



Europäisches
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Patent Office

Office européen
des brevets

Annual report of the Boards of Appeal

2019



Boards
of Appeal



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Foreword



I am very pleased to present the Annual Report of the Boards of Appeal for 2019. Topics covered in the report include, in particular, the measures taken to further increase efficiency while at the same time ensuring the highest quality of our decisions.

2019 has again been a very successful year in which we were able to reap the fruits of our hard work and organisational improvements. For the second year in a row, the Boards have exceeded their objectives and are ahead of plan. From 1 January 2017 to 31 December 2019, production (i.e. settled cases) in the Boards of Appeal increased by 46%. Productivity (i.e. cases settled with action divided by technical member capacity) increased by 27.8%. These impressive results would not have been possible without the strong and continuous commitments of the entire staff of the Boards of Appeal. I would like to thank all chairpersons and members, the Presidium, and the entire staff of the Boards of Appeal for their outstanding work.

A major milestone in 2019 concerns the revision of the Rules of Procedure of the Boards of Appeal. Due to the tireless efforts of the members of the internal working group, the valuable input provided by the users, and the excellent cooperation with the Boards of Appeal Committee, the extensive preparatory work could be concluded in 2019. The revised Rules of Procedure entered into force on 1 January 2020, and I expect them to increase efficiency, predictability for parties, and harmonisation.

Quality was once more at the centre of the Boards' activities in 2019. An important project in this regard concerns quality-focused decision making. We have drawn up a comprehensive document on the factors contributing to the quality of the decisions of the Boards of Appeal, and I encourage everyone to read this document on our website.

Institutionally, the conclusion of a Memorandum of Understanding between the President of the European Patent Office and the President of the Boards of Appeal has further strengthened the organisational autonomy of the Boards of Appeal.

Finally, the publication of this report coincides with the pandemic spread of the novel Coronavirus. While the Boards of Appeal have also been affected by this global emergency, I am certain that the strong foundation which we have built in the recent years will allow us to tackle the challenging times ahead.

A handwritten signature in black ink, appearing to be 'Carl Josefsson', written in a cursive style.

Carl Josefsson
President of the Boards of Appeal

1. Executive summary

The Boards of Appeal 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 by 2023. From the entry into force of the structural reform on 1 January 2017 until 31 December 2019, the Boards have increased their productivity by 27.8%. This remarkable increase is due to the continued, strong commitment of all the Boards' chairpersons, members and support staff to achieving their objectives and bringing down the backlog of pending cases.

In 2019, the Boards increased their capacity by recruiting 17 additional technically qualified members. However, due to a large increase in incoming cases, the stock figure continued to grow. In accordance with the request of the President of the Boards of Appeal, the Administrative Council of the EPO has approved 16 additional technically qualified member posts for the 2020 budget.

The Boards have increased their productivity by 27.8%.

2. Structural reform of the Boards of Appeal

The Boards of Appeal are the first and final judicial instance in the procedures before the European Patent Office. They are independent in their decisions and bound only by the European Patent Convention.

The 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 as a subsidiary body of the Administrative Council, and the relocation of the Boards to separate premises in Haar. In 2018, the Act of Delegation was renewed (OJ EPO 2018, A63). In 2019, the implementation of the Act of Delegation was detailed in a Memorandum of Understanding between the President of the European Patent Office and the President of the Boards of Appeal (BOAC/12/19).

The aim of the reform was to increase the organisational and managerial autonomy of the Boards, the perception of their independence, and their efficiency. It confirmed the Boards' status as an independent judicial body (see CA/43/16 Rev. 1, point 14), 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.

The reform confirmed the Boards' status as an independent judicial body.





3. Production, productivity and pendency time

3.1. Five-year objective

With a view to reducing the backlog, the objective is set 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. The measures to be taken to achieve these objectives are:

- increasing the productivity of the Boards by 32% from 1 January 2017 until 31 December 2020, and
- allocating additional resources for a limited period of time.

3.2. Workload and production

In 2019, a total of 3 292 technical appeal cases were received, 8.6% more than in 2018. 3 254 technical appeal cases were settled, a 19.1% increase compared with 2018. This means an increase of 46% in production since the entry into force of the structural reform on 1 January 2017.

Because of the large increase in the number of appeal cases received, the number of pending cases is still growing, although not by much. At 31 December 2019, 9 234 technical appeal cases were pending, which was only 38 (0.4%) more than at 31 December 2018 (see Figure 1).

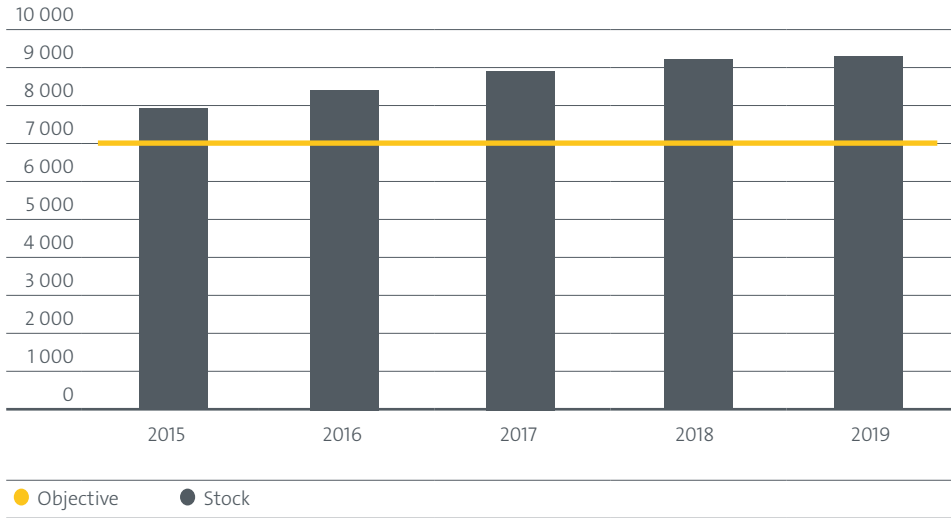
Table 1

Number of new and settled cases

	New cases					Settled cases				
	2019	2018	2017	2016	2015	2019	2018	2017	2016	2015
Legal Board of Appeal	14	16	17	19	12	17	16	15	18	27
Technical Boards of Appeal	3 292	3 032	2 798	2 748	2 387	3 254	2 733	2 284	2 229	2 287
Enlarged Board of Appeal	12	12	10	9	9	11	15	8	18	14
Referrals	4	1	0	1	1	2	0	2	0	4
Petitions for review	8	11	10	8	8	9	15	6	18	10
Disciplinary Board of Appeal	19	18	26	25	9	12	20	17	25	7

Figure 1

Number of pending cases



3.3. Productivity

For the purpose of calculating productivity, only cases settled “with action” are taken into account. These are cases settled by a decision or after a communication has been issued by a board member and/or oral proceedings have taken place. In 2019, the Boards settled 2 526 cases with action, requiring 1 250.5 net technical member (TM) months. This represents a productivity rate of 2.02 cases per net TM month. In 2018, the corresponding figure was 1.87. In 2019 productivity thus increased by 8.0%. The productivity increase from 1 January 2017 to 31 December 2019 was 27.8%.

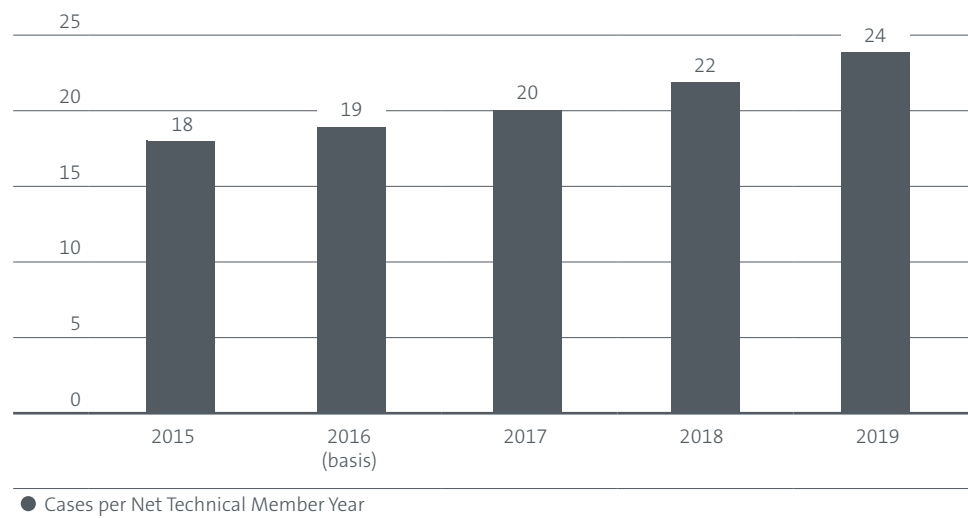
In 2019, the Boards settled 2 526 cases.



The Boards of Appeal have thus reached and exceeded their very ambitious objective of increasing the productivity by 26% from 2017 to 2019. 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 and their support staff. It also shows that the measures taken by the President of the Boards of Appeal to increase efficiency continue to yield results.

Figure 2

Number of cases settled with an action



The further increasing of productivity to the envisaged total of 32% will mainly depend on when the expected positive effects of the amended Rules of Procedure (see par. 5.2) and of the introduction of the new staggered reimbursement possibilities of the appeal fee (see par. 5.3) materialise. The required modernisation of the IT landscape in the Boards of Appeal will also play an important role. Moreover, the Boards of Appeal have been forced to restrict their judicial activities considerably in the first half of 2020, due to preventive measures taken against the pandemic spread of the novel Coronavirus (COVID-19). In particular, a large number of oral proceedings had to be cancelled. It is to be expected that this will have an impact on the number of settled cases in 2020.

3.4. Pendency time

Even though in 2019 the number of pending cases continued to grow, due to the increase in incoming cases, the Boards succeeded in reducing pendency time. Whilst in 2018 90% of cases were settled in 67 months, in 2019 this number fell to 65 months. As the figures below show, this positive trend can be seen in all technical fields with the exception of physics. It should be noted in this context that the Boards' workload and its fluctuations depend heavily on the output of the departments of first instance.

Figure 3

Pendency time (90% of cases settled in months)

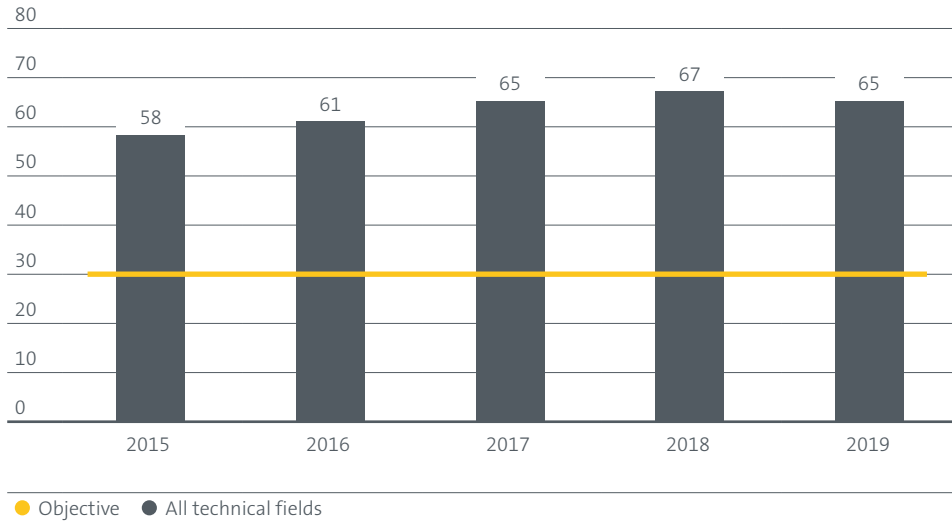
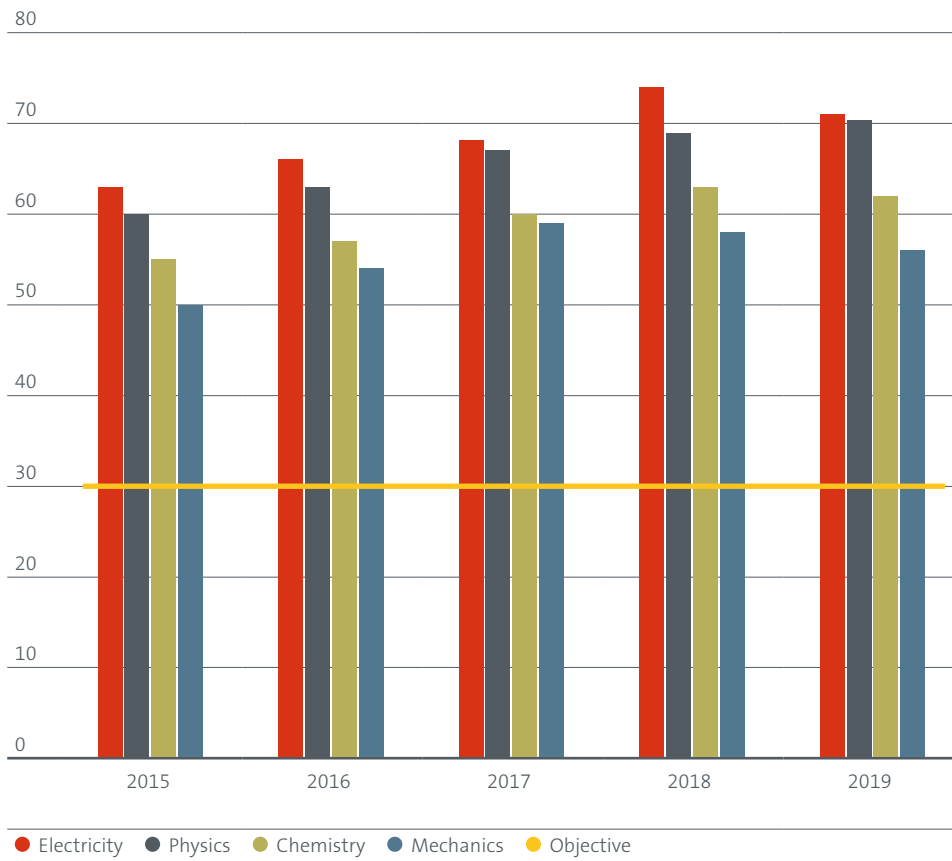


Figure 4

Timeliness results per technical field (90% of cases settled in months)



The percentage of pending appeal cases older than 30 months (backlog cases) has continued to decrease in 2019, and reached 33.2% by the end of the year.

Figure 5

Percentage of backlog cases

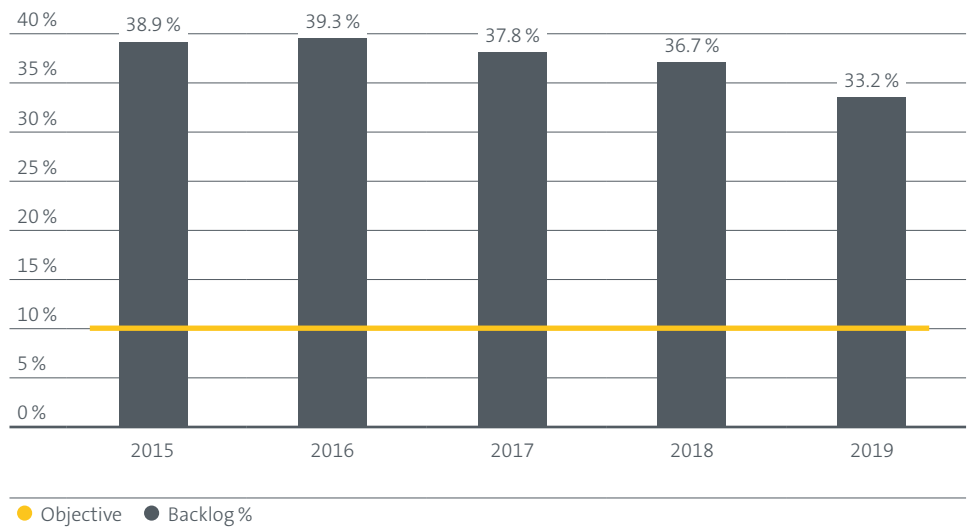
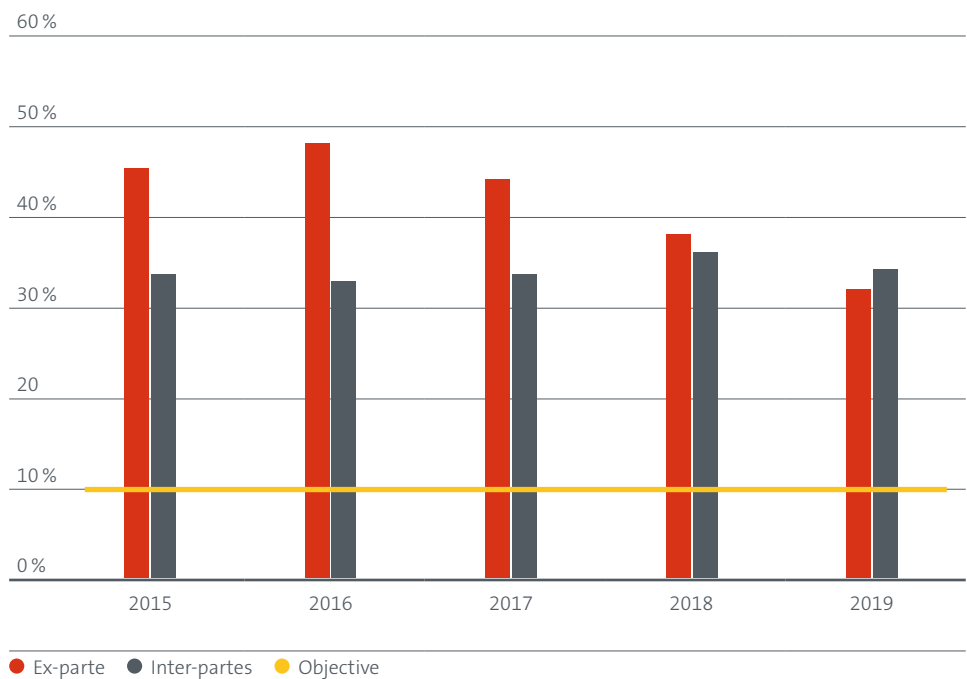


Figure 6

Percentage of backlog cases per proceeding type





4. Quality

4.1. Quality-focused decision-making

The legal and technical quality of the decisions taken by the Boards of Appeal has been a central priority for them since the beginning of their activity. 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 President of the Boards of Appeal has mandated a working group to provide a definition of quality as well as to produce two compendia of good practice examples, one for the workflow of an appeal file and the other for the drafting of decisions.

Efficiency gains are made at no material cost to the quality of the decision-making.

The working group drafted a document addressed primarily to board members and outlining guiding principles for quality-focused decision-making. It sets out the following as the most important elements that contribute to the quality of decisions of the Boards of Appeal:

- in the proceedings leading up to the decision: transparency, respect for the right to a fair trial and timeliness
- in the written decision itself: clarity, clear reasoning, succinctness, responsiveness to the arguments of the parties, proper analysis of the factual and legal issues, respect for the right to be heard and consideration of diverging lines of case law.

After the draft document on quality-focused decision-making was discussed by the Presidium of the Boards of Appeal, a revised version was submitted to the Boards of Appeal Committee. Feedback from the Boards of Appeal Committee was incorporated into the document, which was then discussed with external users at the 25th MSBA Meeting in November 2019, where it received positive feedback overall. A large number of the amendments from this meeting have been included in the final version of the document, which has now been published on the Boards' website ([http://documents.epo.org/projects/babylon/eponet.nsf/0/A58D4747B7DCB508C12585960049897C/\\$FILE/quality_focussed_decision_making_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/A58D4747B7DCB508C12585960049897C/$FILE/quality_focussed_decision_making_en.pdf)) in order to inform the public about the Boards' definition of quality.

4.2. Professional development

Quality is also ensured in the context of professional development.

The professionalism of the members and chairs of the Boards of Appeal is the primary guarantee of the high quality of the decisions of the Boards of Appeal. Therefore, quality is also ensured in the context of professional development. New members follow intensive training courses on aspects of procedure and substantive law, on decision writing, and judicial ethics. Furthermore, they are supported by their chairs and other experienced members. More generally, continuous training is available to all members and chairs to further develop their skills and competencies.

Consistency and predictability of the jurisprudence are another aspect of quality.

Consistency and predictability of the jurisprudence are another aspect of quality. Different forums within the Boards of Appeal (e.g. the Boards of Appeal Professional Development Committee) take up current topics and organise discussion events. Regular information to all chairpersons and members on important developments, in particular on recent decisions of the Boards and national patent courts, contribute to the awareness of different approaches and facilitate discussions which enhance harmonisation of case law.

4.3. Publications

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 (<https://www.epo.org/law-practice/case-law-appeals.html>). 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 ninth edition of the “Case Law of the Boards of Appeal of the EPO” was published in July 2019.

The ninth edition of the “Case Law of the Boards of Appeal of the EPO” was published in July 2019. It is available in hardback, as well as in HTML and PDF formats. It provides a comprehensive overview of the case law and contains summaries of or references to almost 7 000 decisions which were issued in writing in the period up to the end of 2018. Also included are a number of important decisions rendered at the beginning of 2019.



5. Measures to increase efficiency

5.1. Objectives and improved planning

As part of operational planning, the production figures and filing trends of the departments of first instance are continuously analysed. The results of these analyses are used to achieve an even distribution of work between the Boards and their members. Ultimately, this is reflected in the business distribution scheme. The results of the analyses are also used for recruitment planning and objective-setting for the Boards.

Improved planning was a decisive factor for the high increase in production achieved in 2019.

Improvements are in particular visible in the number of planned oral proceedings. For 2019, technical Boards planned 2 325 oral proceedings. For 2018, the same figure was 1 938, which indicates an increase of 20.0%. Improved planning was a decisive factor for the high increase in production achieved in 2019.

In 2019, the minutes of oral proceedings were issued within seven calendar days of the oral proceedings in 83.3% of the time, and the written decision was despatched within three months of them in 75.7% of the time. As of 1 January 2020, where the decision on the appeal is announced orally, it is mandatory under Article 15(9)(a) of the Boards' amended Rules of Procedure to put the decision in writing and despatch it within three months of the date of the oral proceedings. If a Board is unable to do so, it has to inform the parties and the President of the Boards of Appeal of when the decision will be despatched.

5.2. RPBA 2020

5.2.1. Background and aims

The extensive preparatory work for revising the Boards' Rules of Procedure, which started in 2017 and involved several user consultations, was completed in early 2019. The revised Rules of Procedure of the Boards of Appeal ("RPBA 2020") were unanimously adopted



by the Boards of Appeal Committee on 4 April 2019 and unanimously approved by the Administrative Council at its 160th meeting on 26 and 27 June 2019 (see the decision of the Administrative Council of 26 June 2019 in OJ EPO 2019, A63). The RPBA 2020 entered into force on 1 January 2020 and apply in general to any appeal pending on, or filed after, that date (for the transitional provisions, see Article 25 RPBA 2020).

More information on the RPBA 2020 is available on the Boards' website (<https://www.epo.org/law-practice/case-law-appeals/communications/2019/20190704.html>). As well as the Administrative Council's decision of 26 June 2019, it contains a table setting out all the amendments to the RPBA and detailed explanatory remarks on the individual articles.

The aims of the RPBA 2020 are to increase efficiency, to increase predictability for parties and to further harmonise practice.

The underlying aims of the RPBA 2020 are to increase efficiency by reducing the number of issues to be dealt with, to increase predictability for parties and to further harmonise practice. Active case management by the Boards is also a central element of the revised provisions.

The main new features of the RPBA 2020 are described in turn below.

5.2.2. Annual list of planned cases

Article 1(2) RPBA 2020 requires the annual publication of a list of cases.

Article 1(2) RPBA 2020 requires the annual publication of a list of cases. These are the cases in which the Boards are likely to hold oral proceedings or issue a communication or a decision in written proceedings in the following working year. The list is based on a working plan drawn up by each chairperson for their Board. It is expected to increase efficiency and make the work of the Boards more transparent and predictable. The first annual list was published on the Boards' website in October 2019 (<https://www.epo.org/law-practice/case-law-appeals/about-the-boards-of-appeal/annual-list-of-cases.html>).

5.2.3. Designation of members for Board composition

The RPBA 2020 provide greater flexibility with regard to the composition of the Board in a particular case.

The RPBA 2020 provide greater flexibility with regard to the composition of the Board in a particular case. They make a distinction between the "Chair of the Board", who is the chairperson appointed by the Administrative Council, and the "Chair in the particular appeal", who is responsible for a specific case. The Chair of the Board need not act as the Chair in each individual appeal case. Rather, the Chair of the Board can designate any member of the Board to be the Chair in the particular appeal.

In addition, Article 5(1) RPBA 2020 provides that the Chair of the Board may initially designate only the case rapporteur – and leave the remaining composition to be determined at a later stage. For example, the rapporteur may be determined as soon as the case reaches the Board, but the other members only when it appears in the published list of cases. The option of determining the remaining composition later on allows the Boards to organise their work more flexibly and efficiently.

5.2.4. More tasks for rapporteur

Under Article 5(3) RPBA 2020, the rapporteur is permitted to do some clearly defined preparatory work on a case before the Board's entire composition has been decided. In this regard, the RPBA 2020 introduces an important element of early case management. In general, cases are dealt with on a "first in, first out" basis. It has now been codified that the



rapporteur should depart from this principle when synergetic effects among cases can be achieved. Therefore, the rapporteur examines whether the appeal should be handled with, or given priority over, others assigned to them. The option for dealing with appeals together is provided for in Article 10(2) RPBA 2020.

5.2.5. Acceleration of appeal proceedings

Article 10(3) to (6) RPBA 2020 expressly allows parties and national courts to request the acceleration of appeal proceedings. Valid reasons for a party to request acceleration are, in particular, that infringement proceedings have been brought or are envisaged, or that the decision of potential licensees of the patent in suit hinges on the appeal's outcome. A national court, by contrast, does not need to provide a specific reason for requesting acceleration. As a rule, the Boards will grant a request for acceleration from a court. The Board will then also promptly inform the court of when oral proceedings are likely to take place.

Article 10(3) to (6) RPBA 2020 allows parties and national courts to request the acceleration of appeal proceedings.

5.2.6. Mandatory communication in preparation for oral proceedings and new timescale

A further important case management instrument and one which fulfils a long-standing wish within the user community is that, under Article 15(1) RPBA 2020, a Board must issue a communication in preparation for oral proceedings. It is based on a thorough analysis of the case and draw attention to matters that, at first sight, are of particular significance for the decision to be taken. The communication encourages concentration on the essentials and ensure that the oral proceedings are conducted efficiently. In most cases, the Board also gives – as was the practice already before – a preliminary opinion in its communication.

Under Article 15(1) RPBA 2020, a Board must issue a communication in preparation for oral proceedings.

In addition, the Boards observe a new timescale when preparing for oral proceedings. They normally issue the summons and the above-mentioned communication at least four months before them. The communication is not necessarily sent with the summons, depending on how the individual case is being handled.

5.2.7. Remittal to department of first instance

Article 11 RPBA 2020 governs the remittal of a case to the department of first instance for further prosecution. It provides that the Boards will not remit unless there are special reasons to do so. The aim of this provision is to reduce the likelihood of a “ping-pong” effect between the Boards and the departments of first instance, and therefore undue prolongation of the entire proceedings before the EPO. Whether “special reasons” exist will be decided on a case-by-case basis. In the explanatory remarks to this article it is set out that, if all the issues can be decided without placing an undue burden on the Board, it should normally not remit the case.

5.2.8. New timescale for Boards to issue written decision

Under Article 15(9) RPBA 2020, the “decision on the appeal” – which is the decision taken in order to conclude the appeal proceedings – must be issued in a timely manner. In the vast majority of appeal cases, the decision is announced at the end of the oral proceedings. For these standard cases, “in a timely manner” means despatching the written decision within three months of the date of the oral proceedings.

5.2.9. Primary objective of appeal and amendments to a party’s case in light of the “convergent approach”

Article 12(2) RPBA 2020 expressly sets out the primary object of the appeal proceedings as being to review the decision under appeal in a judicial manner. As the Boards are the only judicial body in proceedings under the European Patent Convention, they review appealed decisions on points of fact and law.

Since the primary objective is to review the appealed decision, parties cannot expect to be able to change their case on appeal at will. Rather, as the appeal proceedings progress, the possibilities for parties to amend their cases will become increasingly limited. This is what is referred to as the “convergent approach”.

As the appeal proceedings progress, the possibilities for parties to amend their cases will become increasingly limited.



The most important elements of this approach are that:

- the onus is on a party to explain and justify any amendment to its case,
- an amendment should as a rule narrow down the scope of the case, and
- any amendment may be admitted only at the discretion of the Board.

The convergent approach comprises three levels. These are governed by Articles 12(4) and 13(1) and 13(2) RPBA 2020. Which of these provisions applies will depend on the point in the appeal proceedings at which a party seeks to change its case.

At all levels of the convergent approach, the RPBA 2020 lay down a number of criteria which the Boards should use when exercising their discretion as to whether to admit amendments. These are intended to foster a more harmonised approach in the way this discretion is applied.

In the application of the convergent approach, the parties' right to be heard as guaranteed by Article 113 EPC and their right to fair proceedings more generally must be respected.

The parties' right to be heard as guaranteed by Article 113 EPC must be respected.

5.3. Additional opportunities for reimbursement of the appeal fee

The Administrative Council has adopted a proposal to both increase the appeal fee and create additional opportunities for its partial reimbursement (see CA/80/19). In this context, it is recalled that the Administrative Council has aimed at an ambitious increase in the Boards' ability to cover their own costs (CA/43/16 Rev. 1), which cannot be achieved through productivity gains alone.

New opportunities for partial reimbursement of the appeal fee are laid down in amended Rule 103 EPC.

The new opportunities for partial reimbursement of the appeal fee are laid down in amended Rule 103 EPC, which came into force on 1 April 2020. They are based on the assumption that, the earlier an appeal is withdrawn, the less time and effort the Board and the party or parties will have invested in it. The rate of reimbursement is therefore high at



the beginning and decreases over the appeal's lifetime. Under the previous Rule 103 EPC, the appeal fee could be reimbursed at either 100% or 50%. The amended rule introduced two further partial reimbursement rates: 75% and 25%.

The 75% reimbursement applies to withdrawals that occur after the end of the 100% reimbursement phase but before the appeal file is taken up by the case rapporteur. As a rule, a Board sends out a communication informing the parties of its intention to start substantively examining the appeal. That communication draws attention to the fact that, if the appellant withdraws its appeal within two months of notification of the communication, the appeal fee will be reimbursed at 75%. As to the new 25% reimbursement, its purpose is to offer appellants an incentive to withdraw their appeal even at a very late stage. Appellants receive in particular a 25% reimbursement if they withdraw their appeal before the decision is announced at the oral proceedings.

The option to reimburse an appellant that withdraws its request for oral proceedings has also been created. This is important for planning and case management. If a request for oral proceedings is withdrawn in good time before they take place, a Board may be able to use this freed-up capacity to schedule oral proceedings in another appeal case. Therefore, if the request is withdrawn and the oral proceedings do not take place, the appeal fee will be reimbursed at 25%.

5.4. Other measures

Further flexibility has been created by adding more co-operating Boards to the business distribution scheme.

Measures have been taken to make more efficient use of the oral proceedings rooms. An initial evaluation has shown that use of the available rooms has increased by 15.4% and that there is further potential for improvement.

In the business distribution scheme, a greater number of Boards now have additional members (up to eight technical members). In such Boards, the deputy chairperson often acts as the chairperson in particular cases. At the end of 2019, the number of technical members on the Boards varied from four to eight. The number largely depends on the workload distribution, recruitment and the particular competencies of the members. Further flexibility has been created by adding more co-operating Boards to the business distribution scheme.

Although the Boards are not included in the Office's Strategic Plan 2023, several topics covered by that plan are of interest to them too, notably automation and workflow design. Together with the President of the European Patent Office, pragmatic solutions are being found which ensure that the Boards' interests are taken into account whilst ensuring their independence.

Building on initiatives started by individual members, the Boards are now actively involved in piloting the use of mobile devices by members. In particular the use of tablets potentially brings major benefits, but several issues need to be resolved by technical solutions or defining best practice before the use of mobile devices can be promoted on a larger scale.

6. Staff

The Administrative Council approved 23 additional technically qualified member posts for 2019. By the end of 2019, 17 of these posts had been filled. In addition, new chairpersons and members were recruited to fill posts that had become vacant due to retirement. All in all, two chairpersons, one legally qualified member, 25 technically qualified members (ten in mechanics, six in chemistry, four in physics and five in electricity), and two registrars took up their new function in the Boards of Appeal during 2019. Further recruitment is ongoing.

As at 31 December 2019 there were 185 chairpersons and members of the Boards. The 128 technically qualified and 28 legally qualified members were divided among 28 technical Boards and the Legal Board of Appeal. The total number of staff at the Boards was 243. It increased by 7.4% in comparison to the previous year.

As set out in the Boards' budget request for 2020 (see BOAC/8/19), further additional technical member posts are needed; the filling of these posts will largely depend on how the workload develops. Following the creation of 23 additional technical member posts in the 2019 budget, the Administrative Council has again demonstrated its support for the Boards' five-year objective by endorsing the President of the Boards of Appeal's request for 16 additional technical member posts in the 2020 budget. With regard to the Registry, the Boards' budget request refers to the need for temporary additional resources from the Office central reserve of posts, in order to overcome challenges in succession management. The President of the European Patent Office has agreed to make that reserve available to the Registry.

In view of the increased number of members and oral proceedings, the Administrative Council authorised in 2019 the extension of the premises of the Boards of Appeal in Haar (see CA/5/19). Both additional offices and rooms for oral proceedings were rented.

As at 31 December 2019 there were 185 chairpersons and members of the Boards.

The total number of staff at the Boards was 243.

7. Enlarged Board of Appeal

The main task of the Enlarged Board of Appeal is to ensure the uniform application of the European Patent Convention. It decides on points of law of fundamental importance referred to it either by a Board of Appeal or by the President of the European Patent Office under Article 112 EPC. It is also competent to decide on petitions for review of decisions of the Boards of Appeal under Article 112a EPC.

The main task of the Enlarged Board of Appeal is to ensure the uniform application of the European Patent Convention.

7.1. Referrals under Article 112 EPC

In 2019, the Enlarged Board of Appeal dealt with two cases referred to it under Article 112 EPC.

In G 1/18 the Enlarged Board answered a question of law referred to it by the President of the European Patent Office as follows:

1. An appeal is deemed not to have been filed in the following cases:
 - (a) where notice of appeal was filed within the two-month time limit prescribed in Article 108, first sentence, EPC AND the appeal fee was paid after expiry of that two-month time limit;
 - (b) where notice of appeal was filed after expiry of the two-month time limit prescribed in Article 108, first sentence, EPC AND the appeal fee was paid after expiry of that two-month time limit;
 - (c) where the appeal fee was paid within the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal AND notice of appeal was filed after expiry of that two-month time limit.
2. In the cases referred to in answers 1(a) to (c), reimbursement of the appeal fee is to be ordered ex officio.
3. Where the appeal fee was paid within or after the two-month time limit prescribed in Article 108, first sentence, EPC for filing notice of appeal AND no notice of appeal was filed at all, the appeal fee is to be reimbursed.

In G 2/19 the Enlarged Board dealt with the three questions referred to it by decision T 831/17 of 25 February 2019.

The Enlarged Board rejected the first question as inadmissible. It reformulated questions 2 and 3 and answered them as follows:

1. A third party within the meaning of Article 115 EPC who has filed an appeal against a decision to grant a European patent has no right to have its request for an order that examination proceedings in respect of the European patent be reopened for the purpose of removing allegedly unclear claims (Article 84 EPC) heard at oral proceedings before a board of appeal of the European Patent Office. An appeal filed in such a way has no suspensive effect.
2. Oral proceedings before the Boards of Appeal at their site in Haar do not infringe Articles 113(1) and 116(1) EPC.

Three further referrals were pending before the Enlarged Board in 2019.

The Board in case T 489/14 has referred points of law, which are pending under G 1/19 (“Patentability of computer-implemented simulations”).

The President of the European Patent Office has referred points of law, which were pending under G 3/19¹ (“Article 164(2) EPC/Pepper”).

The Board in case T 318/14 has referred points of law, which are pending under G 4/19 (“Double patenting”).

¹ On 14 May 2020 the Enlarged Board of Appeal issued opinion G 3/19 (Pepper) and concluded that plants and animals exclusively obtained by essentially biological processes are not patentable.

7.2. Petitions for review under Article 112a EPC

In 2019, the Enlarged Board received 8 petitions for review and settled 9.

Moreover, the Enlarged Board created in its Business Distribution Scheme for 2020 the possibility to include external legally qualified members in its composition for petitions for review under Article 112a EPC. External legally qualified members can now sit on the Enlarged Board in its three- and five-member composition when hearing petitions for review. The Enlarged Board has thereby responded to suggestions concerning this possibility made by users in an earlier survey.

External legally qualified members can now sit on the Enlarged Board when hearing petitions for review.

8. Contact with national courts, users and representatives

In 2019, the President of the Boards of Appeal and members of the Boards welcomed numerous judges, users and representatives, such as 20 high-level national European judges for an expert workshop on patentability-related issues, judges of the Supreme People's Court of China, members of the European Patent Practice Committee (EPPC) of the European Patent Institute (epi) and a delegation from the International Federation of Intellectual Property Attorneys (FICPI). In addition, the President of the Boards of Appeal attended both a meeting with Danish users organised by the Danish Patent Office in Copenhagen and the Inaugural Meeting of the Heads of Trial and Appeal Boards in Seoul.

The President of the Boards of Appeal and members of the Boards welcomed numerous high-level judges, users and representatives.

These meetings are an important means of strengthening interaction between national judges, users, and the Boards, and of deepening their knowledge of the respective legal and appeal systems.

The Boards gained observer status on the Inter-Agency Appeal Proceedings Network (IAAPN). Created in June 2018, the IAAPN is a sub-network of the Heads of EU Agencies network. Its aim is to promote co-operation and co-ordination between the different EU agencies, to enable the exchange of knowledge and best practice and to prepare common positions where necessary. The Boards also welcomed representatives from the EUIPO to Haar to exchange experience relating to the registries.

As every year, the President of the Boards of Appeal and members of the Boards also met representatives from industry (nominated by BUSINESSEUROPE) and the patent profession (nominated by the epi). Participants agreed that their fruitful dialogue should continue. The President of the Boards of Appeal further met members of the European Federation of Intellectual Property Agents in Industry (FEMIPi), a delegation from the American Intellectual Property Law Association (AIPLA) IP Practice in Europe Committee and the President of the Intellectual Property Trial and Appeal Board of Korea. In addition, the President of the Boards of Appeal and members of the Boards attended the 100th anniversary of the Intellectual Property Office of the Czech Republic in Prague, a dedicated conference on patent issues in Stockholm and the European Judges' Forum in Venice.

The Boards also met representatives from industry and the patent profession.

Together with the EPO's European Patent Academy, the Boards organised their annual conference for patent law practitioners entitled "EPO Boards of Appeal and key decisions". As in previous years, it was booked to capacity, with about 260 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 38 lectures at conferences, seminars and workshops organised by the Office, guaranteeing a high level of expertise and quality for the benefit of a demanding professional audience.

9. Other external activities of the Boards of Appeal

“START-UP” gave young artists the opportunity to display their work on the Boards’ premises.

In collaboration with the President of the European Patent Office, the President of the Boards of Appeal hosted the first community outreach programme in the Haar building. “START-UP” gave young artists the opportunity to display their work on the Boards’ premises. The programme began with a vernissage, which was attended by staff of the Boards of Appeal and the Office, as well as by external guests such as the Mayor of Haar and local artists. Guided tours of the artworks took place in the following weeks.

As part of the Boards’ commitment to its social responsibility, the President of the Boards of Appeal will continue to consider how a contribution can be made to the community of Haar.



10. Statistics

10.1. Breakdown of appeal cases by type

Table 2

Breakdown of appeal cases by type

	New cases					
	2019		2018		2017	
Enlarged Board of Appeal	12		12		10	
Referrals	4		1		0	
Petitions for review	8		11		10	
Legal Board of Appeal	14		16		17	
Technical Boards of Appeal	3 292	<i>100.0%</i>	3 032	<i>100.0%</i>	2 798	<i>100.0%</i>
Examination procedure (<i>ex parte</i>)	1 355	<i>41.2%</i>	1 169	<i>38.6%</i>	1 081	<i>38.6%</i>
Opposition procedure (<i>inter partes</i>)	1 937	<i>58.8%</i>	1 863	<i>61.4%</i>	1 717	<i>61.4%</i>
Mechanics	1 026	<i>31.2%</i>	1 004	<i>33.1%</i>	959	<i>34.3%</i>
Examination procedure	174		140		136	
Opposition procedure	852		864		823	
Chemistry	1 053	<i>32.0%</i>	959	<i>31.6%</i>	843	<i>30.1%</i>
Examination procedure	203		208		194	
Opposition procedure	850		751		649	
Physics	331	<i>10.0%</i>	278	<i>9.2%</i>	278	<i>9.9%</i>
Examination procedure	223		173		178	
Opposition procedure	108		105		100	
Electricity	882	<i>26.8%</i>	791	<i>26.1%</i>	718	<i>25.7%</i>
Examination procedure	755		648		573	
Opposition procedure	127		143		145	
Disciplinary Board of Appeal	19		18		26	
Total	3 337		3 078		2 851	

Settled				Pending					
2019		2018		2017		2019		2018	
11		15		8		14		13	
2		0		2		3		1	
9		15		6		11		12	
17		16		15		13		16	
3 254		2 733	<i>100.0%</i>	2 284	<i>100.0%</i>	9 234		9 196	<i>100.0%</i>
1 351	<i>41.5%</i>	1 189	<i>43.5%</i>	1 005	<i>44.0%</i>	3 637	<i>39.4%</i>	3 633	<i>39.5%</i>
1 903	<i>58.5%</i>	1 544	<i>56.5%</i>	1 279	<i>56.0%</i>	5 597	<i>60.6%</i>	5 563	<i>60.5%</i>
973	<i>29.9%</i>	835	<i>30.6%</i>	681	<i>29.8%</i>	2 872	<i>30.5%</i>	2 844	<i>30.9%</i>
132		107		110		397		357	
841		728		571		2 475		2 487	
1 078	<i>33.1%</i>	857	<i>31.4%</i>	709	<i>31.0%</i>	2 742	<i>31.4%</i>	2 753	<i>30.0%</i>
281		229		192		500		576	
797		628		517		2 242		2 177	
349	<i>10.7%</i>	292	<i>10.7%</i>	234	<i>10.3%</i>	1 172	<i>10.7%</i>	1 038	<i>11.3%</i>
231		209		170		769		659	
118		83		64		403		379	
854	<i>26.3%</i>	749	<i>27.4%</i>	660	<i>28.9%</i>	2 448	<i>27.4%</i>	2 561	<i>27.8%</i>
707		644		533		1 971		2 041	
147		105		127		477		520	
12		20		17		23		16	
3 294		2 784		2 324		9 284		9 241	

Figure 7

Number of new cases

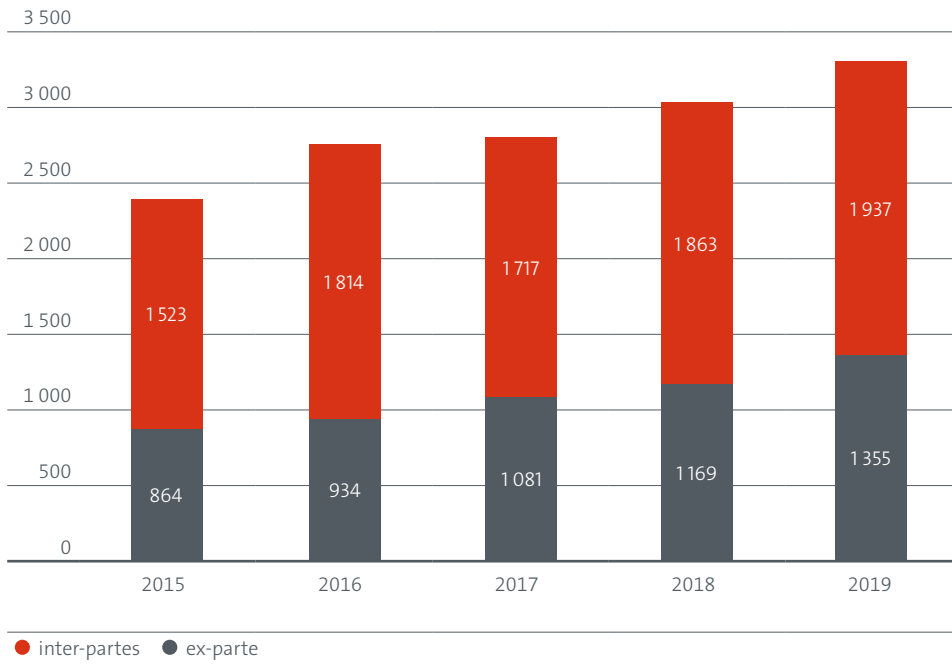


Figure 8

Number of new cases per technical field

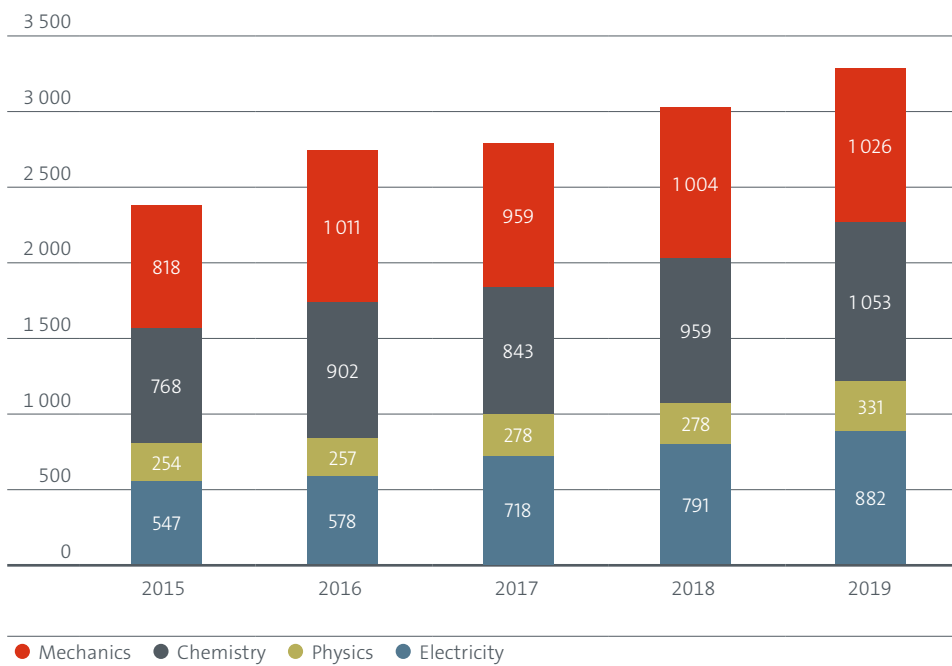


Figure 9

Number of settled cases

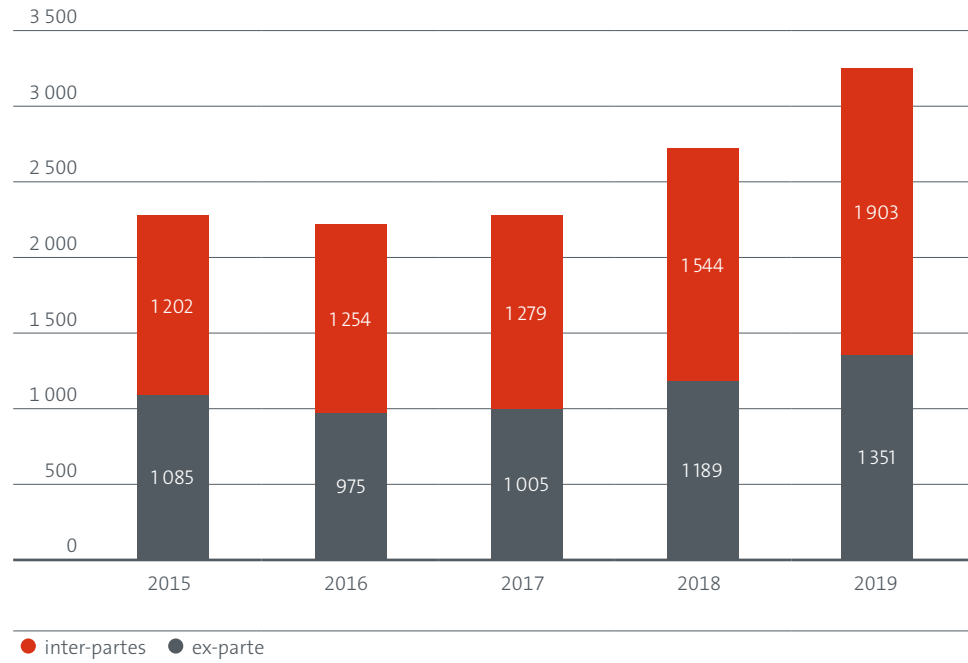


Figure 10

Number of settled cases per technical field

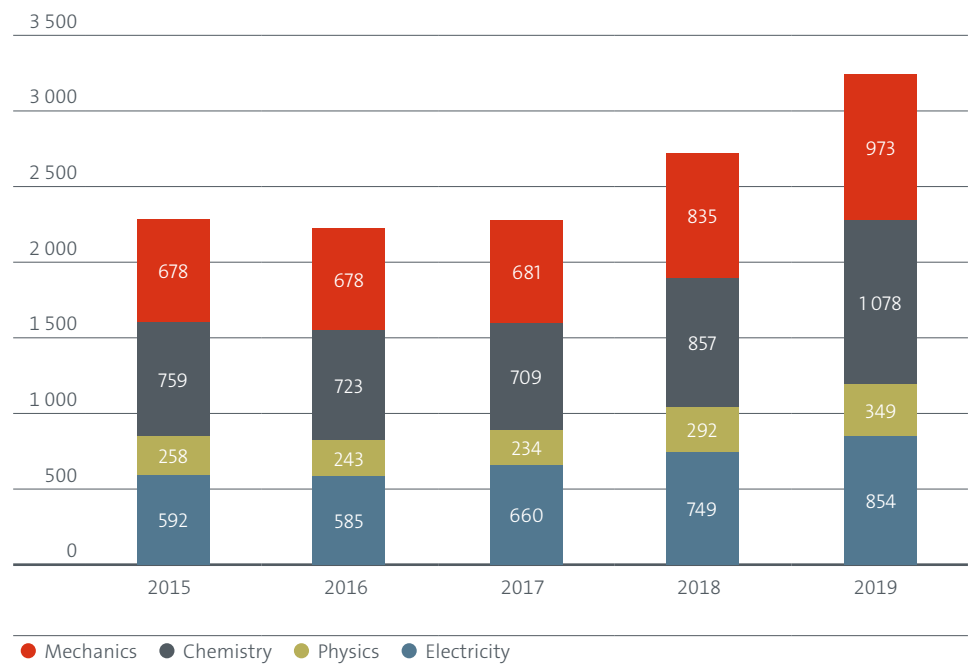


Figure 11

Number of cases pending at 31 December

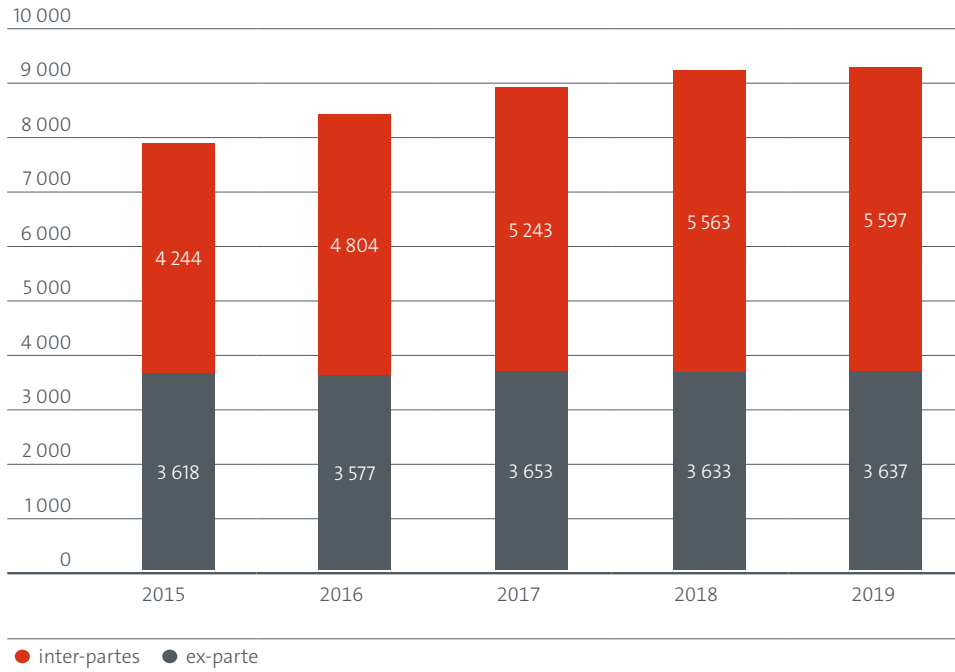
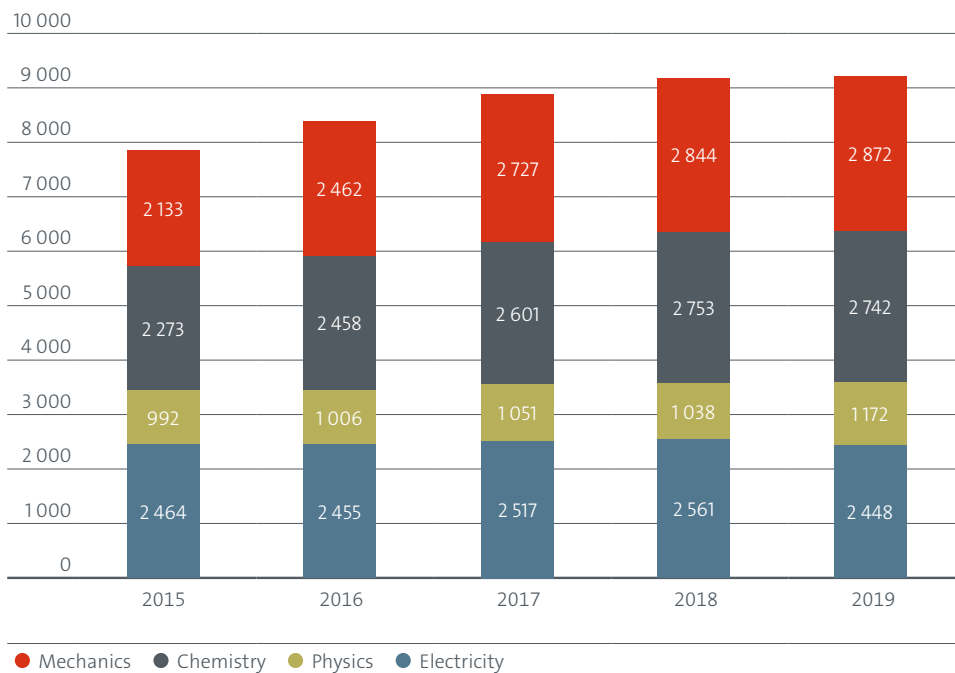


Figure 12

Number of cases pending at 31 December per technical field



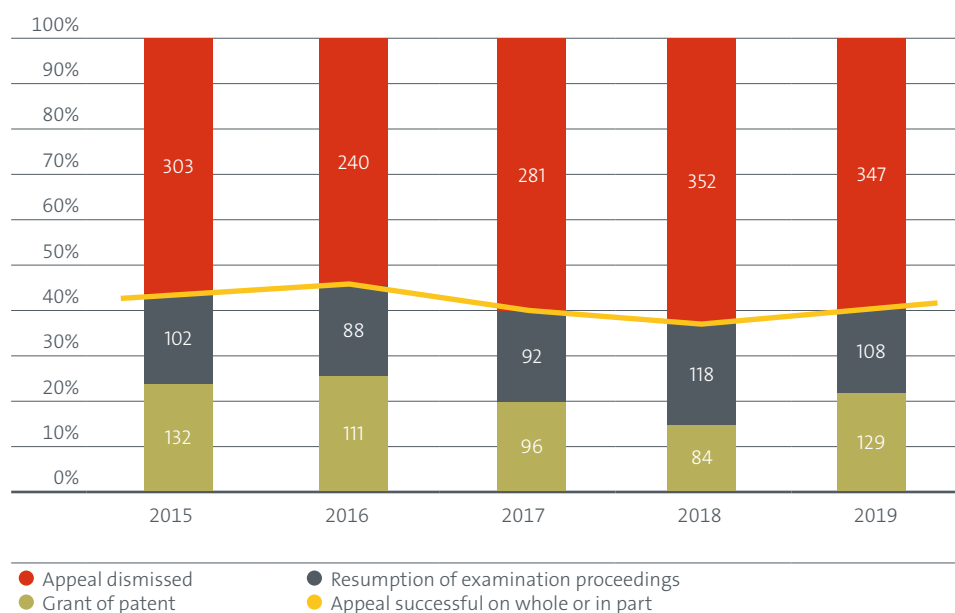
10.2. Outcome of proceedings before the technical Boards of Appeal

In 2019, 1 351 ex-parte cases (2018: 1 189) were settled. 643 ex-parte cases were settled by a decision. The remaining 708 were settled without a decision. In 369 of these cases the appeal was withdrawn after a substantive communication by the Board.

584 ex-parte cases (43%) were settled after a decision on the merits, i.e. not terminated as a result of rejection due to inadmissibility, because of withdrawal of the appeal or patent application, or for other reason. The outcome of these 584 cases is shown in Fig. 13.

Figure 13

Ex-parte cases settled after a decision on the merits

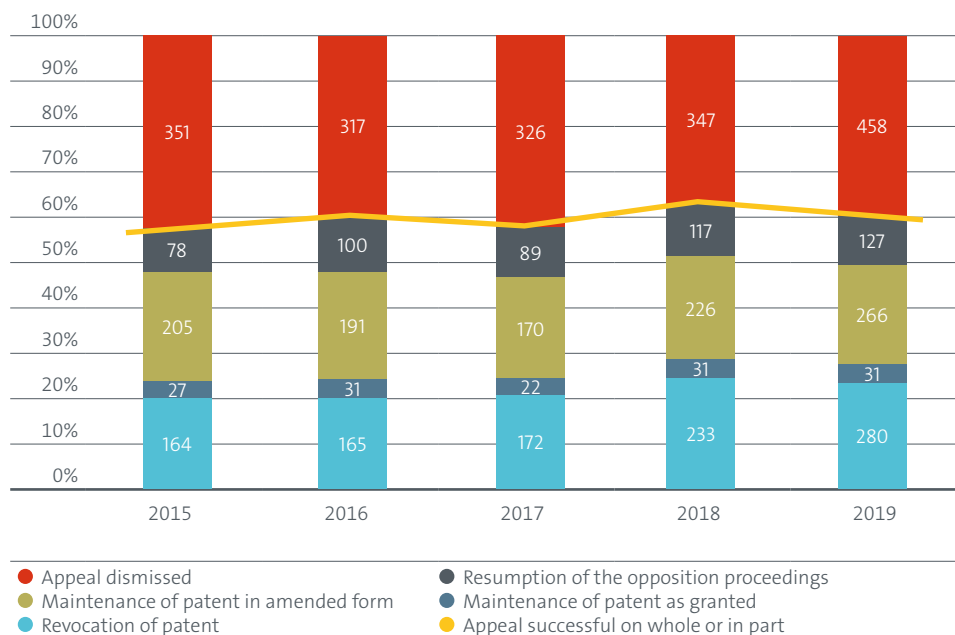


In 2019, 1 903 inter-partes cases were settled (2018: 1 544). 1 233 inter-partes cases were settled by a decision. The remaining 670 were settled without a decision. In 274 of these cases the appeal was withdrawn after a substantive communication by the Board.

1 162 inter-partes cases (61%) were settled after a decision on the merits, i.e. not terminated as a result of rejection due to inadmissibility, because of withdrawal of the appeal, or for other reason. The outcomes of these 1 162 cases are shown in Fig. 14 (no distinction is drawn between appeals by patent proprietors and appeals by opponents; in any one case, there may be more than one appellant).

Figure 14

Inter-partes cases settled after a decision on the merits



10.3. Proceedings before the Disciplinary Board of Appeal

The Disciplinary Board of Appeal decides on appeals in cases relating to the European qualifying examination (EQE) for professional representatives before the EPO and in cases concerning breaches of their Rules of Professional Conduct. It is composed of two legally qualified members of the Boards of Appeal and one European professional representative in EQE cases, and of three legally qualified members of the Boards of Appeal and two European professional representatives in disciplinary cases.

Table 3

Proceedings before the Disciplinary Board of Appeal

	2019	2018
New cases	19	18
European qualifying examination	15	16
Professional representatives' code of conduct	4	2
Settled cases	12	20
European qualifying examination	10	20
Professional representatives' code of conduct	2	0
Pending cases	23	16
European qualifying examination	19	14
Professional representatives' code of conduct	4	2

10.4. Breakdown by language of proceedings

Table 4

Breakdown by language of proceedings

	Total	English	German	French
Appeals filed before the technical boards in 2019	3 292	74.1%	21.9%	3.9%
Oral proceedings scheduled for 2019	2 351	72.1%	23.9%	4.0%
Oral proceedings held in 2019	1 560	69.3%	26.3%	4.4%



