

# **The MPI Luxembourg APPEAL Project: Preliminary Results**

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# Disclaimer

The views expressed are those of the speaker and do not necessarily reflect the position of Consob

# Bridging a gap

- BoAs perform an increasingly important role
  - in the governance of EU agencies
  - in the protection of stakeholders' rights
- To date, BoAs' importance is not matched by a sufficiently broad reflection on their role
  - At institutional level
  - At academic level
- The APPEAL Project aims to fill this gap

# Theoretical framework

- Large recourse to decentralized Agencies in the EU
- Not all future states of the world can be considered when setting up Agencies: discretion as gap-filler
- This creates agency problems:
  - Agents' incentives to pursue their own interest to the detriment of the principals'
  - Sometimes, multiple principals

# A snapshot of the status quo

- BoAs are a key tool in holding Agencies accountable
- Current regulatory framework reflects the non-systematic origin of BoAs
- Do different needs underpin different rules?
- Flexibility v homogeneity

# Aims of the project

- Assessment of BoAs' governance and functioning
- Fostering problem sharing (network)
- Identifying common problems BoAs are facing
- Mapping best practices
  - But: one size does not (necessarily) fit all
- Suggesting improvements
  - But: if it ain't broke, don't fix it

# Topics covered (selection)

- Rules on (re)appointment of BoAs members
- Lodging an appeal: formalities, suspensory effect
  - New facts and evidence before BoAs?
- Scope and intensity of BoAs' review
  - Art. 47 CFR and Art. 6 ECHR
- Relationships with national and EU courts

# Appellate Bodies Included

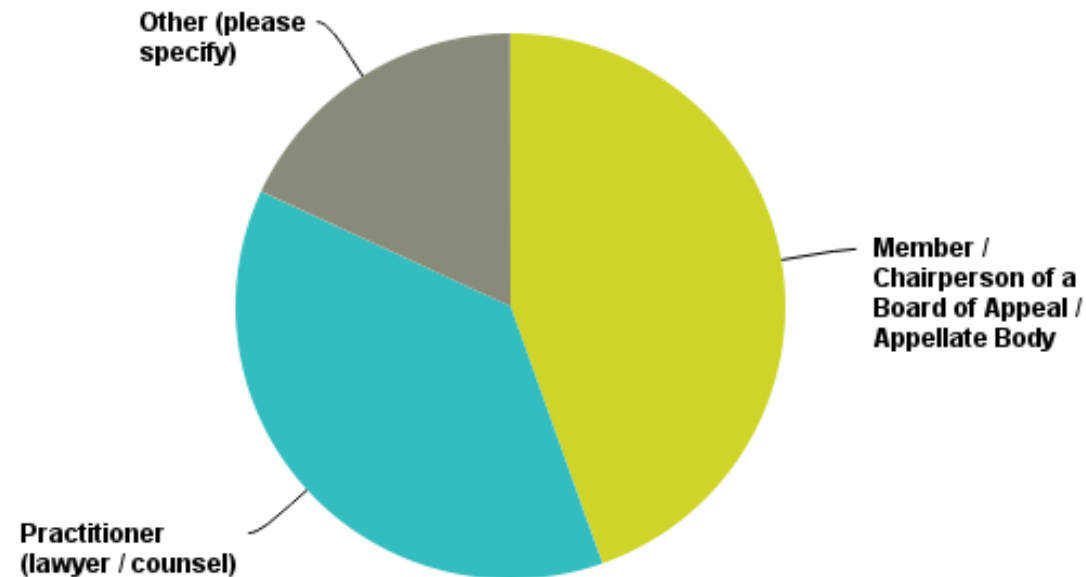
1. Board of Appeal ACER
2. Board of Appeal CPVO
3. Board of Appeal EASA
4. Board of Appeal ECHA
5. Board of Appeal ESAs
6. Joint Superv. Board EUROJUST
7. Joint Superv. Board EUROPOL
8. Boards of Appeal OHIM
9. Appeal Panel SRB
10. Admin. Board of Review SSM
11. (Boards of Appeal EPO)



# The Questionnaire

**Q3 Please describe your qualification. If you act as a Member of an Appellate Body on an ad hoc basis, please select the first option.**

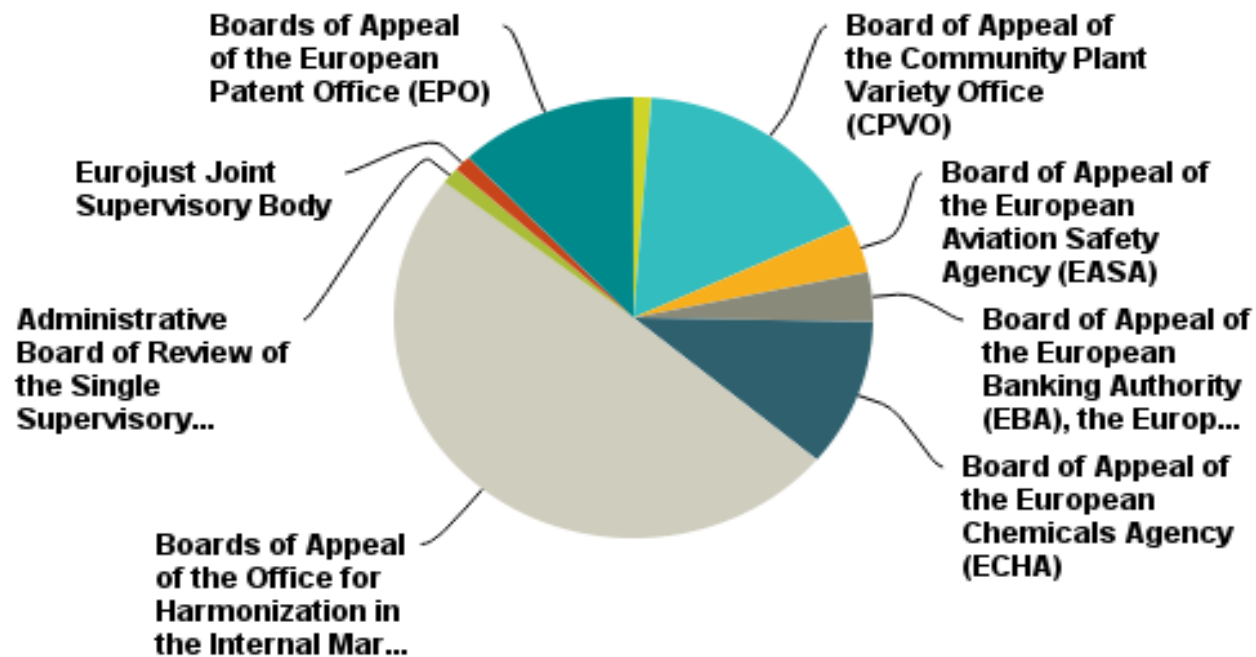
Answered: 83 Skipped: 0



# The Questionnaire

## Q2 Which Appellate Body/Board of Appeal are you reporting on?

Answered: 83 Skipped: 0



# **Key Procedural Issues: An Overview**

# An Outline

- Interlocutory revision
- Power to suspend challenged decisions (or to revert suspensive effect)
- Relevance of previous decisions
- Factual and legal basis of Boards' decisions
- Direct exercise of administrative powers

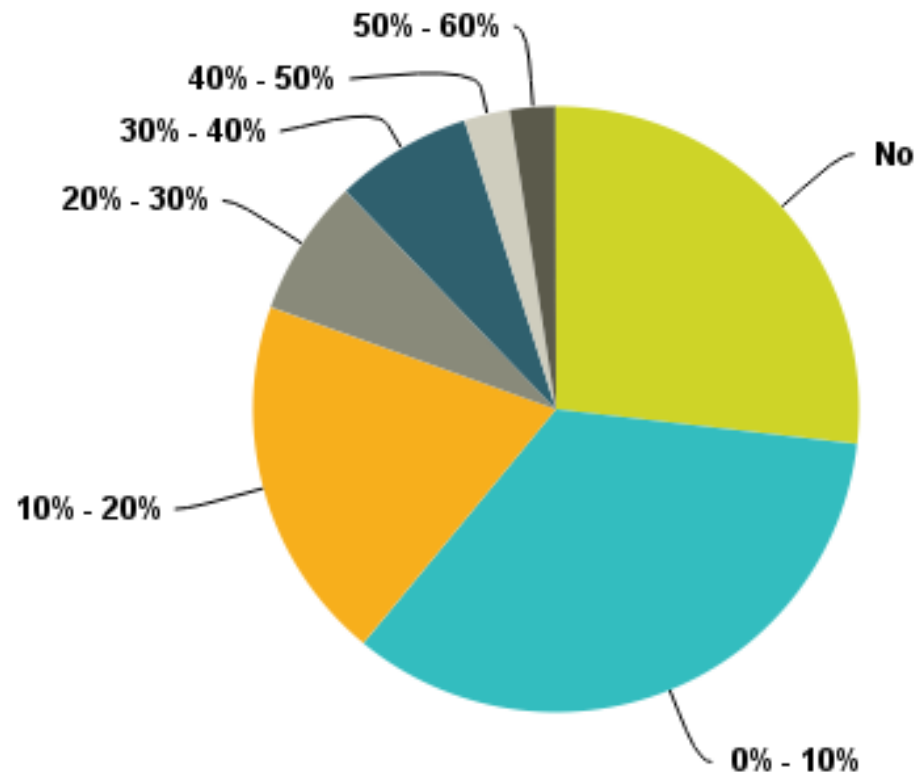
# Interlocutory revision

- May facilitate early dispute settlement
  - Filtering function to the benefit of Boards' caseload
  - May involve Boards' members (chairperson)
- What is the success rate of interlocutory revision, when available? (MPI survey)
- Quite low: reported success rates are «never» or «seldom» (0-10%) for most respondents

# Power to suspend Agencies' decisions?

- In some cases, the decision on the suspension is taken by the Board
- In others, mere filing of a claim triggers suspension

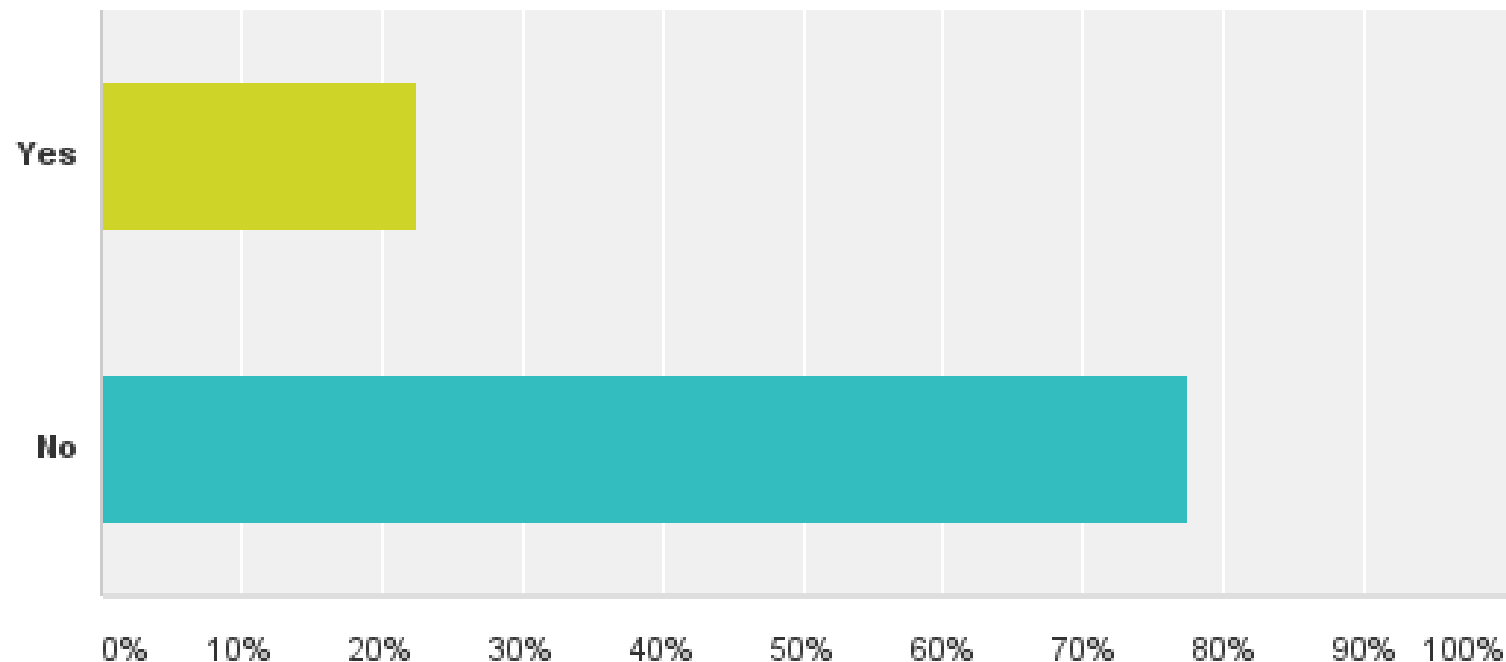
→ How often are claims filed with no solid grounds, just to have – or ask for – suspension?



# Consistency of case-law

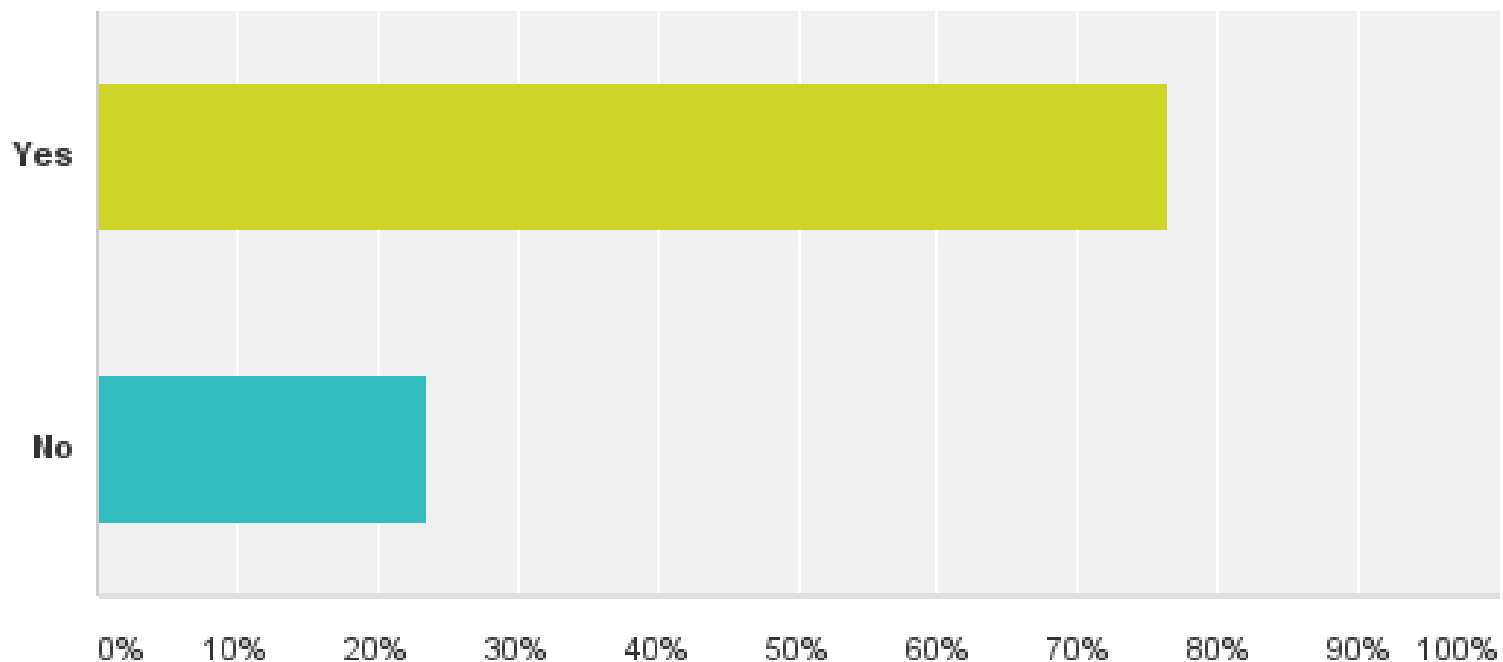
- Precedential value of past decision?
  - For cases between the same parties: repeated litigation
  - For other parties: what role fore precedents?

→ Are previous decisions normally considered as binding (for other parties)?



# Factual and legal basis for decisions

- Can new facts and evidence be brought before Boards?
  - *Jura novit curia?*
  - Can decisions go beyond parties' requests? *Reformatio in pejus?*
- Can the Board change the Agency's grounds for refusal?

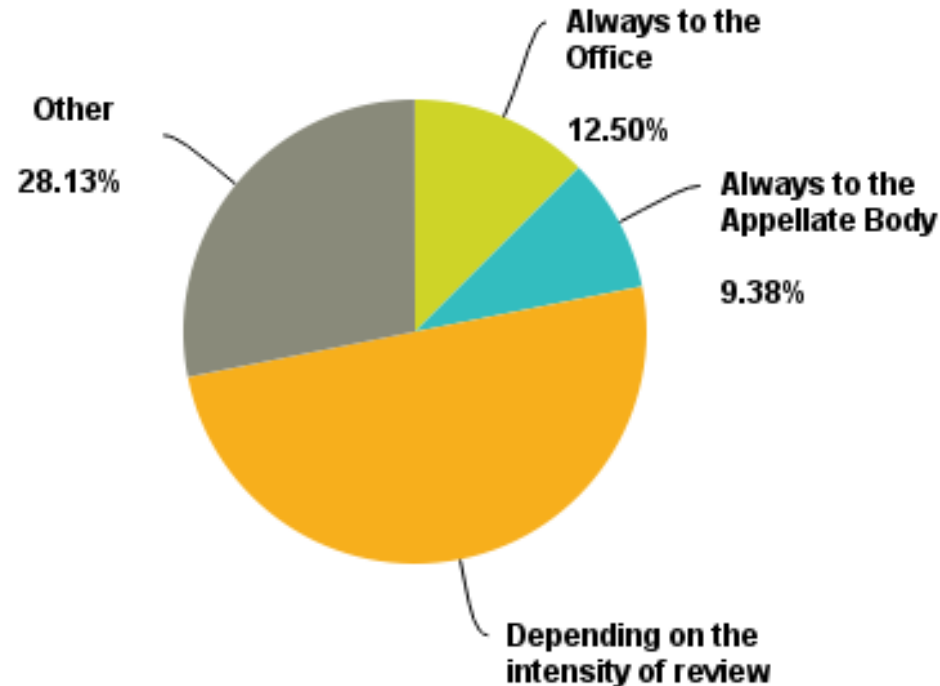




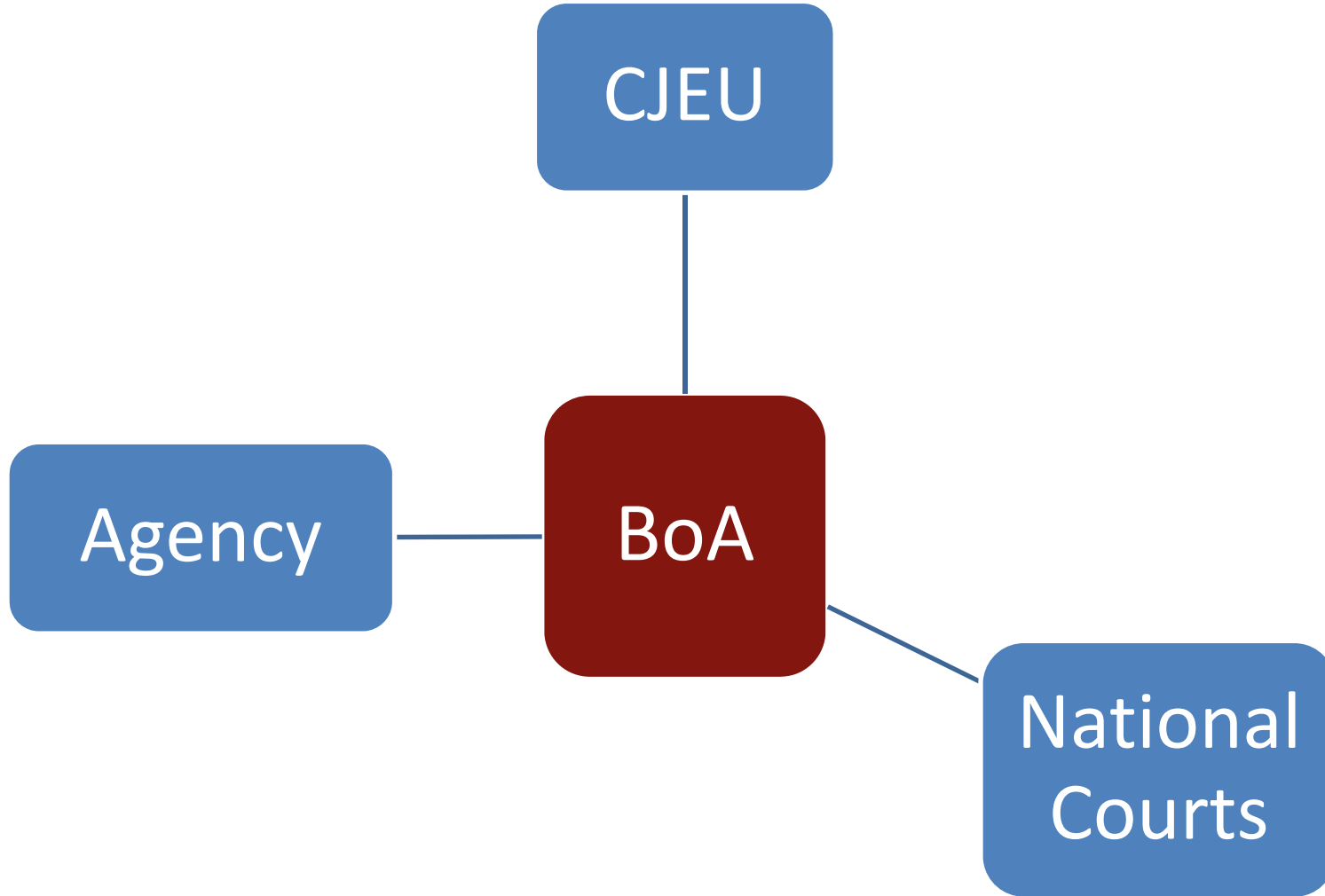
# Direct exercise of administrative powers?

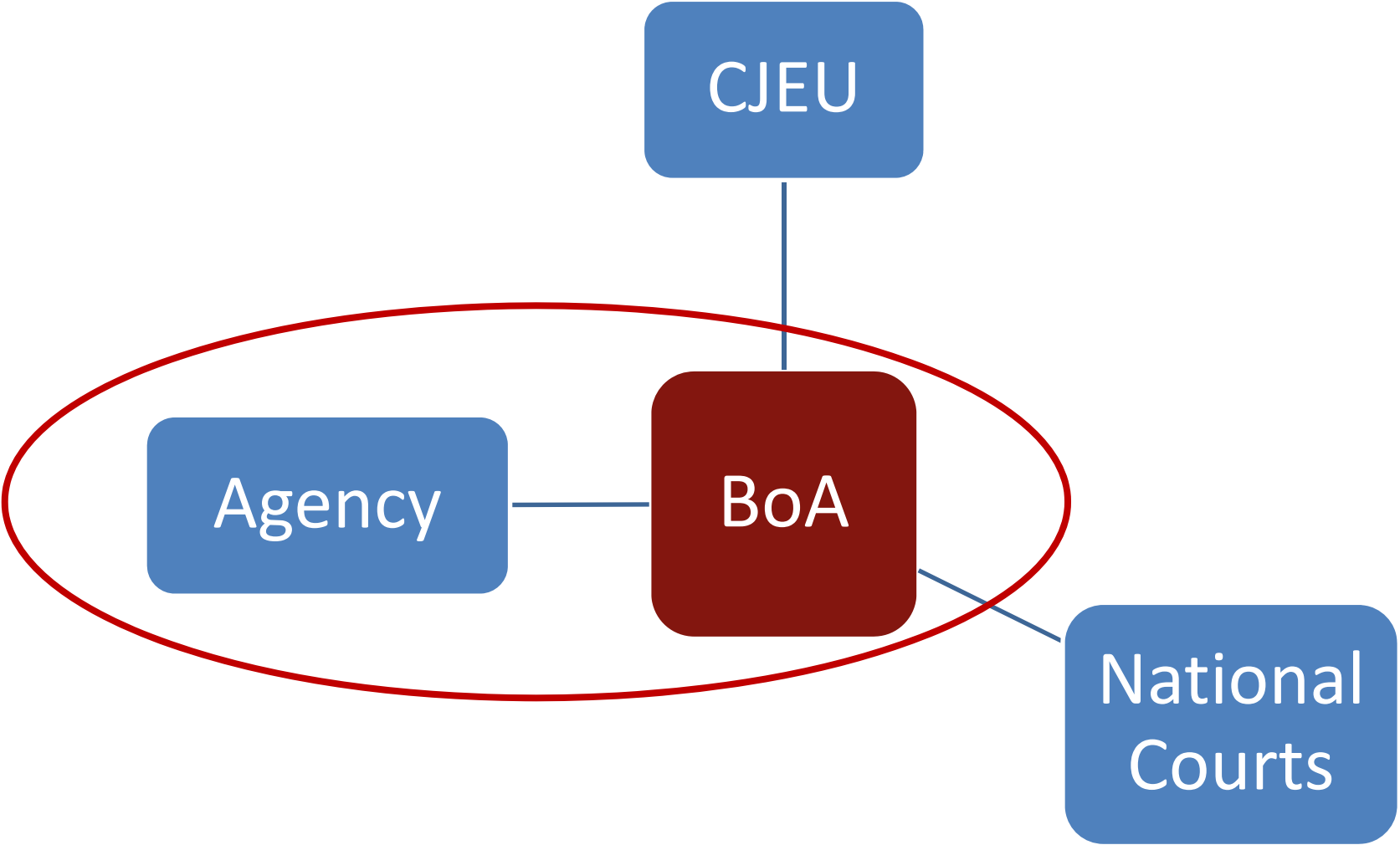
- Some Boards have the power to either:
  - Remit the case to the Agency
  - Directly exercise the power of the Agency (substitution)

→ On which grounds do Boards decide, when that choice is allowed?



# **Broader Implications of Procedural Rules**

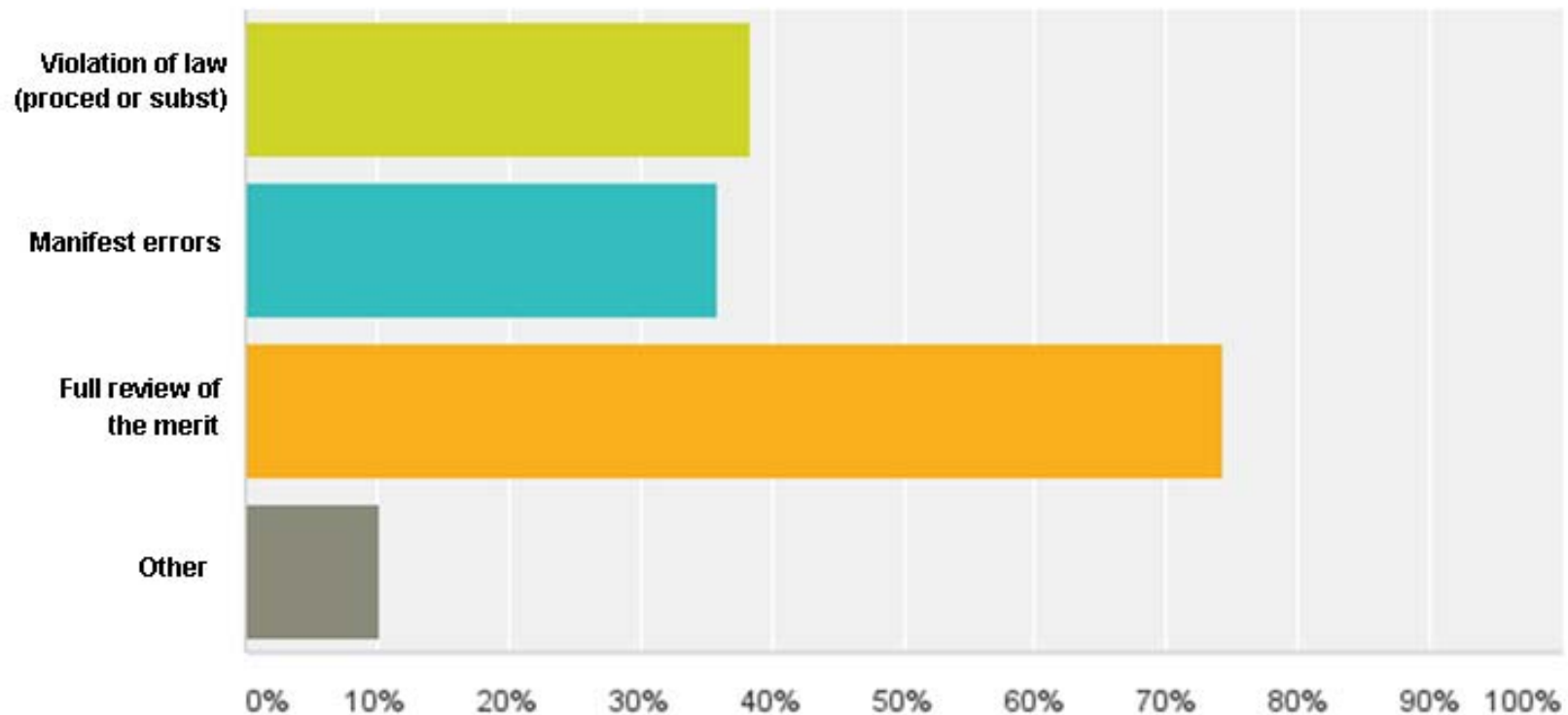


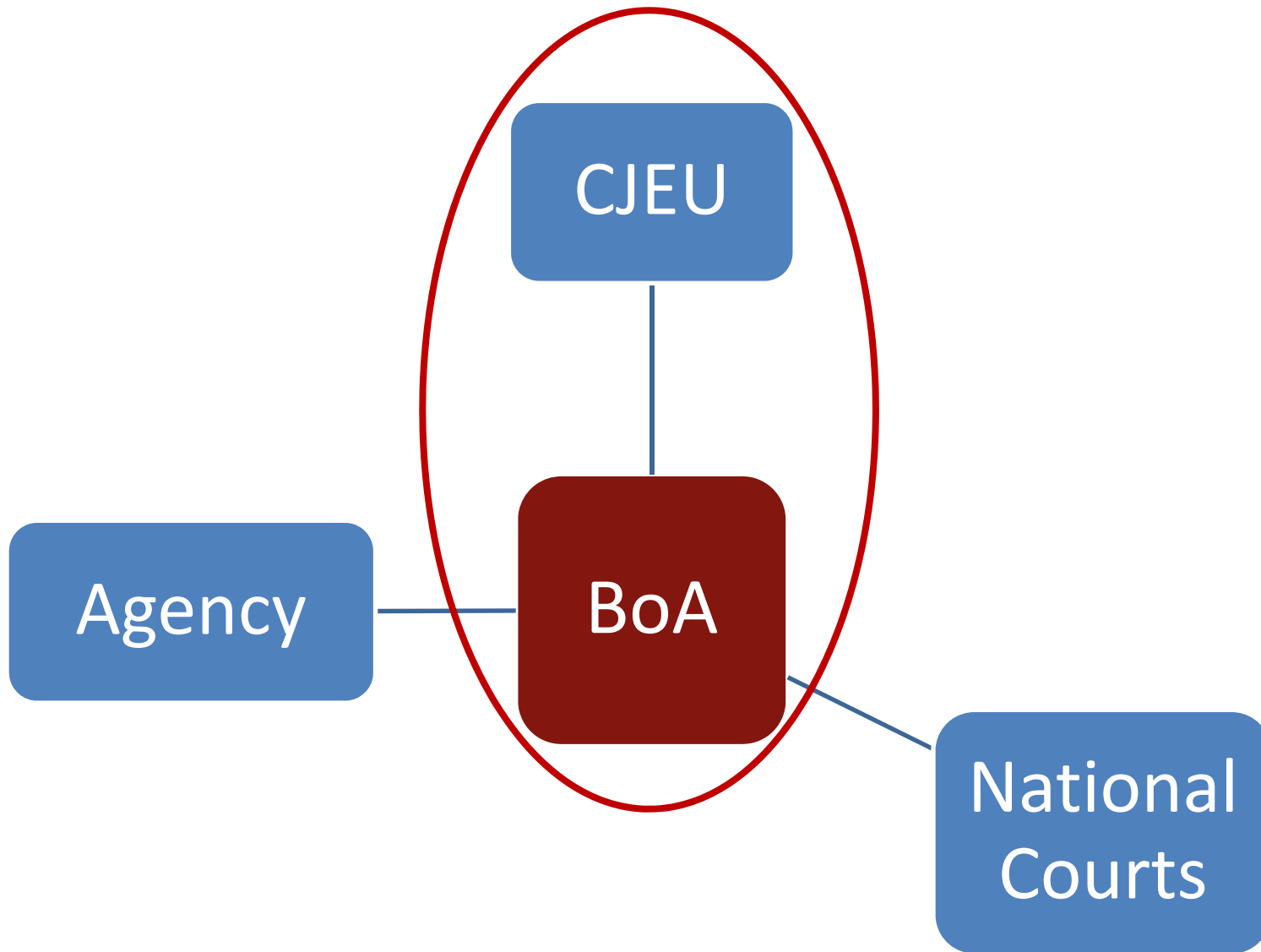


# Standard of review

**Q129 Which is the standard of review the relevant Appellate Body performs when assessing Authority's decisions entailing complex appraisals?**

Answered: 39 Skipped: 44

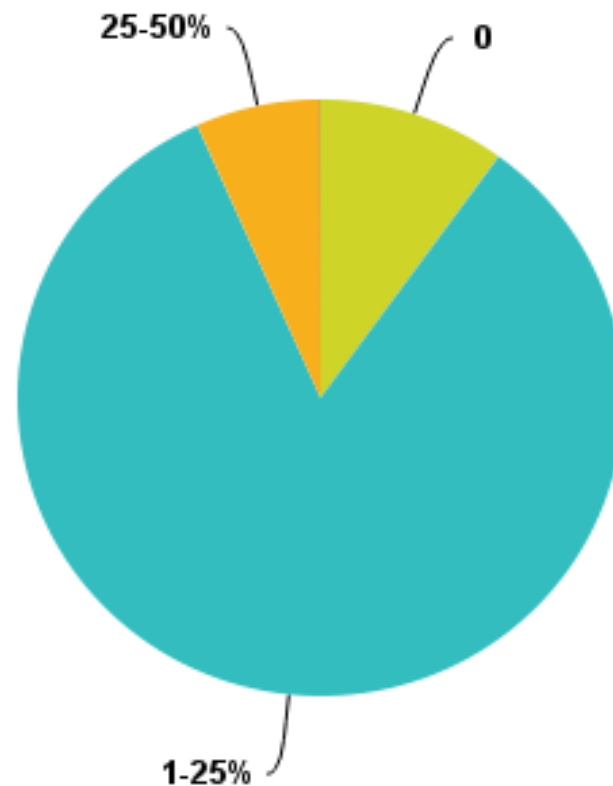




# Challenging BoAs' decisions

**Q141** According to your statistics, how many decisions of the relevant Appellate Body are challenged before the General Court?

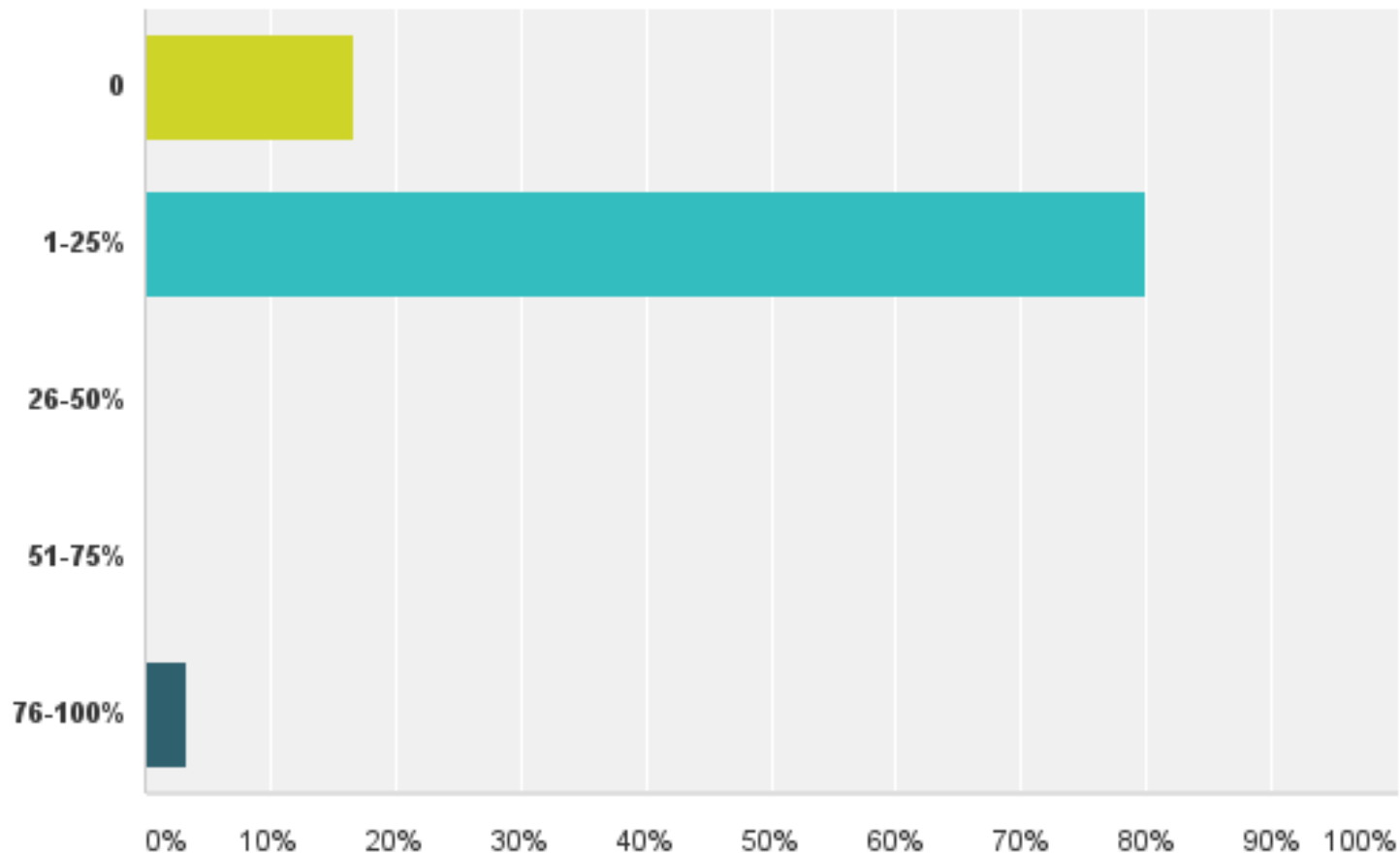
Answered: 30 Skipped: 53



# Challenging BoAs' decisions

**Q149** According to your statistics, out of the challenges brought before the General Court, how many are successful?

Answered: 30 Skipped: 53

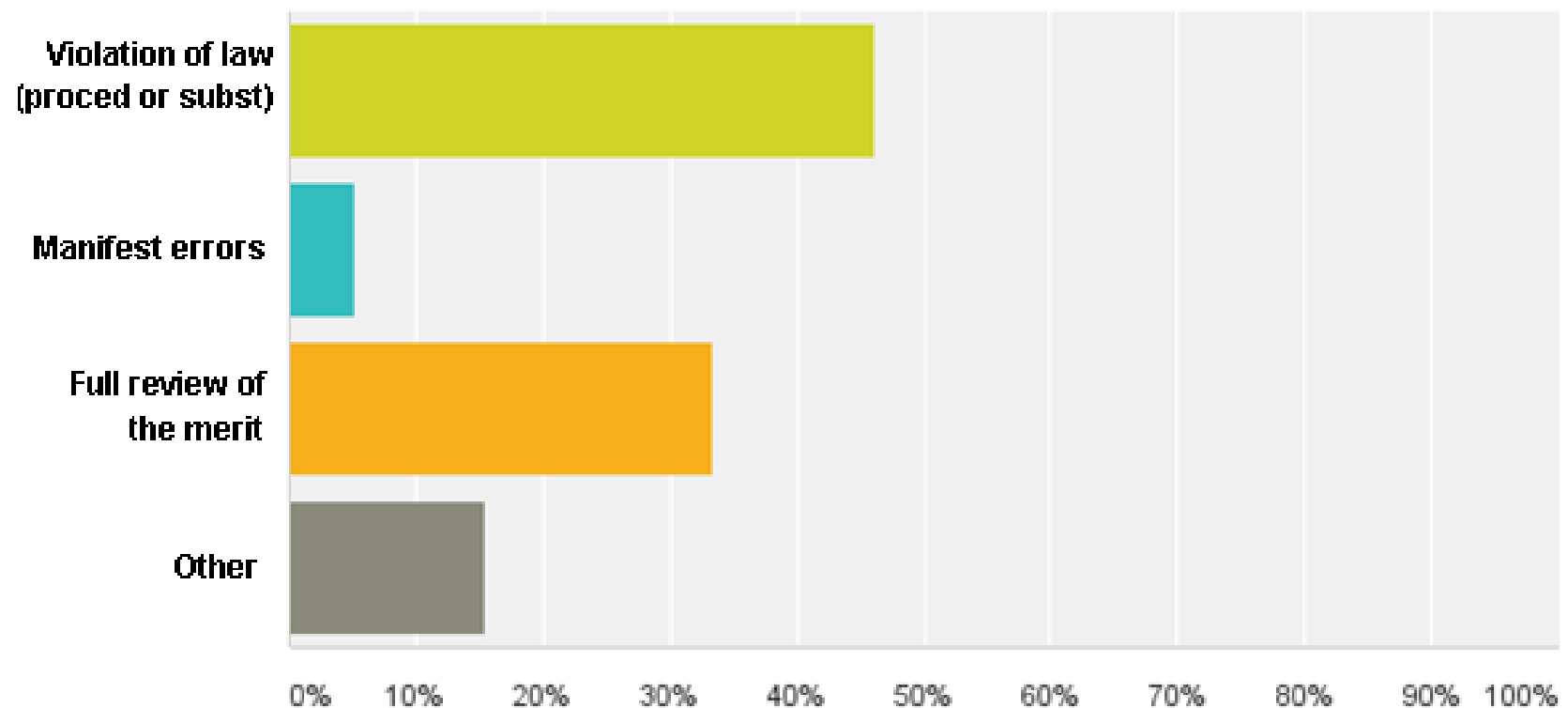


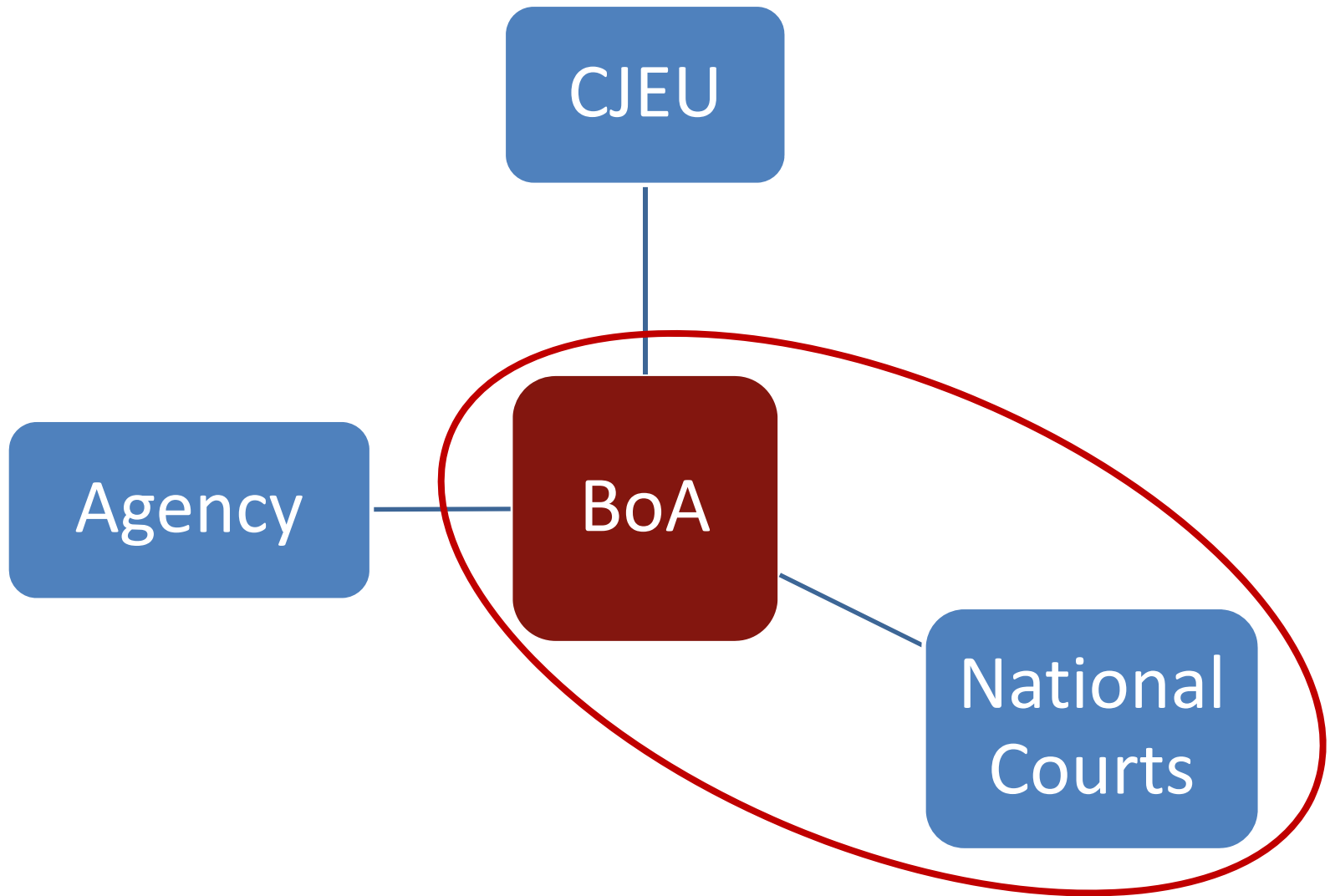


# General Court: standard of review

**Q138 Which is the standard of review the General Court performs when assessing decisions of the relevant Appellate Body entailing complex appraisals?**

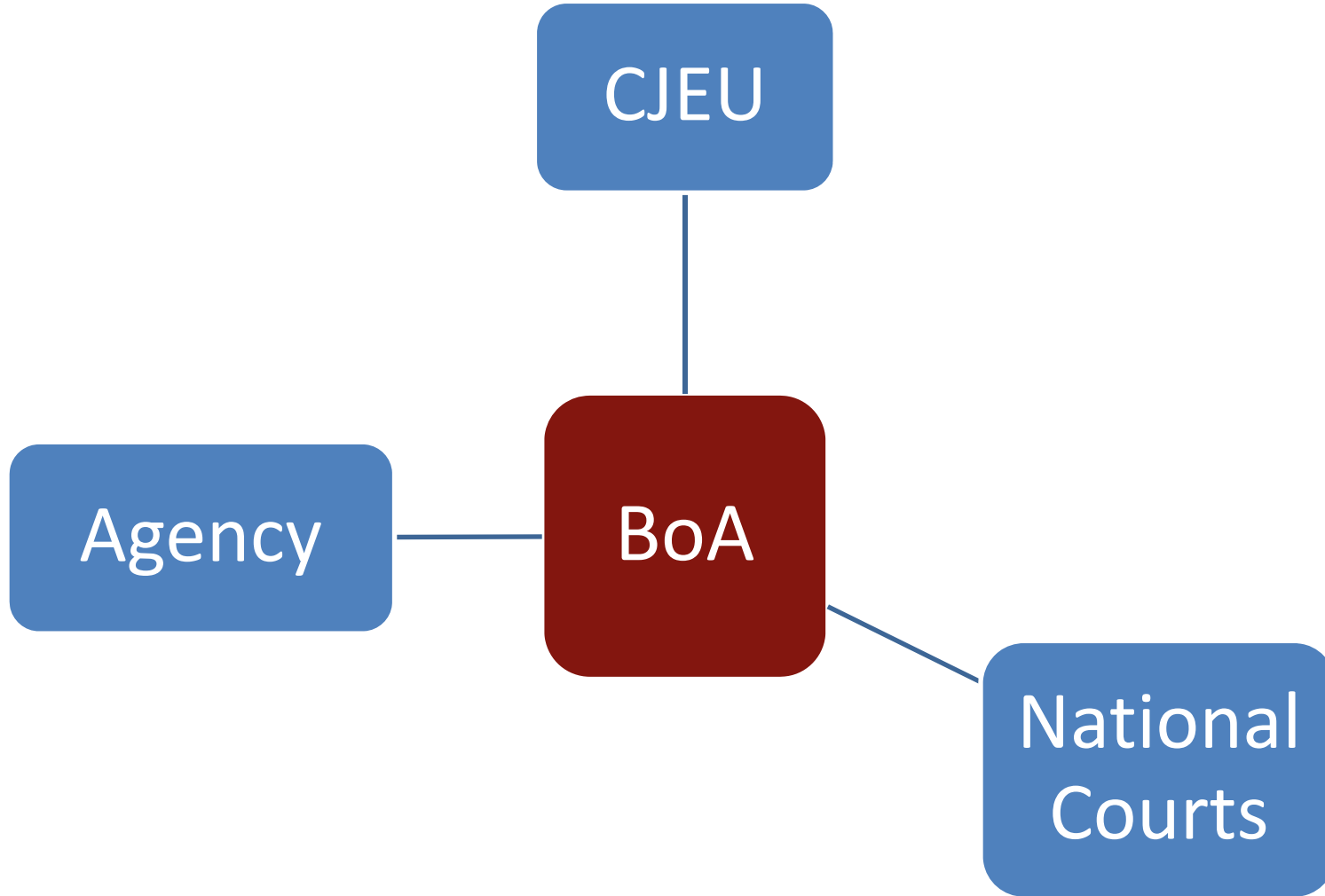
Answered: 39 Skipped: 44





# A smooth interaction?

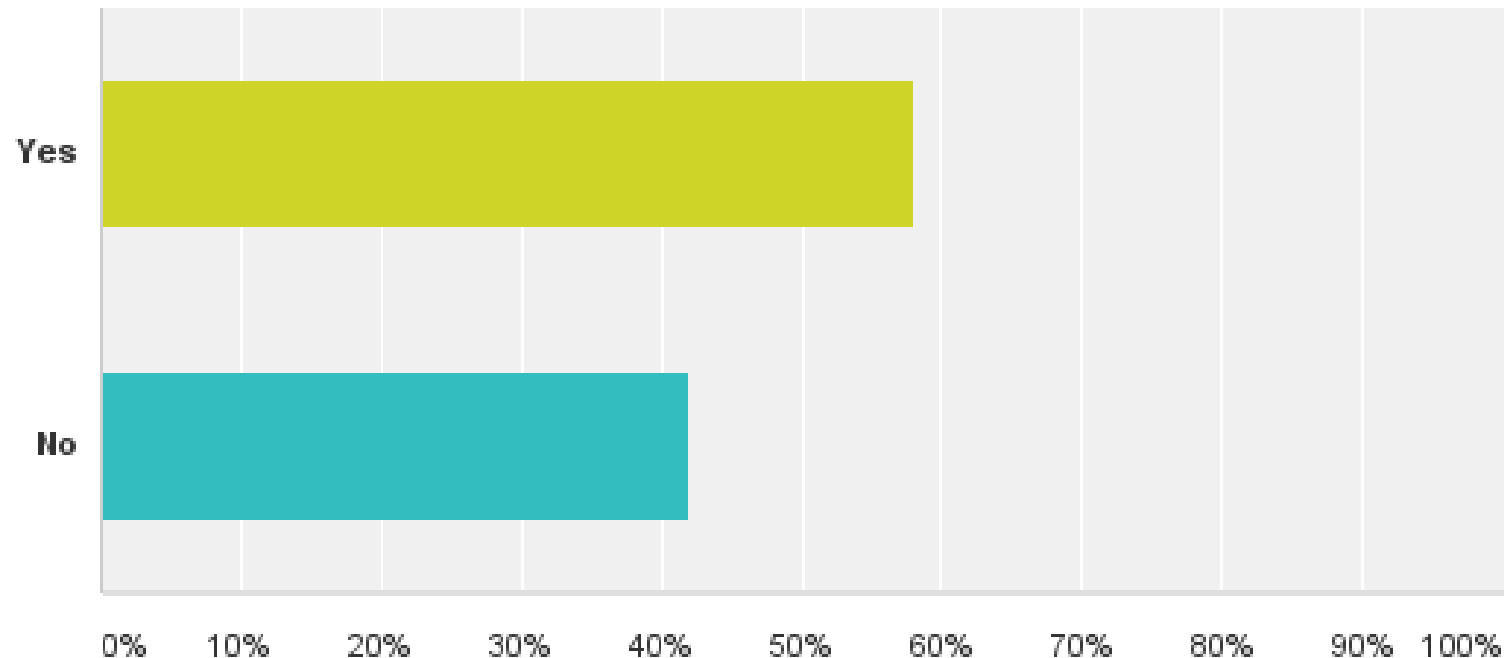
1. Preliminary questions remitted to BoA
  - E.g. counterclaims on validity of trade marks
2. Alleged violation of EU law by NCAs
  - National disputes v NCAs // disputes before BoA
3. Direct application of national law by EU Authority
4. NCA's act adopted upon EU Authority's request
  - National disputes v NCAs // disputes before BoA



# Length of proceedings

**Q166 Overall, are you satisfied with the length of the proceedings at the level of the entire life of the case (including Agency level and CJEU)?**

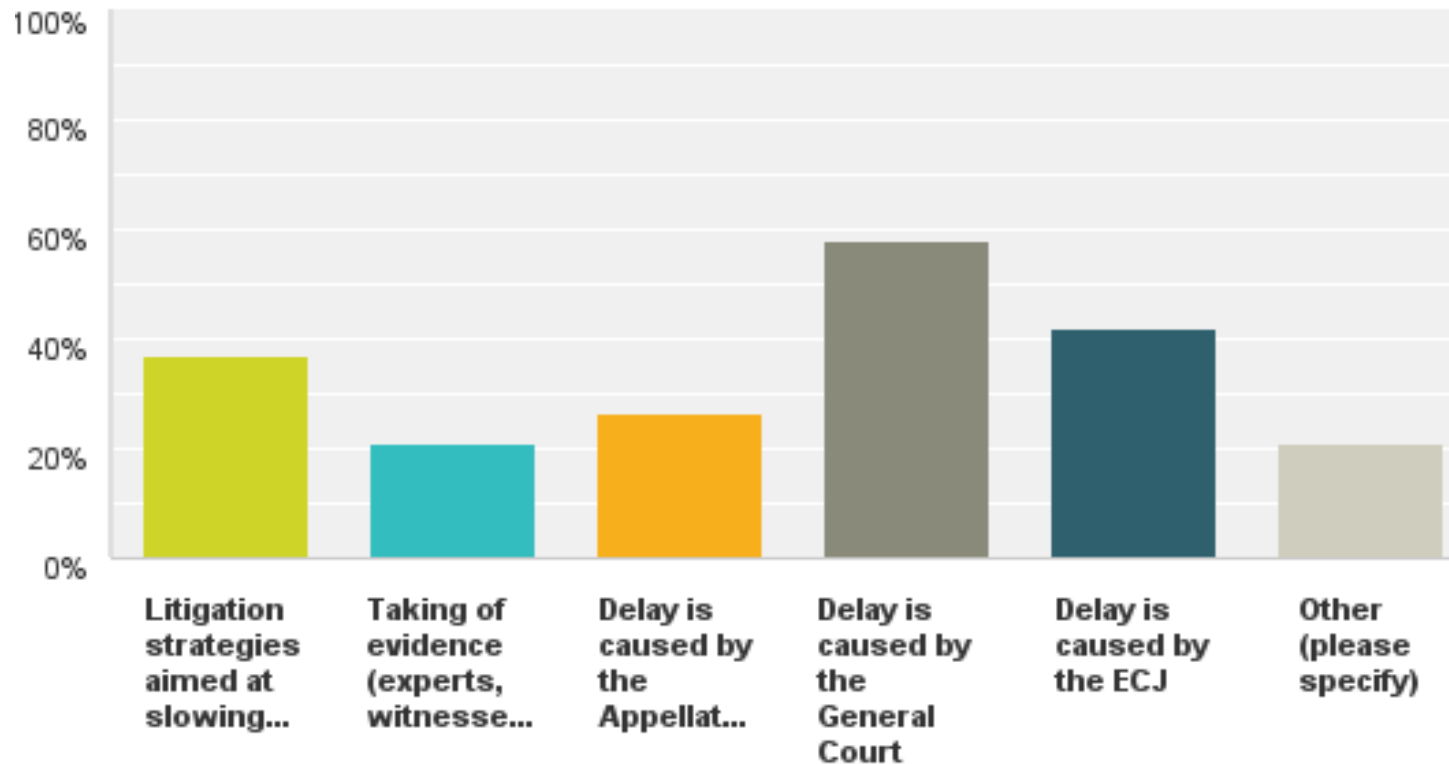
Answered: 43 Skipped: 40



# Reasons for delay

**Q167 Please specify the most common/relevant reasons for delay at the level of the entire life of the case**

Answered: 19 Skipped: 64



# “Final say” on complex appraisals

1. “Full jurisdiction” by a “tribunal” requires at least one level of the (quasi-)judicial review
2. What “full jurisdiction” exactly means is uncertain
  - Is it compatible with review of manifest errors?
  - Criminal charges v civil rights and obligations?
3. A matter of efficiency
  - Full review where the expertise lies?
  - What role for the General Court?

# Contacts

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