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Annual report of the Boards of Appeal

2018



Boards
of Appeal

The primary purpose of this report is to provide information on organisational matters and general developments in the EPO Boards of Appeal. Information on the case law of the Boards of Appeal is available on the website of the Boards of Appeal.

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1. Executive summary

Since the entry into force of the structural reform on 1 January 2017, the Boards of Appeal have increased their productivity by **18%**, and production by **22,6%**. In 2018, they also increased their capacity by filling all vacant posts for technically qualified members. Furthermore, in accordance with the budget request of the President of the Boards of Appeal, the Administrative Council of the EPO has approved 23 additional technically qualified member posts for the 2019 budget, and has positively noted the request for another 16 of such posts for the 2020 budget. In total, this adds up to a possible 33% increase of technical member capacity in 2019-2020. In view of these developments, the Boards are well on track to meet their five-year objective to settle 90% of cases within 30 months of receipt and to reduce the number of pending cases to less than 7 000. However, due to a large increase in incoming cases, backlog and pendency will nevertheless continue to grow in the short term.

2. Structural reform of the Boards of Appeal

The comprehensive structural reform of the Boards of Appeal started in 2017. It involved a delegation of powers from the President of the European Patent Office to the President of the Boards of Appeal (PBoA), the creation of the Boards of Appeal Committee (BOAC) as a subsidiary body of the Administrative Council, and the relocation of the Boards of Appeal to separate premises in Haar. The Act of Delegation was renewed by the newly appointed President of the Office (OJ EPO 2018, A63).

The aim of the reform was to increase the organisational and managerial autonomy of the Boards of Appeal, the perception of their independence, and their efficiency. It confirmed the status of the boards as an independent judicial body, 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.

3. Five-year objective and timeliness

With a view to reducing the backlog, an overall five-year objective has been drawn up by the PBoA, which has been given the support of the BOAC. The objective is to settle 90% of cases within 30 months of receipt and to reduce the number of pending cases to less than 7 000 by 2023. This objective will be achieved by (i) increasing the efficiency/productivity of the Boards of Appeal by 32% as from 1st January 2017 and (ii) the allocation of additional resources for a limited period of time.

Figure 2

Timeliness objective

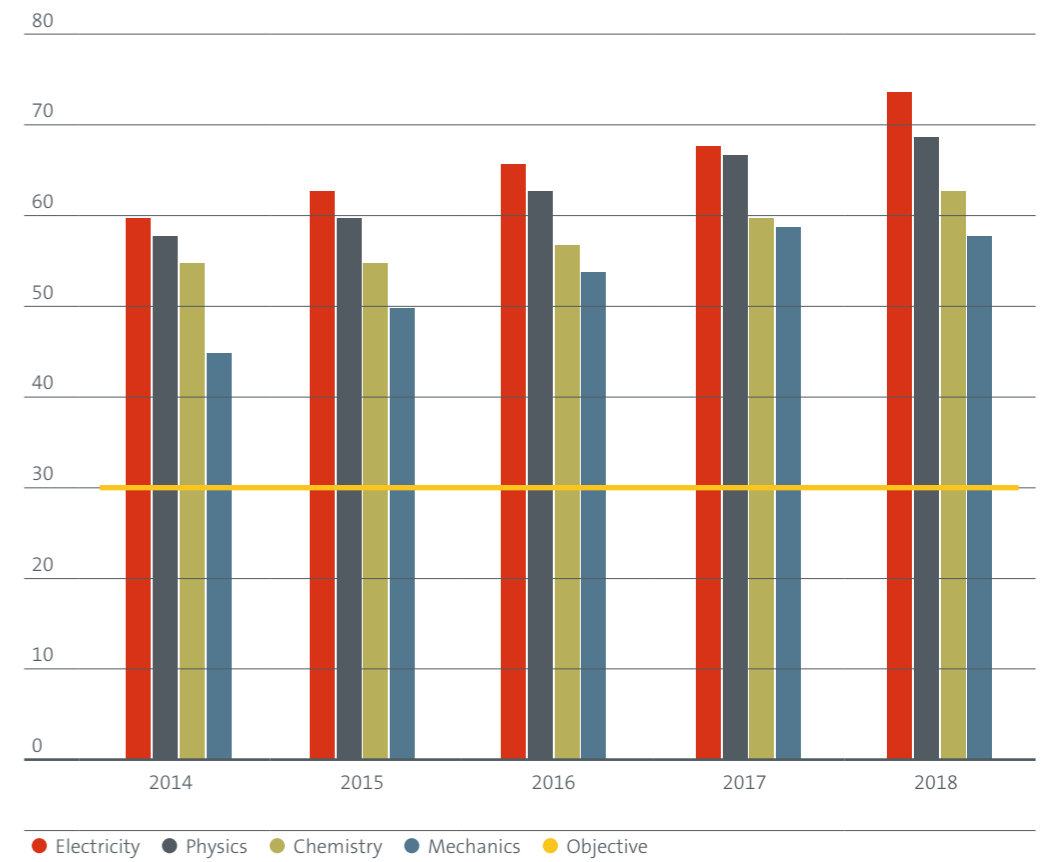
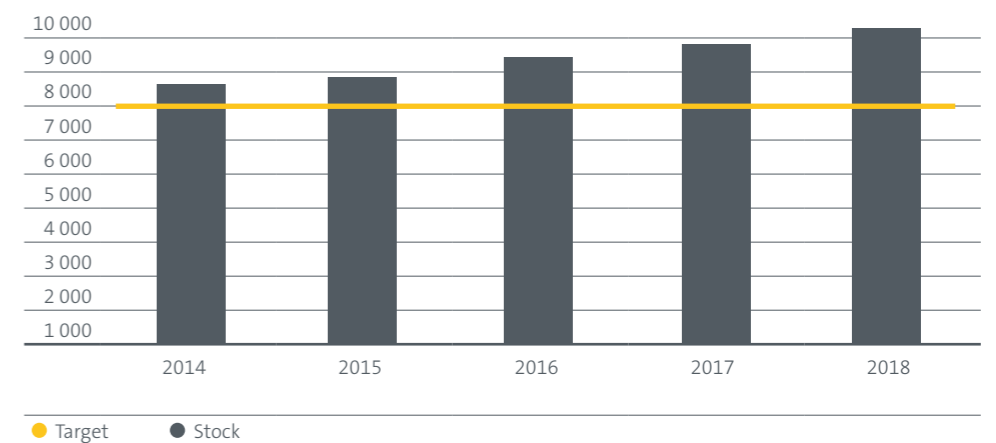


Figure 3

Number of pending cases



4. Measures to reach the 5-year objective

4.1. Performance management

Under the amended Implementing Regulations to the EPC, the reappointment of a member or chairperson is subject to a positive opinion and performance evaluation by the PBoA (Rule 12d(3) EPC). The PBoA may also recommend Board members for promotion (Article 11(3)(b) ServRegs).

In view of these provisions, a comprehensive performance evaluation system for members and chairpersons of the Boards of Appeal has been set up by the PBoA. This entered into force on 1 January 2018.

The evaluation criteria against which performance is assessed are specific to the judicial function of the Boards of Appeal and based on best practices in the contracting states to the EPC, as well as on recommendations from international judicial bodies. While both qualitative and quantitative indicators are used to ensure that a comprehensive assessment can be made, the focus is on quality.

4.2. Revision of the Rules of Procedure of the Boards of Appeal

A comprehensive revision of the Rules of Procedure of the Boards of Appeal is underway. Its aims are to increase

- efficiency, by reducing the number of issues to be treated,
- predictability for the parties and
- harmonisation.

A proposal for the revision was drafted by the PBoA and the BOAC, and stakeholders were invited to provide their comments in an extensive consultation which concluded at the end of April 2018. The results of the consultation have been incorporated into a new draft. On 5 December 2018, the BOAC and the PBoA jointly hosted a user consultation conference to discuss the new draft. The conference was attended by around 140 participants, who were mainly representatives of various user associations (including the epi and BusinessEurope) and patent attorneys.

It is envisaged that the revised Rules of Procedure of the Boards of Appeal will be finalised and adopted by the BOAC in early 2019 and then presented to the Administrative Council for approval in the course of the year. The revised Rules of Procedure can be expected to enter into force at the beginning of 2020.

Active case management by the boards will be a central element of the revised Rules of Procedure of the Boards of Appeal.

4.3 Further measures

Having regard to the objective of reducing pendency times and the need to increase the predictability of the duration of appeal proceedings, the PBoA has set standard timescales for issuing minutes and decisions after oral proceedings. In addition, the use of oral proceedings rooms has been made more efficient, registry tasks have been harmonised, standard clauses for decisions have been drafted, and the business distribution scheme has been amended with a view to increasing flexibility and co-operation between boards. Moreover, a working group has been tasked with developing additional options for the partial reimbursement of the appeal fee.

4.4 Additional capacity

In 2018, all previously vacant technically qualified member posts could be filled. Four chairpersons, one legally qualified member and 24 technically qualified members took up their new function in the Boards of Appeal. At 31 December 2018, there were 166 chairpersons and members of the Boards of Appeal. The 111 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 225.

Significant additional resources in terms of manpower and facilities are necessary in the coming years to achieve the five-year objective, while at the same time maintaining the high quality of the appeal system under the EPC, which is essential to the functioning of the patent litigation system in Europe.

The Administrative Council has endorsed the PBoA's request for 23 additional technical member posts in the 2019 budget, and has positively taken note of the inclusion of another 16 technical member posts in the 2020 budget.

5. Production and productivity

5.1 Workload and production

In 2018, a total of 3 032 technical appeal cases¹ were received, 8.4% more than in 2017. 2 733 technical appeal cases were settled, which was a 19.7% increase compared with the same period in 2017. The combined production increase for 2017 and 2018 is 22.6%.

Because of the large increase in the number of appeal cases received, the number of pending cases will continue to grow in the short term. At 31 December 2018, 9 196 technical appeal cases were pending, which was 300 (3.4%) more than at 31 December 2017.

Table 1

Appeal proceedings by case

	New cases					Settled				
	2018	2017	2016	2015	2014	2018	2017	2016	2015	2014
Legal Board of Appeal	16	17	19	12	22	16	15	18	27	22
Technical Boards of Appeal	3 032	2 798	2 748	2 387	2 353	2 733	2 284	2 229	2 287	2 300
Enlarged Board of Appeal	12	10	9	9	21	15	8	18	14	21
Referrals	1	0	1	1	3	0	2	0	4	4
Petitions for review	11	10	8	8	18	15	6	18	10	17
Disciplinary Board of Appeal	18	26	25	9	13	20	17	25	7	7

5.2 Productivity

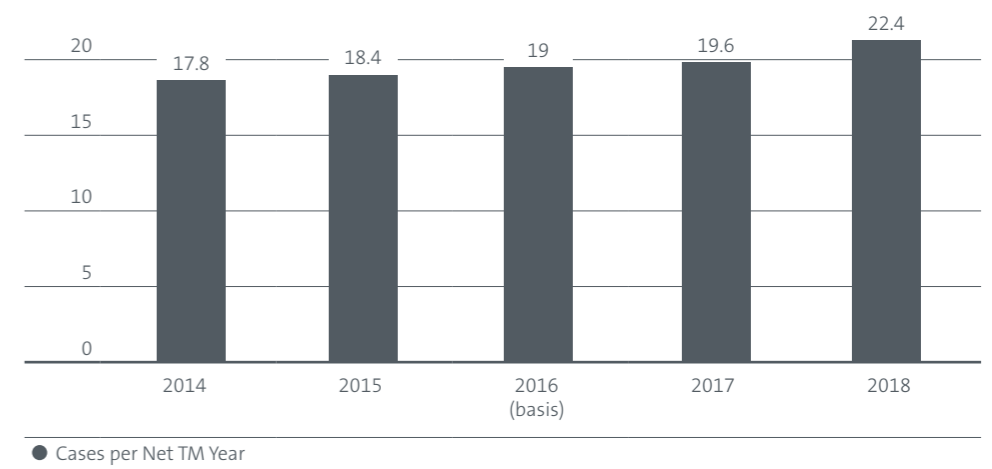
In 2018, the Boards of Appeal settled 2 057 cases with action, meaning cases settled by a decision or after a communication was issued by a board member and/or oral proceedings took place, using 1 098.7 net technical member (TM) months. This represents a productivity rate of 1.87 cases per net TM month. In 2017, the corresponding figure was 1.63. In 2018 productivity thus increased by 14.7%. The combined productivity increase for 2017 and 2018 is 18%.

Only cases settled with an action have been taken into account for these figures. The increase in productivity is 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 PBoA to increase efficiency are already yielding significant results.

¹ One appeal case may include several appeals by different parties.

Figure 1

Trend in settled cases per technical member (cases settled with an action)



6. Quality

Users rightfully expect the highest quality from a judicial authority whose decisions are final. In order to ensure that efficiency gains are made at no material cost to the quality of the decision-making, the PBoA has announced an initiative on quality. The prime focus of the initiative is on best practices for the drafting of decisions, communications and minutes, with a focus on methodology and structure. A working group consisting of experienced chairmen and members of the Boards of Appeal is expected to deliver first results by mid-2019.

7. Information on the case law of the Boards of Appeal

The Boards of Appeal website (<https://www.epo.org/law-practice/case-law-appeals.html>) provides regular news about the Boards of Appeal and the decisions they take.

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 the Boards of Appeal website. This website gives access to the decisions database, up-to-date information, communications of the Boards of Appeal, and texts of importance for appeal proceedings.

The EPO Boards of Appeal Case Law 2017 was published as supplementary publication 3, OJ EPO 2018. The latest issue of the annual “Information from the Boards of Appeal”, which comprises the Rules of Procedure of the Boards of Appeal, was published as supplementary publication 1, OJ EPO 2019. All publications of the Boards of Appeal, including the Case Law of the Boards of Appeal, 8th edition 2016, are available free of charge on the Boards of Appeal website (<https://www.epo.org/law-practice/case-law-appeals/publications.html>). The 9th edition of the Case Law of the Boards of Appeal will be published in 2019.

8. Statistics

8.1 General statistics

For statistics on the appeal procedure by case in 2018, see the tables and charts below.

Table 2

Appeal procedure by case

	New cases						Settled						Pending	
	2018		2017		2016		2018		2017		2016		31.12.2018	31.12.2017
Enlarged Board of Appeal	12		10		9		15		8		18	13	16	
Referrals	1		0		1		0		2		0	1	0	
Petitions for review	11		10		8		15		6		18	12	16	
Legal Board of Appeal	16		17		19		16		15		18	16	16	
Technical Boards of Appeal	3 032	<i>100%</i>	2 798	<i>100%</i>	2 748	<i>100%</i>	2 733	<i>100%</i>	2 284	<i>100%</i>	2 229	<i>100%</i>	8 896	<i>100%</i>
Examination procedure (ex parte)	1 169	38.6%	1 081	38.6%	934	34.0%	1 189	43.5%	1 005	44.0%	975	43.7%	3 633	41.1%
Opposition procedure (inter partes)	1 863	61.4%	1 717	61.4%	1 814	66.0%	1 544	56.5%	1 279	56.0%	1 254	56.3%	5 563	58.9%
Mechanics	1 004	33.1%	959	34.3%	1 011	36.8%	835	30.5%	681	29.8%	678	30.4%	2 844	30.7%
Examination procedure	140		136		144		107		110		124		357	334
Opposition procedure	864		823		867		728		571		554		2 487	2 393
Chemistry	959	31.6%	843	30.1%	902	32.8%	857	31.4%	709	31.0%	723	32.5%	2 753	29.2%
Examination procedure	208		194		208		229		192		209		576	589
Opposition procedure	751		649		694		628		517		514		2 177	2 012
Physics	278	9.2%	278	9.9%	257	9.4%	292	10.7%	234	10.3%	243	10.9%	1 038	11.8%
Examination procedure	173		178		161		209		170		178		659	694
Opposition procedure	105		100		96		83		64		65		379	357
Electricity	791	26.1%	718	25.7%	578	21.0%	749	27.4%	660	28.9%	585	26.2%	2 561	28.3%
Examination procedure	648		573		421		644		533		464		2 041	2 036
Opposition procedure	143		145		157		105		127		121		520	481
Disciplinary Board of Appeal	18		26		25		20		17		25	16	18	
Total	3 078		2 851		2 801		2 784		2 324		2 290	9 241	8 946	

Figure 4

New cases 2018

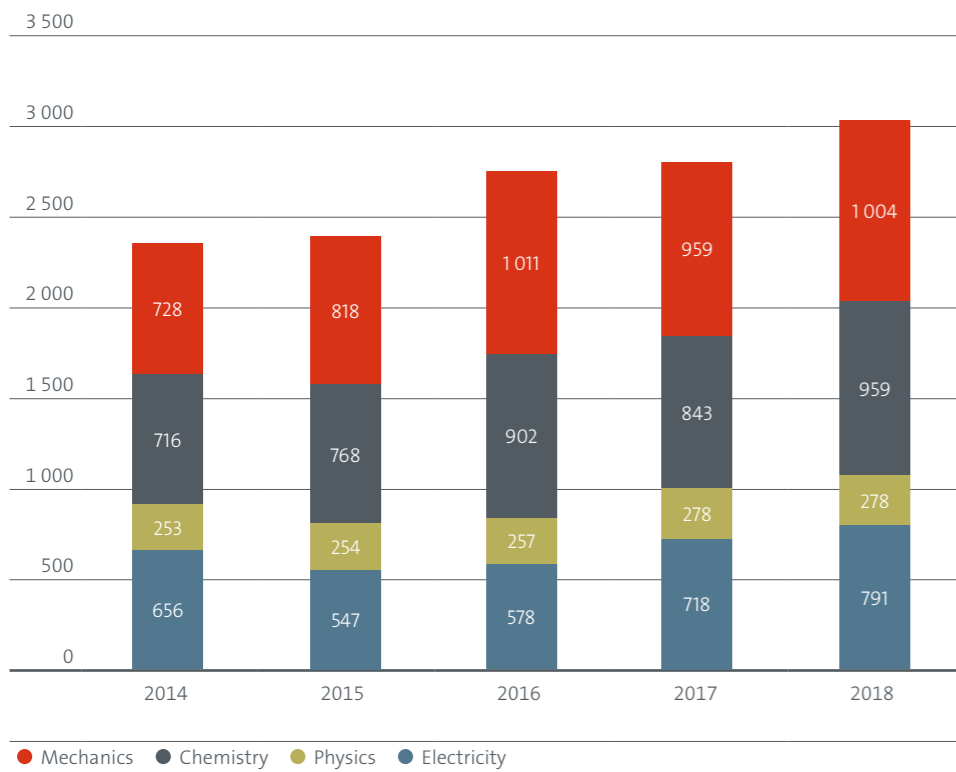
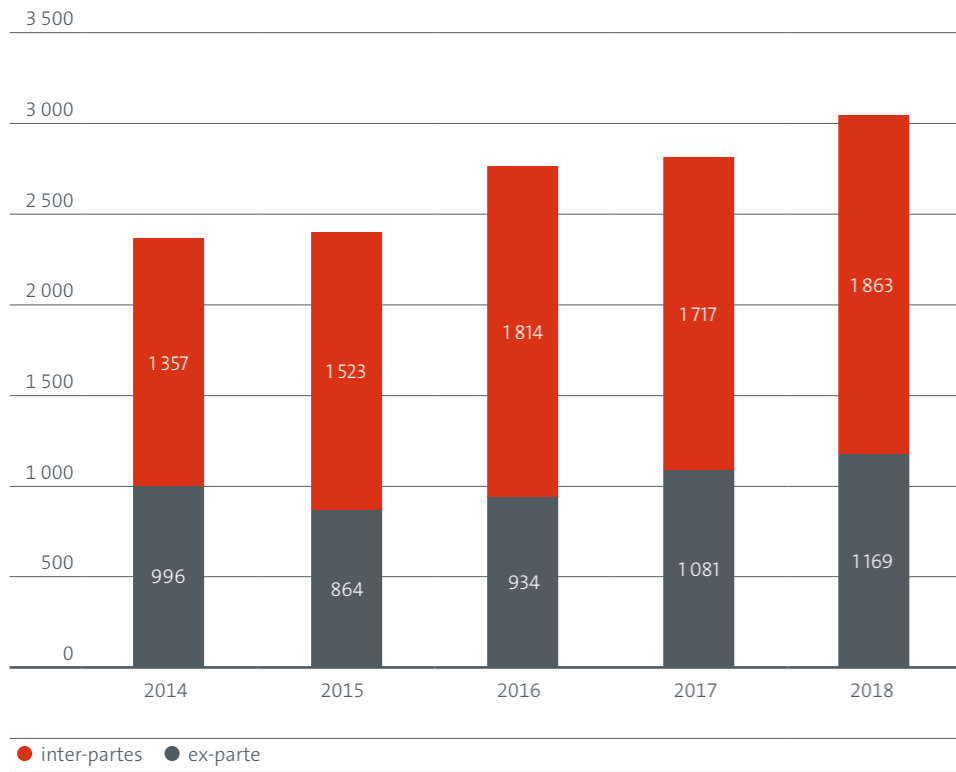


Figure 5

Settled cases 2018

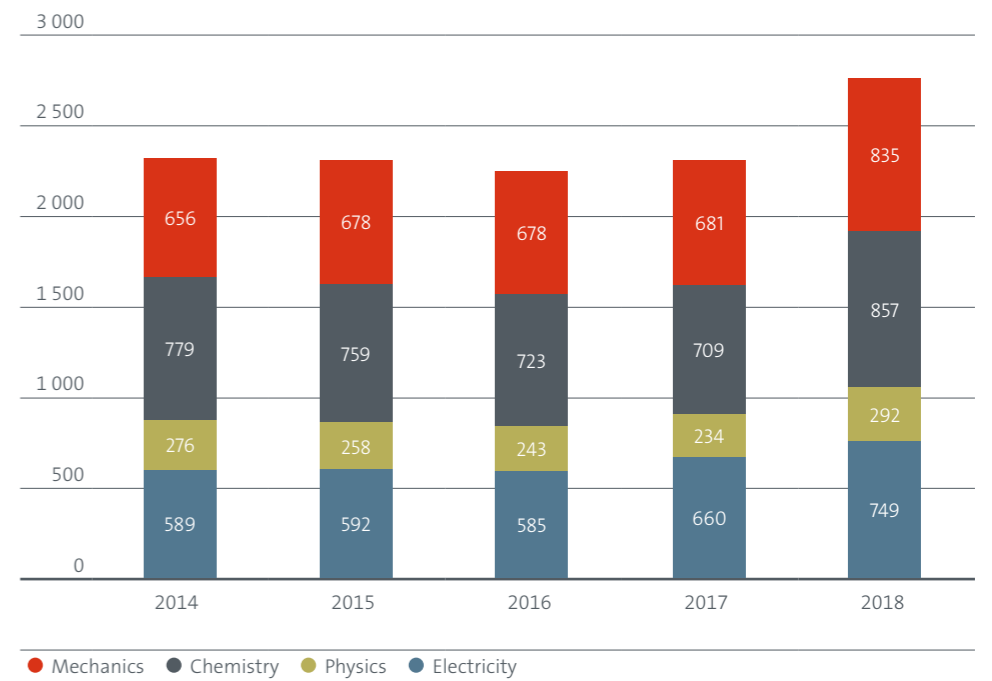
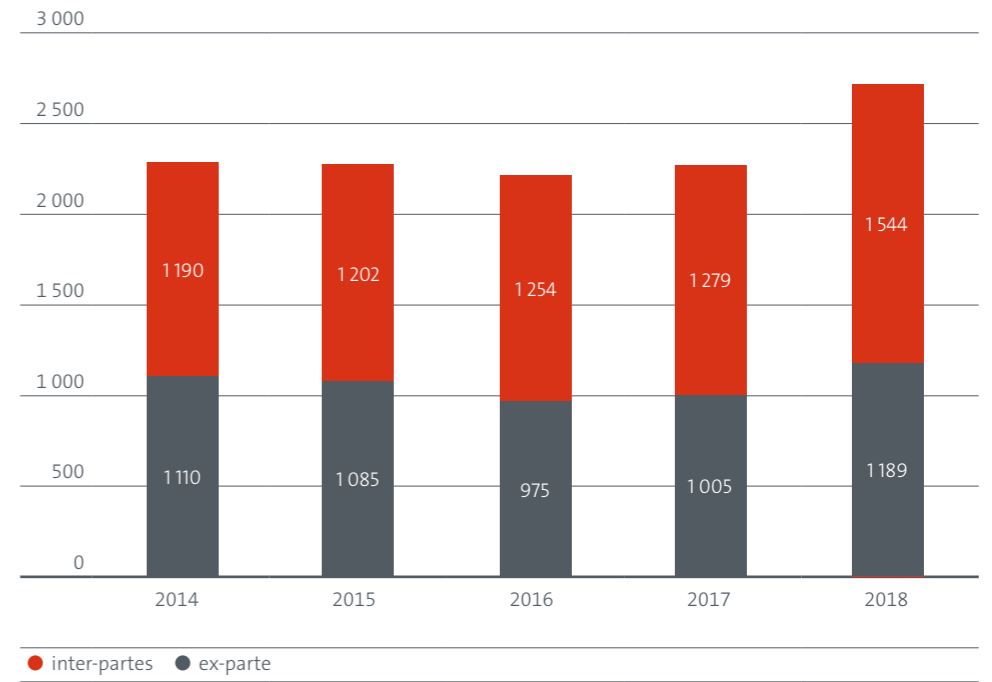
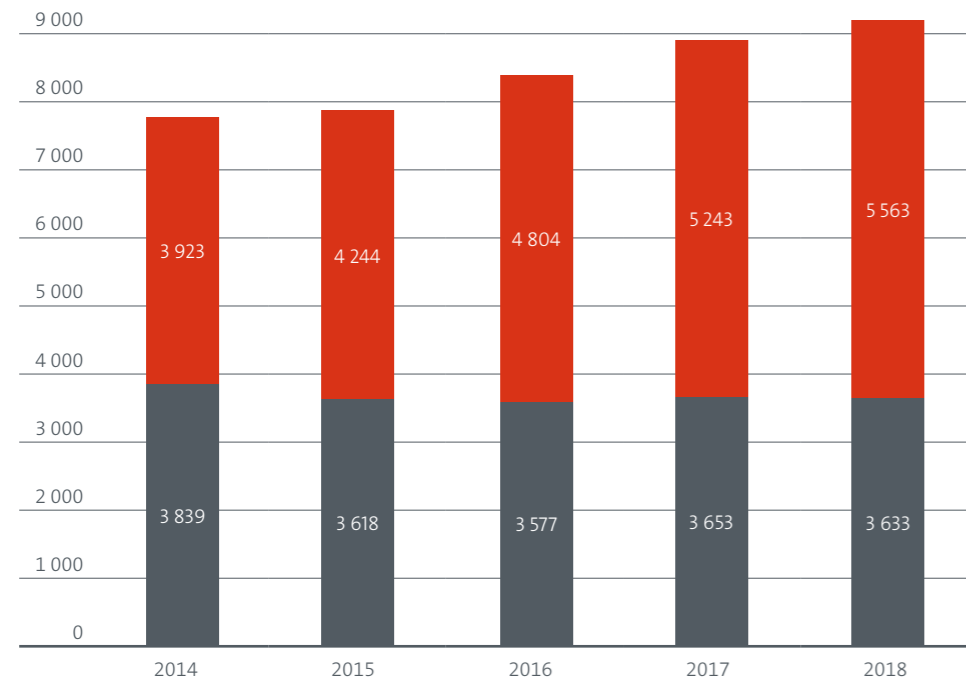
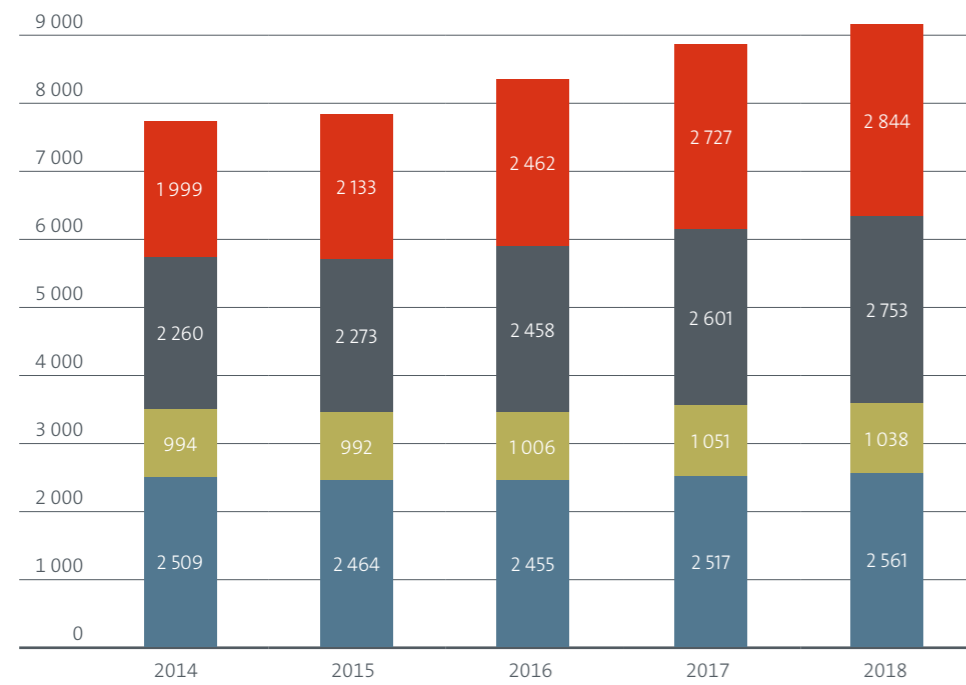


Figure 6
Appeals pending 31 December 2018



● inter-partes ● ex-parte



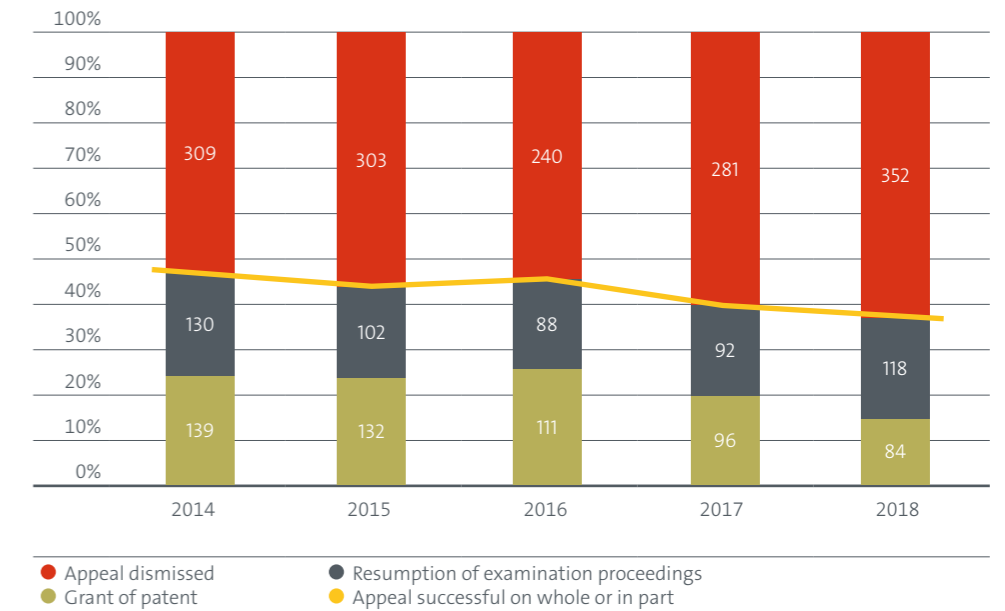
● Mechanics ● Chemistry ● Physics ● Electricity

8.2 More about the Boards' activities

8.2.1 Outcome of proceedings before the technical boards of appeal

In 2018, 1 189 ex parte cases (2017: 1 005) were settled. 594 ex parte cases were settled by a decision. The remaining 595 were settled without a decision. In 276 of these cases the appeal was withdrawn, after a substantive communication by the board. 554 ex parte cases (47%) 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 554 cases is shown in Fig. 7. The increase in the percentage of appeals being dismissed has continued in 2018.

Figure 7
Ex parte cases settled after a decision on the merits

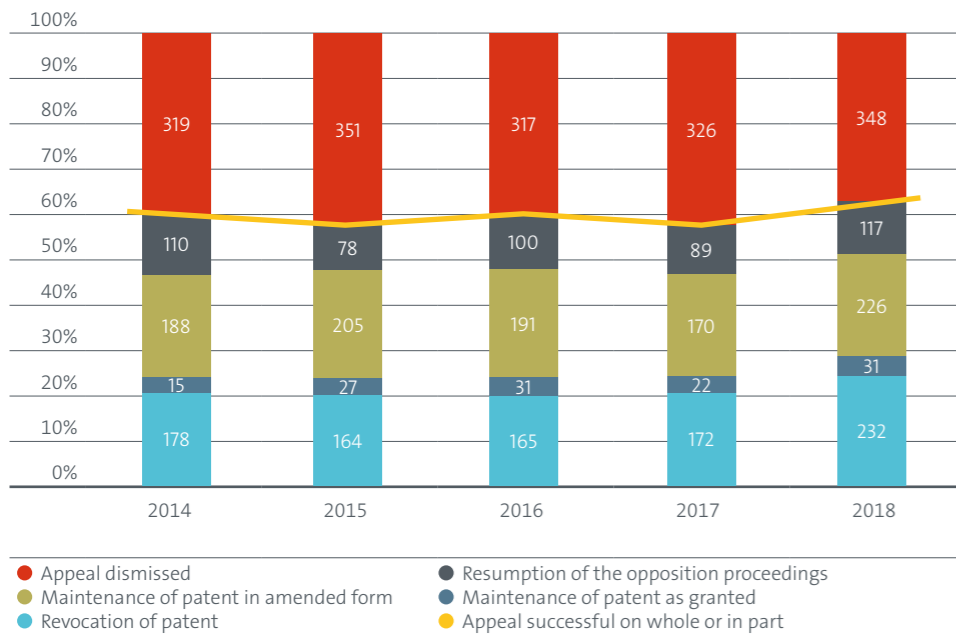


● Appeal dismissed ● Resumption of examination proceedings
● Grant of patent ● Appeal successful on whole or in part

In 2018, 1 544 inter partes cases were settled (2017: 1 279). 1 010 inter partes cases were settled by a decision. The remaining 534 were settled without a decision. In 177 of these cases the appeal was withdrawn, after a substantive communication by the board. 954 inter partes cases (62%) 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 954 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):

Figure 8

Inter partes cases settled after a decision on the merits



8.2.3 Breakdown by language of the proceedings

Table 4

Breakdown by language of the proceedings

	Total	English	German	French
Appeals filed before the technical boards in 2018	3 032	73.4%	22.7%	3.9%
Oral proceedings scheduled in 2018	1 961	72.3%	23.3%	4.4%
Oral proceedings held in 2018	1 374	70.9%	24.3%	4.8%

8.2.2 Proceedings before the Disciplinary Board of Appeal

Table 3

Proceedings before the Disciplinary Board

	2018	2017
New cases	16	26
re European qualifying examination	2	26
re professional representatives' code of conduct	0	0
Cases settled	20	17
re European qualifying examination	20	17
re professional representatives' code of conduct	0	0
Cases pending	14	18
re European qualifying examination	14	18
re professional representatives' code of conduct	2	0

