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Patent Office

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des brevets

Annual report of the Boards of Appeal

2017



Boards
of Appeal

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1. Introduction

In 2017, a comprehensive structural reform of the Boards of Appeal entered into force. It involved a delegation of powers from the President of the European Patent Office to the President of the Boards of Appeal and the relocation of the Boards of Appeal to separate premises in Haar.

The aims of the reform are to increase the organisational and managerial autonomy of the Boards of Appeal, the perception of their independence, and their efficiency. The reform also confirms the status of the boards as an independent judiciary, whose responsibility it is to serve the parties to appeal proceedings, users of the European patent system, and society at large by handing down final decisions on the granting of European patents.

2. Structural reform of the Boards of Appeal

2.1 Act of Delegation

On 1 March 2017, the Act of Delegation of powers from the President of the European Patent Office to the President of the Boards of Appeal entered into force (OJ EPO 2017, A19). Supervisory and disciplinary authority over members and other staff of the Boards of Appeal was delegated, as were the power to propose appointments and the right to be consulted on reappointments of members of the Boards of Appeal (Annex 3 to CA/43/16 Rev. 1).

2.2. Performance evaluation

Under the amended Implementing Regulations to the EPC, a member's or a chairman's reappointment is subject to a positive opinion and performance evaluation by the President of the Boards of Appeal (Rule 12d(3) EPC). Board members may also be recommended for promotion by the President of the Boards of Appeal (Article 11(3)(b) ServRegs).

As required by these provisions, a performance evaluation system for members and chairmen of the Boards of Appeal has been set up in the form of guidelines issued by the President of the Boards of Appeal. The Boards of Appeal Committee was formally consulted on the evaluation criteria, and the Administrative Council took note thereof. The criteria chosen are specific to the judicial function of the boards of appeal and based on recommendations of international judicial bodies, as well as on best practices in the Contracting States to the EPC. While both qualitative and quantitative indicators are used to ensure that a comprehensive assessment can be made, the focus lies on quality. The evaluation system entered into force on 1 January 2018.

2.3 Relocation

In autumn 2017, the Boards of Appeal moved to their own dedicated building in Haar. Despite the organisational challenges and constraints caused by the relocation, the Boards of Appeal managed to continue operations without interruption, and were even able to achieve a significant increase in their overall quantitative performance for 2017.

In December 2017, the new building was officially inaugurated. The ceremony was attended by Boards of Appeal President, Carl Josefsson, the Chair of the Administrative Council of the European Patent Organisation, Christoph Ernst, the Mayor of Haar, Gabriele Müller, EPO Vice-President for International and Legal Affairs, Raimund Lutz, as well as by members of the Boards of Appeal and delegations from the Administrative Council.

2.4 Measures to increase efficiency

With a view to reducing the backlog, an overall five-year objective has been formulated by the President of the Boards of Appeal and given the support of the Boards of Appeal Committee, namely to settle 90% of cases within 30 months and to reduce the number of pending cases to below 7000. It is planned that this objective will be achieved by (i) increasing the efficiency of the Boards of Appeal by 32% and (ii) the allocation of additional resources for a limited period of time.

In order to increase efficiency, working methods are being improved. Specific objectives have been developed for each technical field and each technical board. Internal timelines have been developed for the main stages of the appeal procedure, standard clauses for decisions have been drafted, the planning of oral proceedings has been improved, and registry tasks have been harmonised. In order to allow for more cooperation between boards, the business distribution scheme has been amended.

Moreover, a comprehensive revision of the Rules of Procedure of the Boards of Appeal is under way. Its aims are to increase (i) efficiency, by reducing the number of issues to be treated, (ii) predictability for the parties and (iii) harmonisation. The Boards of Appeal Committee expressed its support for the roadmap submitted by the President of the Boards of Appeal for amendment of the Rules of Procedure of the Boards of Appeal.

3. Performance and production

In 2017, 2798 technical appeals were filed, 1.8% more than in the corresponding period in 2016. The number of technical cases settled was 2284, which was a 2.5% increase compared to the same period in 2016. The number of cases settled by a decision or after a communication was issued and/or oral proceedings took place was 1675, which constitutes a 2.1% increase in production in comparison to 2016. In addition, the number of technical cases which the Boards of Appeal started working on has increased considerably. In 2017, the Boards of Appeal dispatched 1681 first communications in such cases, which amounts to a 12.4% increase compared to 2016. At 31 December 2017, 8896 technical appeals were pending, which was 515 (6.1%) more than at the same date in 2016.

The increase in settled cases of 2.5% and in new technical cases being worked on by 12.4% was due to a concerted effort by all members of the Boards of Appeal and their support staff. It also shows that the measures taken by the President of the Boards of Appeal to increase efficiency (see point 2.4 above) are already yielding results.

In its decision on referral G 1/16, the Enlarged Board of Appeal provided guidance on questions relating to the allowability of disclaimers and the standard to be applied under Article 123(2) EPC. With eleven amicus curiae briefs, the referral attracted considerable attention from the user community. The Enlarged Board also received 10 petitions for review in 2017, and settled 6.

4. Number of staff

At 1 January 2018, there were 148 chairmen and members of the Boards of Appeal. The 93 technically qualified and 27 legally qualified members were divided among 28 technical Boards of Appeal and the Legal Board. The total number of staff of the Boards of Appeal was 202. The remaining open posts will be filled in 2018, including the 5 administrative posts that have been upgraded to technical member posts.

In view of the steady increase in the number of appeals filed, improving the working methods and the efficiency of the Boards of Appeal by 32% (see point 2.4 above) will on its own not be sufficient to deal with the stock of almost 9000 cases in a timely manner and at the same time secure the high quality that users rightfully expect from a judicial authority whose decisions are final. Significant additional resources in terms of manpower and facilities will be necessary in the coming years to ensure the proper functioning of the appeal system under the EPC, which is essential to the patent litigation system in Europe.

5. Contacts with national courts, users and representatives

In 2017, the President and the members of the Boards of Appeal welcomed several high-level delegations of, for example, French-speaking judges, members of the JPO's Trial and Appeal department, members of the SIPO Patent Re-examination Board, and the US delegation of the US Bar-EPO Liaison Council. The President of the Boards of Appeal also met with the President of the German Federal Patent Court and attended an expert patent judges' workshop in London, the European Patent Judges Forum in Venice, and the GRUR Annual Meeting in Hamburg. These meetings are an important means of strengthening interaction between national judges and experts and the Boards of Appeal, and of deepening their knowledge of the respective legal systems.

The President and the members of the Boards of Appeal also met representatives from industry (nominated by BUSINESSEUROPE) and the patent profession (nominated by epi), and all participants agreed that this fruitful dialogue should continue. Representatives of the International Federation of Intellectual Property Attorneys (FICPI) were also met and welcomed by the President of the Boards of Appeal.

Together with the EPO's European Patent Academy, the Boards of Appeal organised its annual conference for patent law practitioners entitled "EPO Boards of Appeal and key decisions 2017". The event was booked to capacity, with about 250 practitioners attending. At the request of the European Patent Academy, board members and members of the Legal Research Service of the Boards of Appeal gave lectures at several other seminars and workshops organised by the Office, guaranteeing a high level of expertise and quality for the benefit of a demanding professional audience. In doing so, the Boards of Appeal made significant resources available to the Office in terms of manpower.

6. Information on the Boards of Appeal and their case law

The efforts of the Boards of Appeal to develop online tools to provide the public with information on case law are continuing. All decisions of the Enlarged Board of Appeal, the Legal Board of Appeal and the technical Boards of Appeal handed down since 1979 are available free of charge on a searchable database on the EPO's website. A dedicated web section (<http://www.epo.org/law-practice/case-law-appeals.html>) has been set up. It gives access to the decisions database, provides up-to-date information on the Boards of Appeal and contains texts such as the Rules of Procedure of the Boards of Appeal.

The latest issue of the annual "Information from the Boards of Appeal", which comprises the Rules of Procedure of the Boards of Appeal and other texts of importance for appeal proceedings, was published as supplementary publication 1, OJ EPO 2018. In 2017, "EPO Boards of Appeal Case Law 2015 and 2016" was published as supplementary publication 4, OJ EPO 2017, and "Case Law from the Contracting States to the EPC 2014-2016" as supplementary publication 6, OJ EPO 2017. All these publications of the Boards of Appeal are available free of charge on the EPO Official Journal website (www.epo.org/official-journal).

7. Statistics

7.1 General statistics

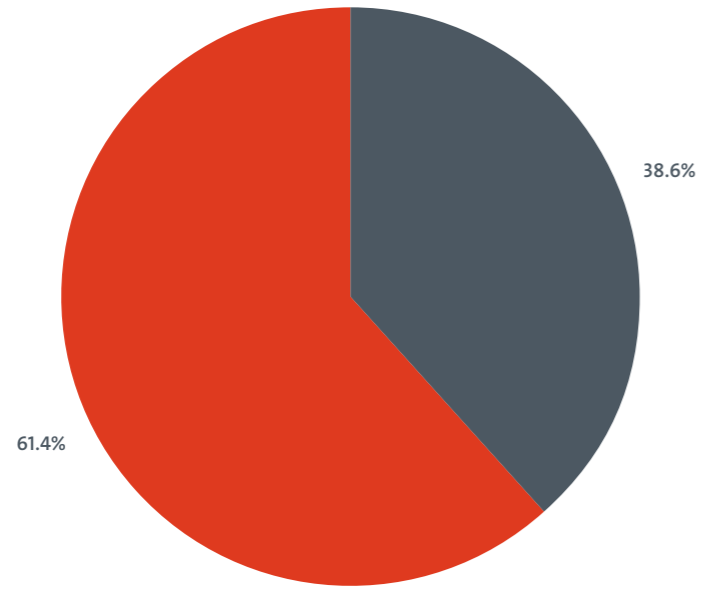
For statistics on the appeal procedure by case in 2017, see the tables and charts below.

Table 1

Appeal procedure by case

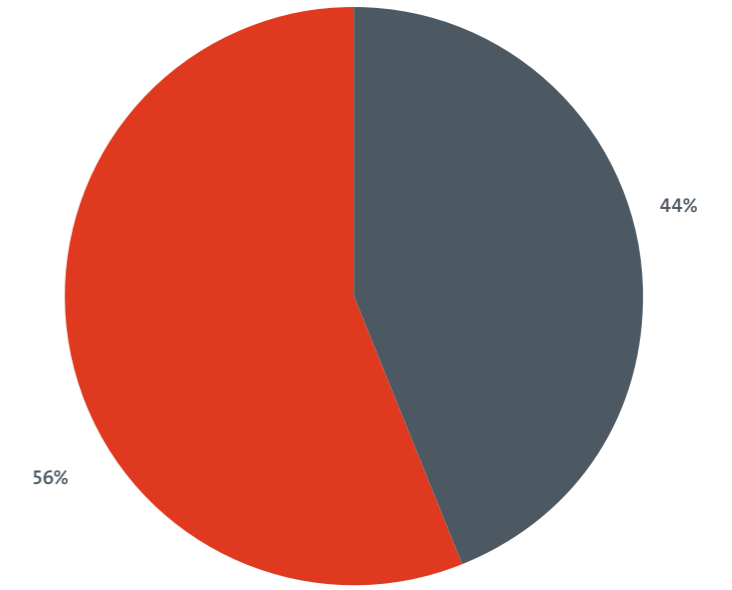
	New cases						Settled						Pending			
	2017		2016		2015		2017		2016		2015		31.12.2017	31.12.2016		
Enlarged Board of Appeal	10		9		9		8		18		14		16		14	
Referrals	0		1		1		2		0		4		0		2	
Petitions for review	10		8		8		6		18		10		16		12	
Legal Board of Appeal	17		19		12		15		18		27		16		14	
Technical Boards of Appeal	2 798	<i>100%</i>	2 748	<i>100%</i>	2 387	<i>100%</i>	2 284	<i>100%</i>	2 229	<i>100%</i>	2 287	<i>100%</i>	8 896	<i>100%</i>	8 381	<i>100%</i>
Examination procedure (ex parte)	1 081	<i>38.6%</i>	934	<i>34.0%</i>	864	<i>36.2%</i>	1 005	<i>44.0%</i>	975	<i>43.7%</i>	1 085	<i>47.4%</i>	3 653	<i>41.1%</i>	3 577	<i>42.7%</i>
Opposition procedure (inter partes)	1 717	<i>61.4%</i>	1 814	<i>66.0%</i>	1 523	<i>63.8%</i>	1 279	<i>56.0%</i>	1 254	<i>56.3%</i>	1 202	<i>52.6%</i>	5 243	<i>58.9%</i>	4 804	<i>57.3%</i>
Mechanics	959	<i>34.3%</i>	1 011	<i>36.8%</i>	818	<i>34.3%</i>	681	<i>29.8%</i>	678	<i>30.4%</i>	678	<i>29.6%</i>	2 727	<i>30.7%</i>	2 462	<i>29.4%</i>
Examination procedure	136		144		126		110		124		167		334		312	
Opposition procedure	823		867		692		571		554		511		2 393		2 150	
Chemistry	843	<i>30.1%</i>	902	<i>32.8%</i>	768	<i>32.2%</i>	709	<i>31.0%</i>	723	<i>32.5%</i>	759	<i>33.2%</i>	2 601	<i>29.2%</i>	2 458	<i>29.3%</i>
Examination procedure	194		208		154		192		209		220		589		585	
Opposition procedure	649		694		614		517		514		539		2 012		1 873	
Physics	278	<i>9.9%</i>	257	<i>9.4%</i>	254	<i>10.6%</i>	234	<i>10.3%</i>	243	<i>10.9%</i>	258	<i>11.3%</i>	1 051	<i>11.8%</i>	1 006	<i>12.0%</i>
Examination procedure	178		161		161		170		178		211		694		684	
Opposition procedure	100		96		93		64		65		47		357		322	
Electricity	718	<i>25.7%</i>	578	<i>21.0%</i>	547	<i>22.9%</i>	660	<i>28.9%</i>	585	<i>26.2%</i>	592	<i>25.9%</i>	2 517	<i>28.3%</i>	2 455	<i>29.3%</i>
Examination procedure	573		421		423		533		464		487		2 036		1 996	
Opposition procedure	145		157		124		127		121		105		481		459	
Disciplinary Board of Appeal	26		25		9		17		25		7		18		9	
Total	2 851		2 801		2 417		2 324		2 290		2 335		8 946		8 418	

Graph 1
New cases 2017

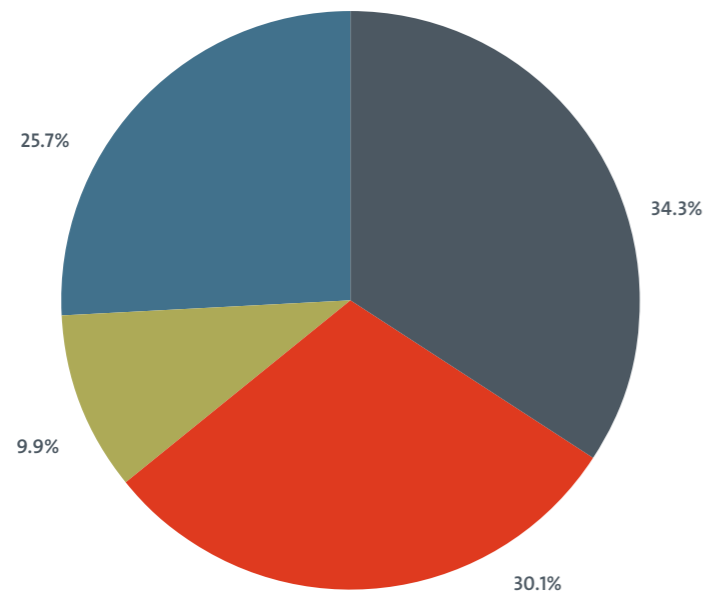


● Ex parte ● Inter partes

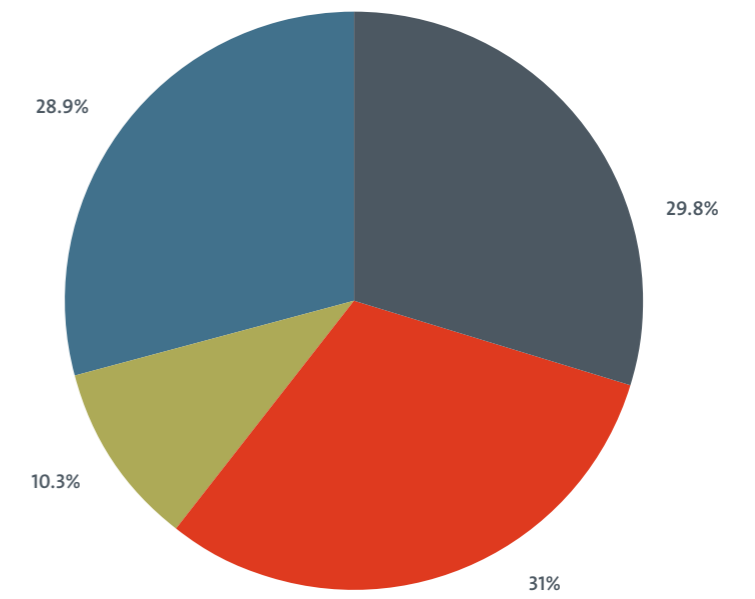
Graph 2
Settled cases 2017



● Ex parte ● Inter partes



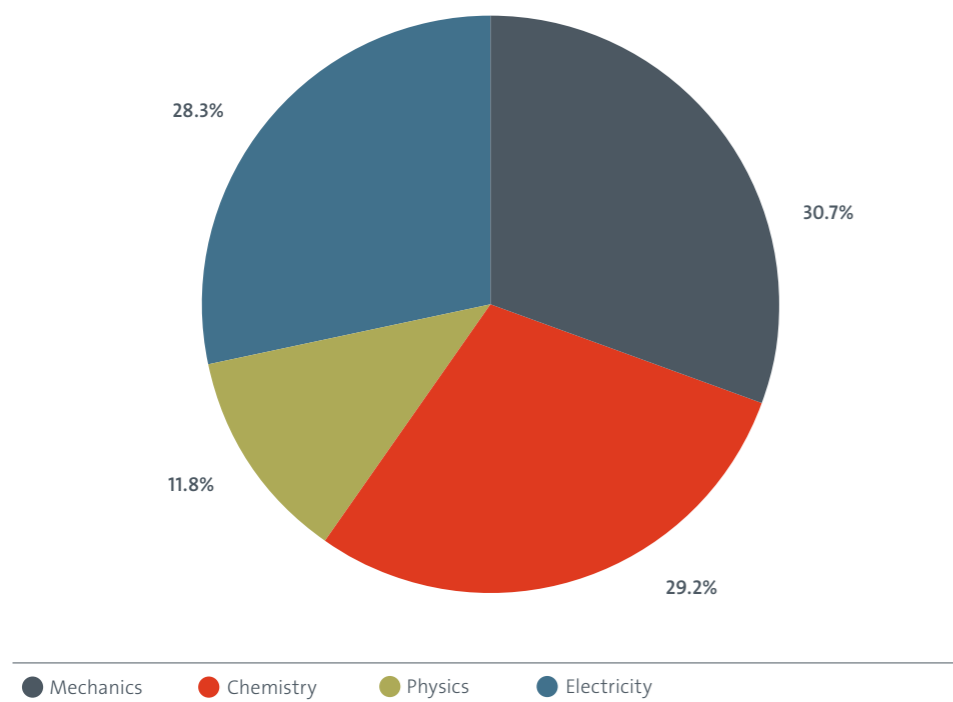
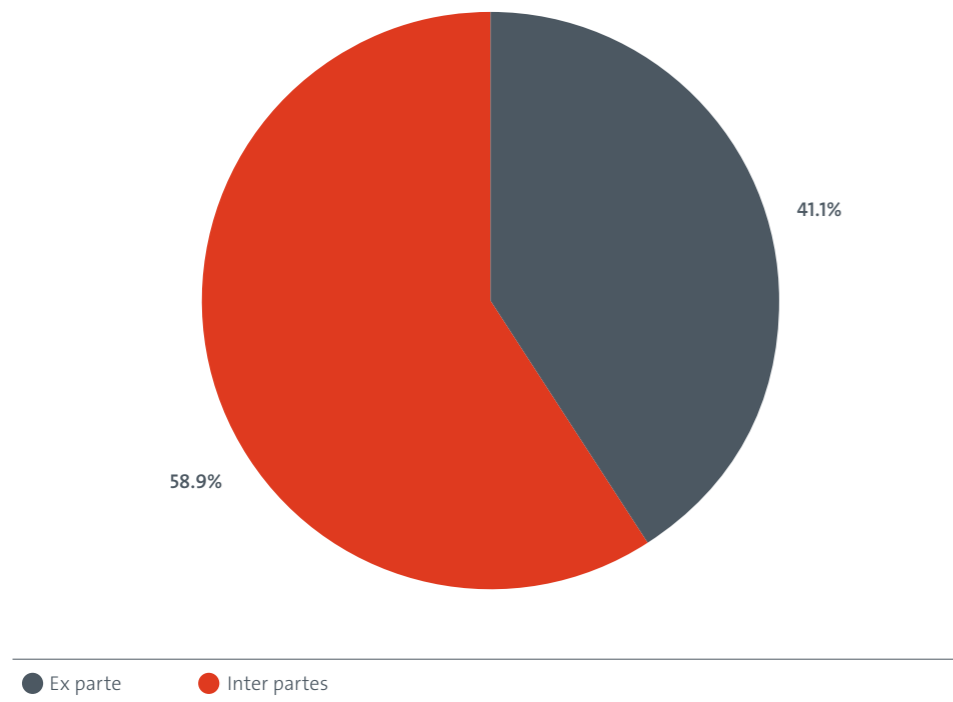
● Mechanics ● Chemistry ● Physics ● Electricity



● Mechanics ● Chemistry ● Physics ● Electricity

Graph 3

Appeals pending 31.12.2017



7.2 Situation of the Boards of Appeal in the last five years

For statistics on appeal proceedings by case in the last five years, see the table below.

Table 2

Appeal proceedings by case

	New cases					Settled				
	2017	2016	2015	2014	2013	2017	2016	2015	2014	2013
Legal Board of Appeal	17	19	12	22	23	15	18	27	22	25
Technical Boards of Appeal	2 798	2 748	2 387	2 353	2 515	2 284	2 229	2 287	2 300	2 137
Enlarged Board of Appeal	10	9	9	21	23	8	18	14	21	17
Referrals	0	1	1	3	2	2	0	4	4	0
Petitions for review	10	8	8	18	21	6	18	10	17	17
Disciplinary Board of Appeal	26	25	9	13	9	17	25	7	7	8

7.3. More about the Boards' activities

7.3.1 Outcome of proceedings before the Technical Boards of Appeal

In 2017, 1005 ex parte cases (2016: 975) were settled. 498 ex parte cases were settled by a decision. The remaining 507 were settled without a decision. In 212 of these cases the appeal was withdrawn, and 1 case not deemed to be filed, after a substantive communication by the board. 469 cases (47%; 2016: 439, i.e. 45%) were settled after a decision on the merits, i.e. not terminated as a result of rejection due to inadmissibility, withdrawal of the appeal or application, or for other reasons. The outcome of these 469 cases was as follows:

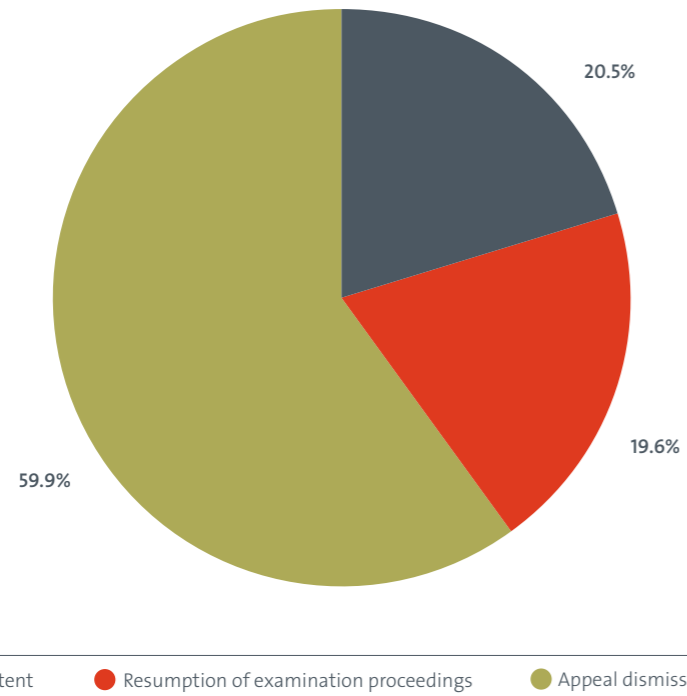
Table 3

Ex parte cases

	2017		2016	
	Count	Percentage	Count	Percentage
Ex parte cases settled after decision on the merits	469		439	
Appeal dismissed	281	59.9%	240	54.7%
Appeal successful in whole or in part	188	40.1%	199	45.3%
Grant of patent	96	20.5%	111	25.3%
Resumption of examination proceedings	92	19.6%	88	20.0%

Graph 4

Ex parte cases settled after decision on the merits 2017



In 2017, 1279 inter partes cases were settled (2016: 1254). 838 inter partes cases were settled by a decision. The remaining 441 were settled without a decision. In 123 of these cases the appeal was withdrawn, and in 2 cases not deemed to be filed, after a substantive communication by the board. 779 cases (61%; 2016: 804, i.e. 64%) were settled after a decision on the merits, i.e. not terminated as a result of rejection due to inadmissibility, withdrawal of the appeal or application, or for other reasons. The outcome of the 779 cases settled after a decision on the merits was as follows (no distinction is drawn between appeals by patent proprietors and appeals by opponents; furthermore, for the numbers of cases referred to below no account is taken of the number of parties who filed an appeal against the same decision):

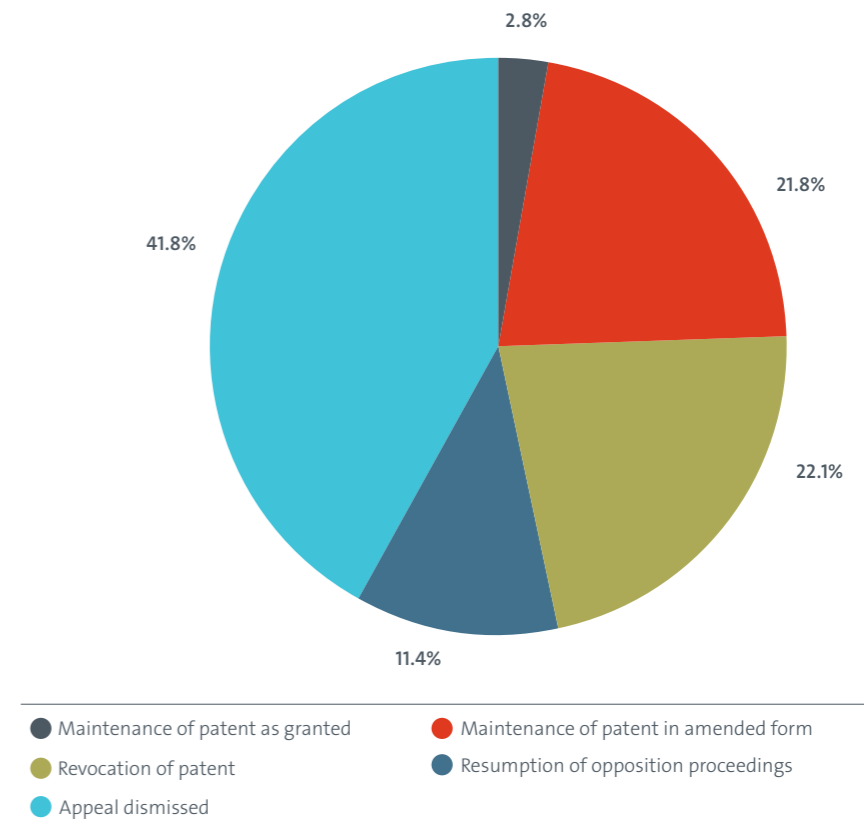
Table 4

Inter partes cases

	2017		2016	
Ex parte cases settled after decision on the merits	779		804	
Appeal dismissed	326	41.8%	316	39.3%
Appeal successful in whole or in part	453	58.2%	488	60.7%
Maintenance of patent as granted	22	2.8%	32	4.0%
Maintenance of patent in amended form	170	21.8%	191	23.8%
Revocation of patent	172	22.1%	165	20.5%
Resumption of opposition proceedings	89	11.4%	100	12.4%

Graph 5

Inter partes cases settled after substantive legal review 2017



7.3.2 Proceedings before the Disciplinary Board of Appeal

Table 5

Proceedings before the Disciplinary Board

	2017	2016
New cases	26	25
re European qualifying examination	26	25
re professional representatives' code of conduct	0	0
Cases settled	17	25
re European qualifying examination	17	25
re professional representatives' code of conduct	0	0
Cases pending	18	9
re European qualifying examination	18	9
re professional representatives' code of conduct	0	0

7.3.3 Length of proceedings

Table 6

Length of technical proceedings

	2017	2016
Average length (months)	38	37
Ex parte	42	40
Inter partes	35	34

The number of cases pending for over two years at the end of the year under review (31 December 2017) – i.e. filed in 2015 or earlier – is as follows:

Table 7

Number of cases pending for over two years

	2017	2016
2007		
2008		2
2009	2	6
2010	10	33
2011	61	245
2012	322	779
2013	754	1226
2014	1286	1688
2015	1743	
Total	4178	3979

7.3.4 Breakdown by language of the proceedings

Table 8

Breakdown by language of the proceedings

	Total	English	German	French
Appeals filed before the technical boards in 2017	2798	72.1%	23.7%	4.2%
Oral proceedings held in 2017	1178	71.1%	23.6%	5.3%

7.4 Staff statistics and distribution of responsibilities

At 1 January 2018, there were 148 chairmen and members of the boards of appeal (1 January 2017: 149). The 93 technically qualified (1 January 2017: 96) and 27 legally qualified members (1 January 2017: 27) were divided amongst 28 technical Boards of Appeal and the Legal Board of Appeal.

The composition of each board is published at the beginning of each year in the EPO Official Journal (supplementary publication 1; R. 12b(4) EPC). Amendments to the business distribution scheme during the year are published on the website of the Boards of Appeal.

The total number staff at 1 January 2018 was 202 (204 at 1 January 2017).

Table 9

Number of staff

	1.1.2018	1.1.2017
President of the Boards of Appeal	1	0
Chairmen of the Boards of Appeal	27	26
Technically qualified members	93	96
Legally qualified members	27	27
Assistants	0	0
Support staff	53	55
Total number of staff	202	204

