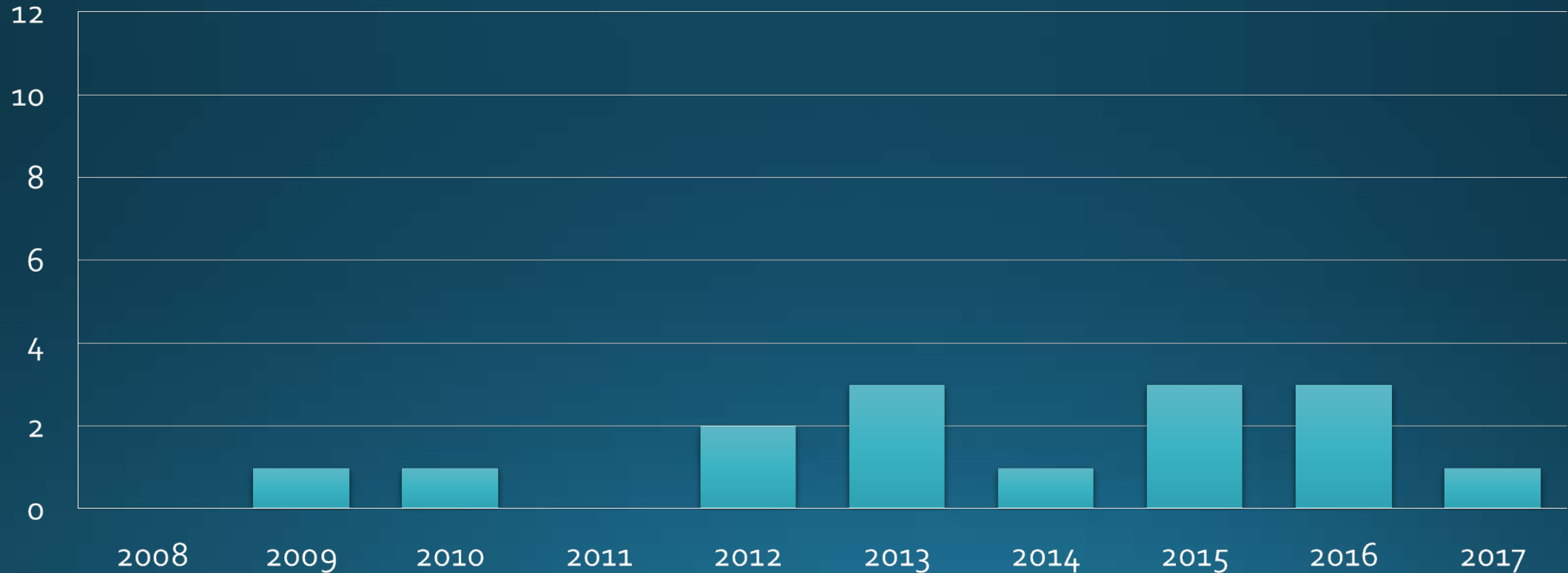
- Court orders of 21 September 2010
- Judgments of 7 March 2016 or of 15 September 2016

Cases closed (2008-31 March 2017)



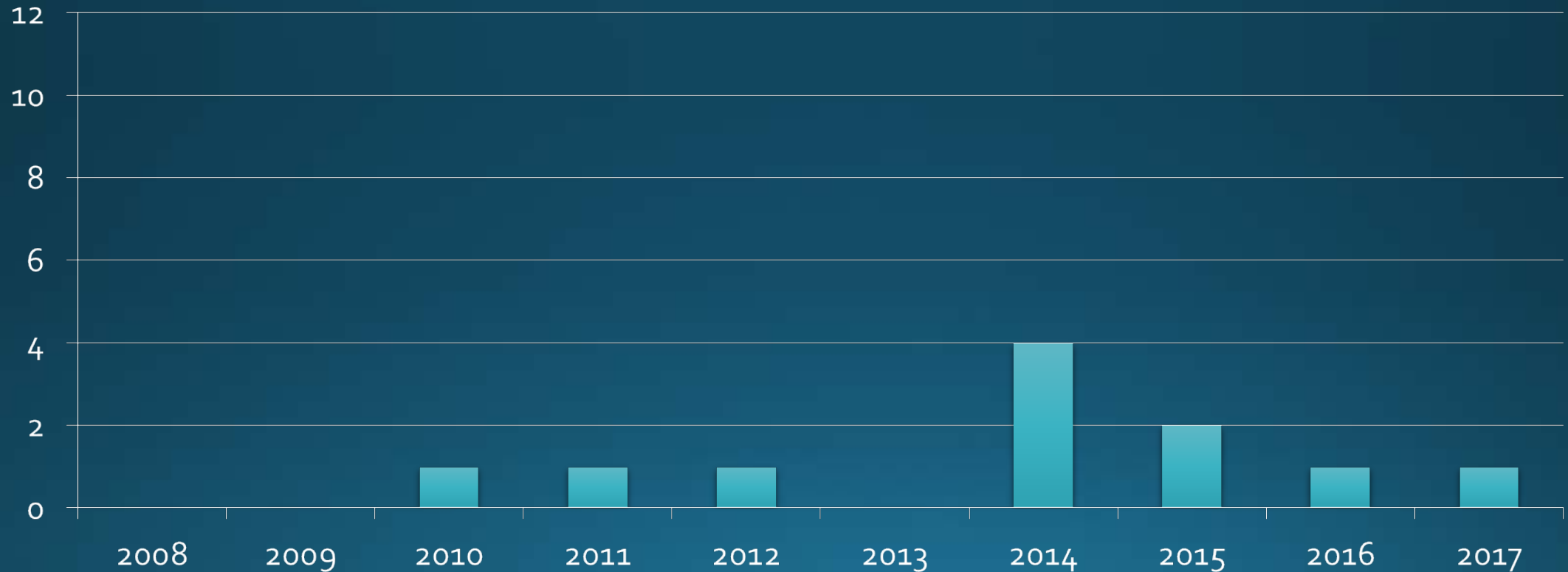
II. Quantitative aspects : EMA cases before the General Court

Cases introduced (2008-31 March 2017)



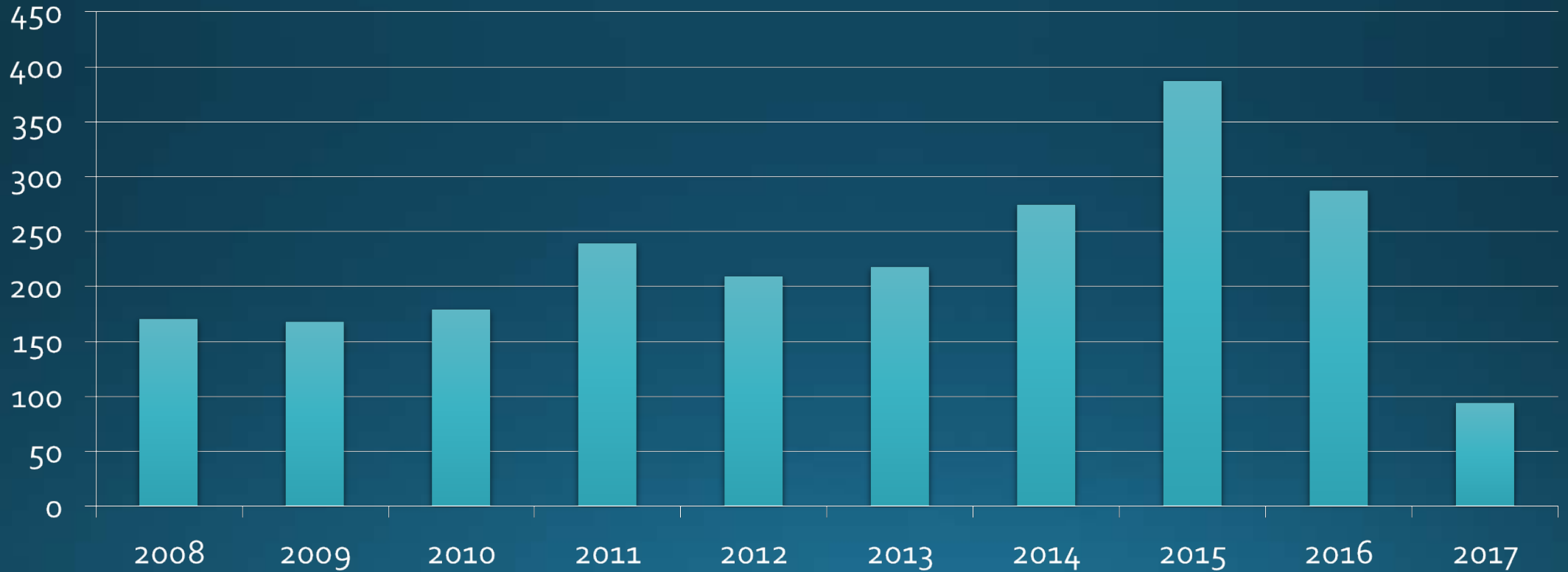
II. Quantitative aspects : EMA cases before the General Court

Cases closed (2008-31 Marc 2017)



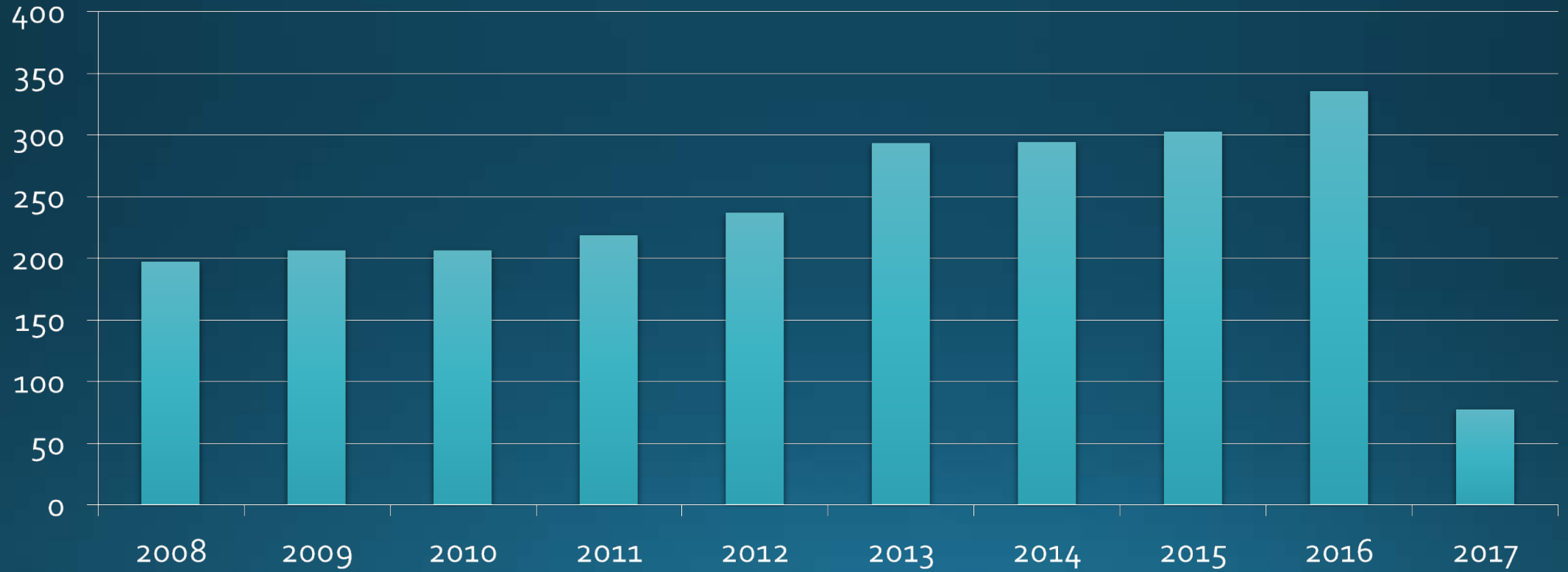
II. Quantitative aspects : IP cases before the General Court

Cases closed (2008-31 March 2017)



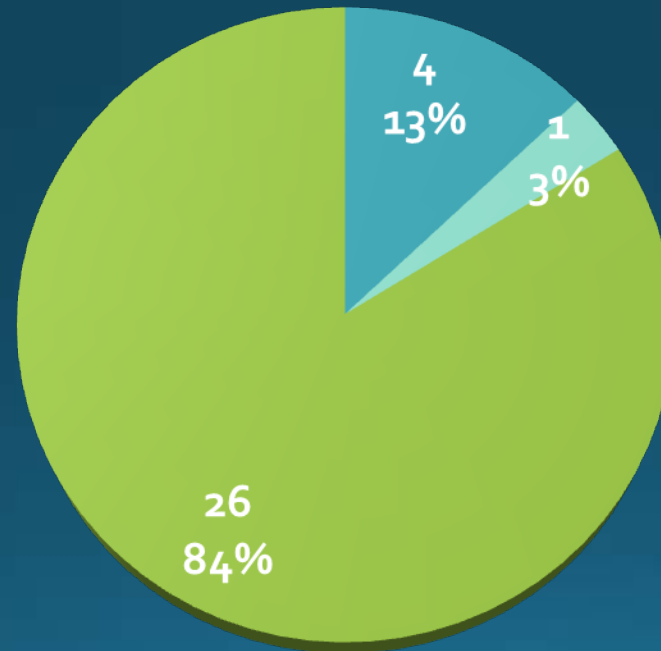
II. Quantitative aspects : IP cases before the General Court

Cases introduced (2008-31 March 2017)



II. Quantitative aspects : REACH cases

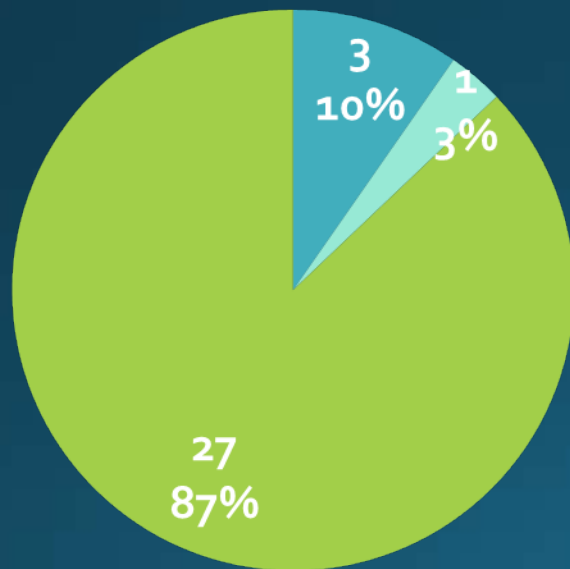
■ Commission decisions ■ ECHA BoA decisions ■ ECHA decisions



II. Quantitative aspects: outcome of REACH cases (2008-31 March 2017)

Outcome before GC

- Annulment
- Partial annulment
- Dismissal, Inadmissibility, Removal

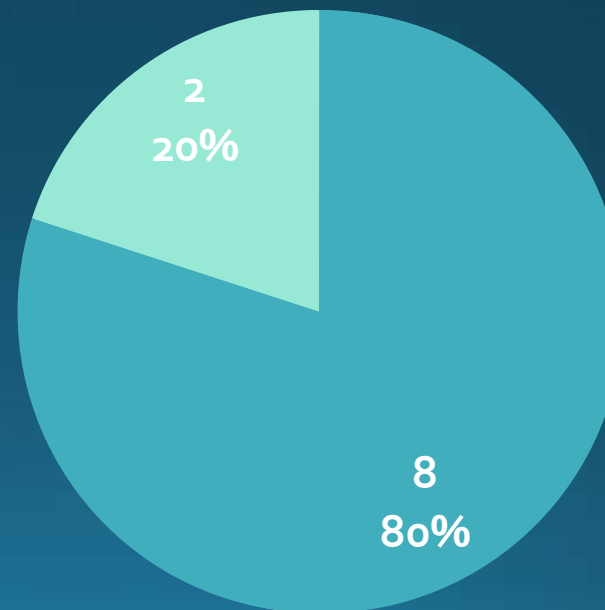


Annulment rate:
9,7%

Partial annulment rate:
3,2%

Appeals in first instance before Court

- Appeared
- Not appeared
- Upheld
- Annulled



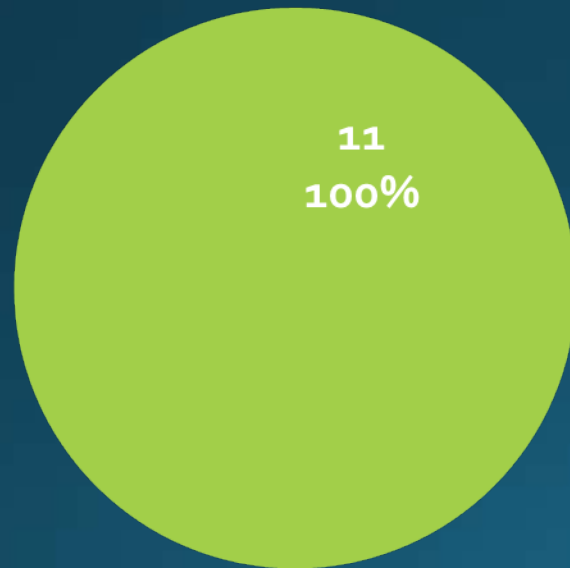
Appeal rate:
50%

Appeal rate:
80%

II. Quantitative aspects: outcome of EMA cases (2008-31 March 2017)

Outcome before GC

- Annulment
- Partial annulment
- Dismissal, Inadmissibility, Removal

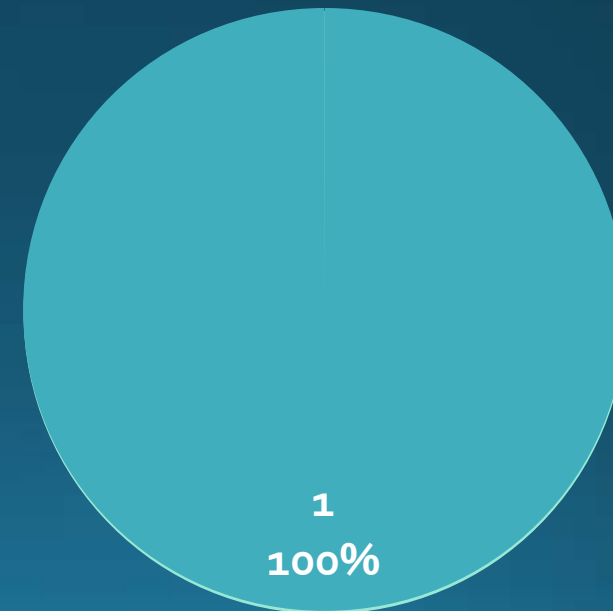


Annulment rate:
0%

Partial
annulment rate:
0%

Outcome if appealed before Court

- Appealed
- Not appealed
- Upheld
- Annulled

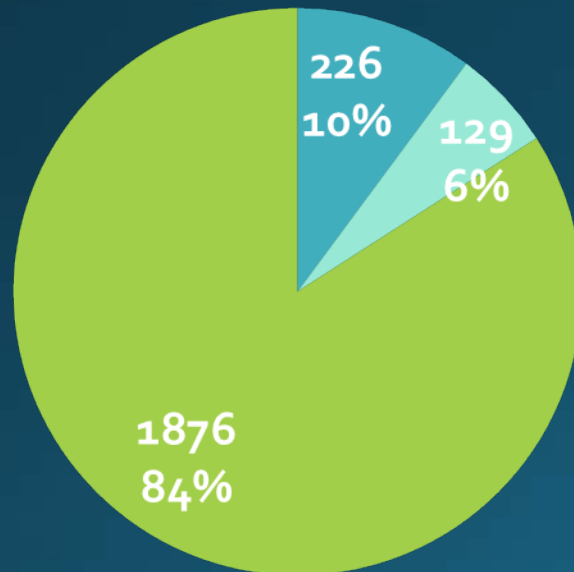


Annulment
rate: 100%

II. Quantitative aspects: outcome of IP cases (2008-31 March 2017)

Outcome before GC

- Annulment
- Partial annulment
- Dismissal, Inadmissibility, Removal

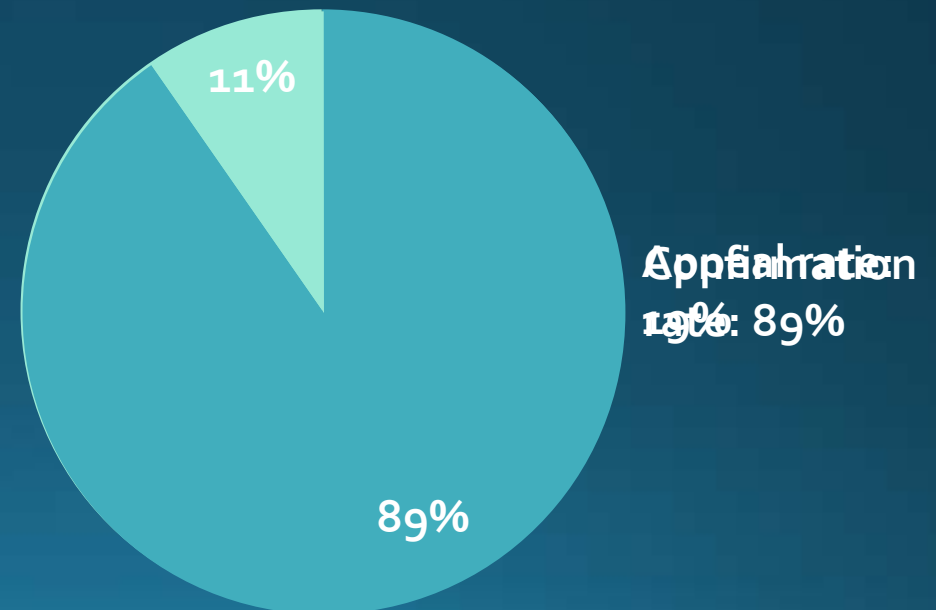


Annulment rate:
10%

Partial
annulment rate:
6%

Appeals introduced before Court

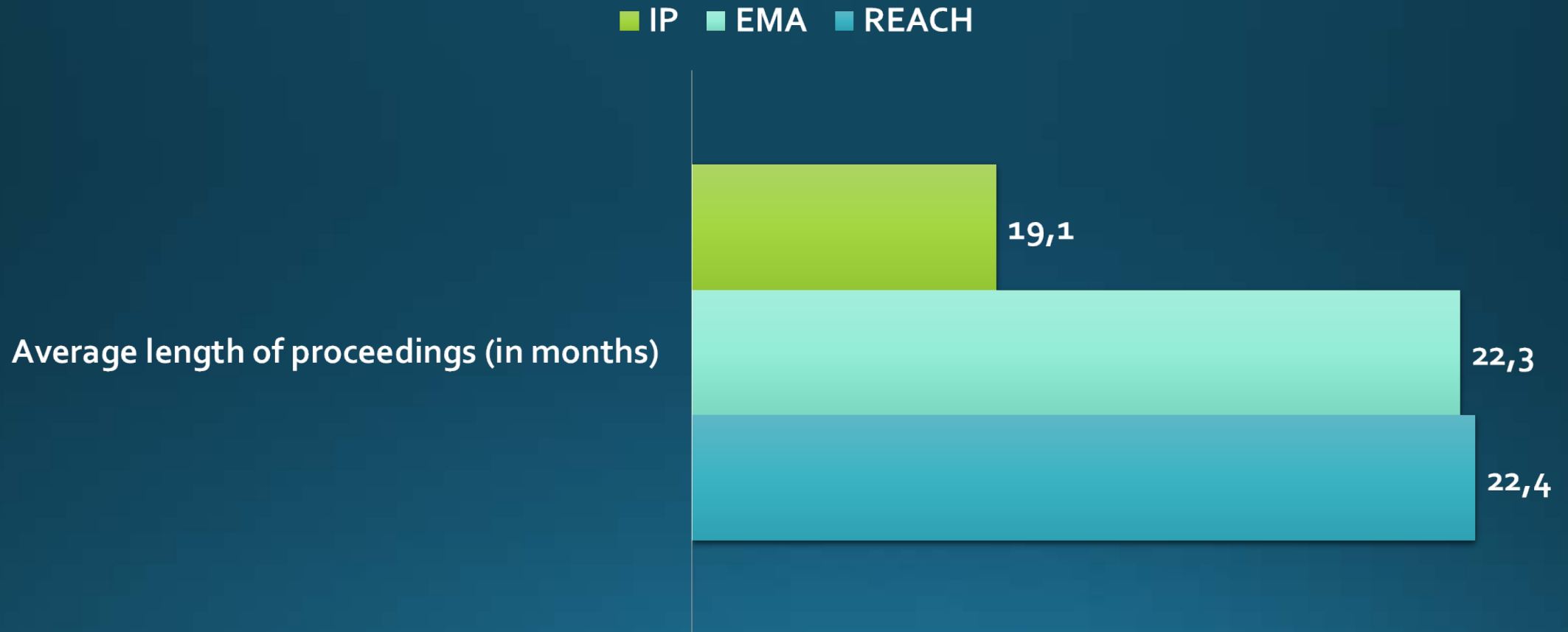
- Appeared
- Not appeared
- Upheld
- Annulled



Appeal rate:
19%

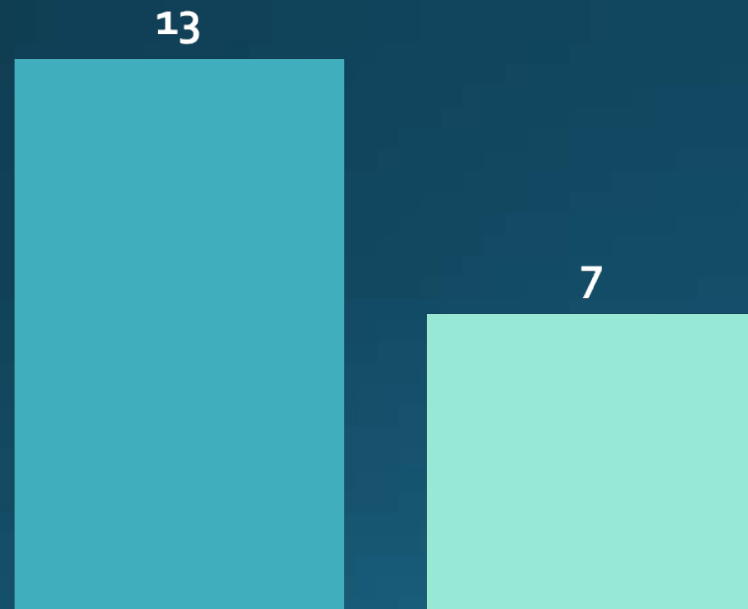
89%

II. Quantitative aspects: length of proceedings (2008-2016)



Quantitative aspects: REACH cases before Court

■ Appeals ■ Preliminary rulings



Confirmation rate: 80%

Issues examined in preliminary rulings:

- Interpretation of REACH Regulation
- Free movement issues

II. Quantitative aspects : findings

Less REACH litigation than expected initially

- Technically oriented not commercially driven
- Relatively limited number of substances in comparison to medicines and trademarks
- Most issues involving ECHA directly and Commission, not BoA
- Relatively high appeal rate against GC rulings

III. Some comments on EU litigation

Regulation convergence of many elements

- High level of protection
- Free circulation
- Convergence and integration of national and EU bodies
- Innovation

III. Some comments on EU litigation

REACH affects all areas of EU administrative law

- Admissibility issues
- Principles of good administration
- Rights of defence
- General principles of EU law
 - Proportionality
 - Equal treatment

General Court is EU administrative court

- Facing complex technical issues: question of intensity of judicial control

III. Some comments on EU litigation

Access to documents (ClientEarth et International Chemical Secretariat / ECHA, T-245/11)

- Transparency regulation applicable, with four provisos (Article 118), among which the precise tonnage or mixture composition of the substance and links between the firms involved, rebuttal presumption of non-disclosure, in light of Aarhus convention?
- Presumption as regards precise tonnage or mixture (4(2))
- Overriding public interest, not necessarily met because of Aarhus or link with the environment

III. Some comments on EU litigation

What is a fine ?

Fee (regular contribution € 1,000 – 2,000) and administrative handling charge of €20,000 (Spraylat/ECHA, T-177/12)

- not a fine (discouraging wrong information), but fine by Member States
- so proportionality principle to administrative charge, not 17 times higher
- concept of undertaking (fortunately linked to 2003 recommendation), related undertakings, exclusion of other concepts (“indirectly linked”, K Chimica / ECHA, T-675/13)

III. Some comments on EU litigation

Relative absence of:

- staff cases, only one which was manifestly inadmissible
- competition law issues (data sharing) in context of joint applications for authorisations
- interpretation of soft law issues, (FCD et FMB, C-106/14, merely explanatory)

Conclusions

- Limited number of cases
- Comparable with EMA rather than with EUIPO
- Technical and field-specific
- Embedded in general structure of EU law

Thank you for your attention