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Annual report of the Boards of Appeal

2020



Boards
of Appeal



Foreword



The year 2020 was shaped by the COVID-19 pandemic. Combined with associated lockdown restrictions, the global health crisis had a profound effect on all aspects of life, including the justice system. Courts had, and continue to have, a role to play in containing the pandemic while at the same time ensuring access to justice. As an international judicial body of final instance, the Boards of Appeal have a heightened responsibility in this respect.

To meet this responsibility, we introduced a set of measures so that we could continue hearing cases in a safe environment. For in-person oral proceedings, this includes staggered starting times, physical distancing rules, mandatory face masks, regular ventilation of rooms and strict hygiene standards.

Additional measures were needed for situations where parties and representatives were prevented from attending in-person oral proceedings because of travel restrictions and quarantine regulations. In response to this new circumstance, the technical prerequisites for conducting oral proceedings by videoconference were created. A total of 188 oral proceedings were held using this technology in 2020.

Despite the specific challenges we faced as a result of the COVID-19 pandemic, we never lost sight of our objective to reduce case backlog and pendency. Though the temporary disruption of oral proceedings due to the pandemic had a negative effect on our productivity, we still managed to reduce the number of pending cases by 10.3% and the time for settling 90% of cases by five months.

I wish to express my sincere gratitude to the entire staff of the Boards of Appeal for making this possible. Waves of infection, anxiety about the future, the closure of childcare facilities and schools, the abrupt halt of social and cultural life as we knew it and restrictions to our freedom of movement were difficult for all of us. This was particularly challenging in an international setting where our staff come from 22 different contracting states and travel restrictions kept many of us separated from our home countries and relatives.

In these challenging times, the professionalism, flexibility and resilience shown by the staff of the Boards of Appeal was nothing short of exemplary. Board members and support staff not only ensured the seamless continuation of our judicial work, they also adopted entirely new methods of working. They worked from home on electronic files that they created on the new iPads they received, and they used videoconferencing technology to conduct training sessions, conferences and oral proceedings. Throughout, staff maintained the very high standard of quality that users have come to expect and appreciate.

The Boards of Appeal rose to the challenges brought by 2020. Together, we are now determined to tackle whatever challenges 2021 might hold.

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

Carl Josefsson
President of the Boards of Appeal

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1. Executive summary

The number of pending cases before the Boards of Appeal (BoA) were reduced by 10.3%, to 8280 cases during 2020. The boards have also succeeded in reducing the pendency time – during 2020 90% of the cases were settled within 60 months, compared to 65 months during 2019. The disruption to oral proceedings due to the COVID-19 pandemic has had a severe effect on productivity, since productivity is calculated on the basis of cases settled with action, which in most cases is after oral proceedings. However, the number of first communications increased by 34%. An increase in productivity to levels prior to the start of the COVID-19 pandemic will mainly depend on being able to schedule and hold oral proceedings at the normal pace.

The pandemic poses a major challenge to courts worldwide. The President of the Boards of Appeal (PBoA) has taken a series of measures to ensure the proper and seamless functioning of the BoA during the pandemic. Staff have adapted in an impressive way to the changes in working conditions and the resulting additional challenges.

The BoA have attempted to mitigate the negative impact of the difficult situation by allowing staff to work from home and by creating the technical prerequisites for conducting oral proceedings with videoconferencing technology. Teleworking has allowed members to draft decisions and to continue preparing communications. The first oral proceedings by videoconference have been held, with the agreement of the parties, in early May 2020. In parallel, the BoA have, after a period of closure for external visitors, re-started holding in-person oral proceedings again, albeit, first on a very small scale only and later on a reduced scale, due to physical distancing measures and travel restrictions. To guarantee a safe environment for staff, parties and the public alike, a strict hygiene concept has been put in place.

The successful introduction of oral proceedings by videoconference in response to the constraints of the COVID-19 situation has provided an incentive to expressing the legal framework for the conduct of oral proceedings by videoconference, including the possibility of the board not requiring the parties' consent, in the Rules of Procedure of the Boards of Appeal. The new Article 15a RPBA enters into force on 1 April 2021.

The necessity of working from home, has pushed a pilot to enable boards to work fully electronically on electronic files using iPads. The feedback from the pilot boards so far is very positive although an extra effort of the involved members was needed in order to compensate for the lack of experience and the limited support. In addition, new routines need to be further harmonised among the boards and defined for the registry.

The impact of the pandemic on the working conditions for BoA staff has been immense. The disruption in the organisation of oral proceedings has had an especially strong impact, it has been significant for all staff, including in particular the registrars. New routines have been established in order to enable and ensure contacts with all colleagues. Awareness of and enhanced focus on the wellbeing of all staff under the new conditions has and will continue to be essential. In the light of all the changes occurred, the relentless commitment and tireless efforts of all colleagues is all the more impressive.

The number of pending cases before the Boards of Appeal (BoA) were reduced by 10.3%.

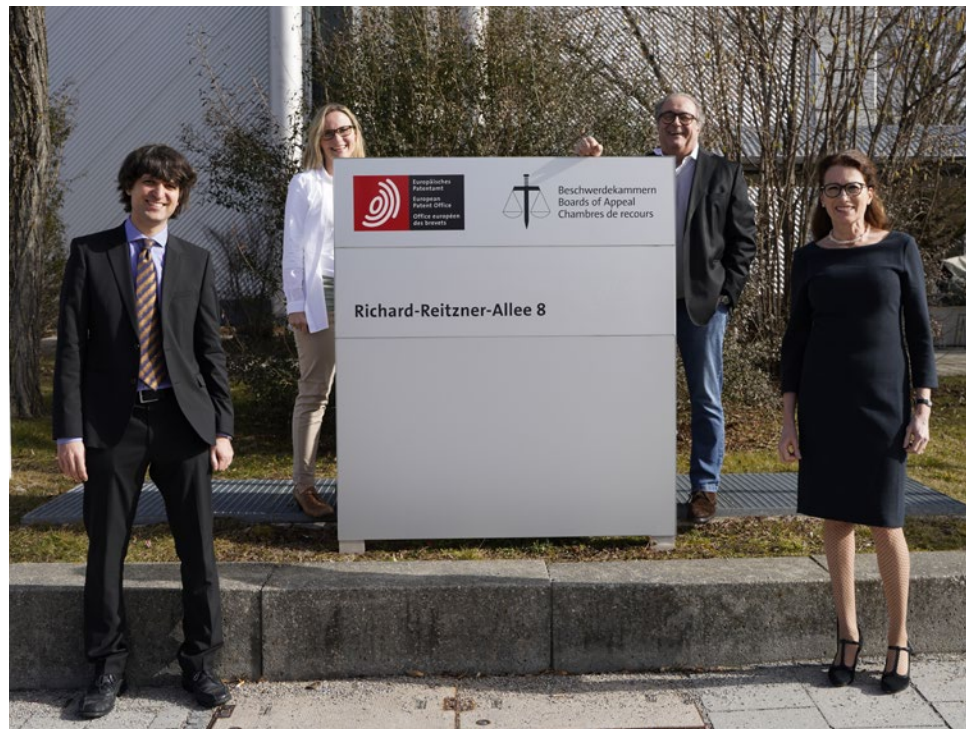
The BoA have attempted to mitigate the negative impact of the COVID-19 pandemic by introducing the possibility of conducting oral proceedings with videoconferencing technology.

2. Structural reform of the Boards of Appeal

The BoA are the first and final judicial instance in the procedures before the European Patent Office (EPO). They are independent in their decisions and bound only by the European Patent Convention (EPC).

The structural reform of the BoA started in 2017. It involved a delegation of powers from the President of the EPO to the PBoA, the creation of the BOAC as a subsidiary body of the Administrative Council, and the relocation of the BoA to separate premises in Haar. The Act of Delegation was renewed in 2018 (OJ EPO 2018, A63), and in 2019, the implementation of the Act of Delegation was detailed in a Memorandum of Understanding between the President of the EPO and the PBoA (BOAC/12/19).

The aim of the reform was to increase the organisational and managerial autonomy of the BoA, the perception of their independence, and their efficiency. It confirmed the status of the BoA 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.



3. Production, productivity and pendency time

3.1. Five-year objective

With a view to reducing the backlog, the objective is to settle 90% of cases within 30 months of receipt and to reduce the number of pending cases to below 7 000 by 2023. The measures taken to achieve this objective are:

- increasing BoA productivity by 32% between 1 January 2017 and 31 December 2020 and
- allocating additional resources for a limited period of time.

The objective is to settle 90% of cases within 30 months of receipt.

3.2. Workload and production

In 2020, a total of 2 059 technical appeal cases were received, 37.5% fewer than in 2019. Despite the impact of the COVID-19 crisis, 3 013 technical appeal cases were settled, a 7.4% decrease compared with 2019. Overall, this still represents an increase of 35.2% in production since the entry into force of the structural reform on 1 January 2017.

Despite the impact of the COVID-19 crisis, 3 013 technical appeal cases were settled.

Because of the relatively low decrease in production despite the COVID-19 crisis and the larger decrease in the number of appeal cases received, the number of pending cases was reduced by 954. As at 31 December 2020, 8 280 technical appeal cases were pending, which is 10.3% fewer than at 31 December 2019 (see Figure 1).



Table 1

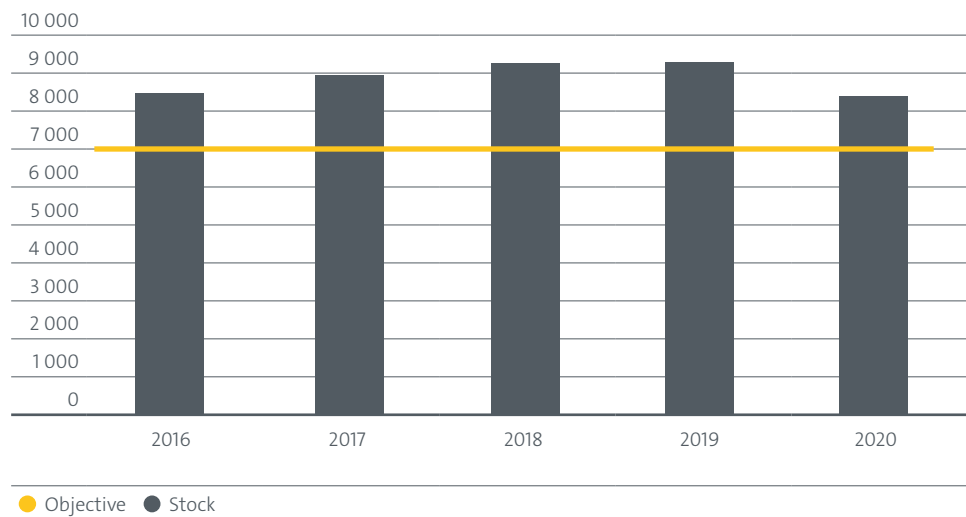
Number of new and settled cases

	New cases					Settled cases				
	2020	2019	2018	2017	2016	2020	2019	2018	2017	2016
Legal Board of Appeal	29	14	16	17	19	26	17	16	15	18
Technical boards of appeal	2 059	3 292	3 032	2 798	2 748	3 013	3 254	2 733	2 284	2 229
Enlarged Board of Appeal	14	12	12	10	9	6	11	15	8	18
Referrals	0	4	1	0	1	1	2	0	2	0
Petitions for review	14	8	11	10	8	5	9	15	6	18
Disciplinary Board of Appeal	3	19	18	26	25	15	12	20	17	25

At 31 December 2020, 8 280 technical appeal cases were pending, which is 10.3% fewer than at 31 December 2019.

Figure 1

Number of pending cases



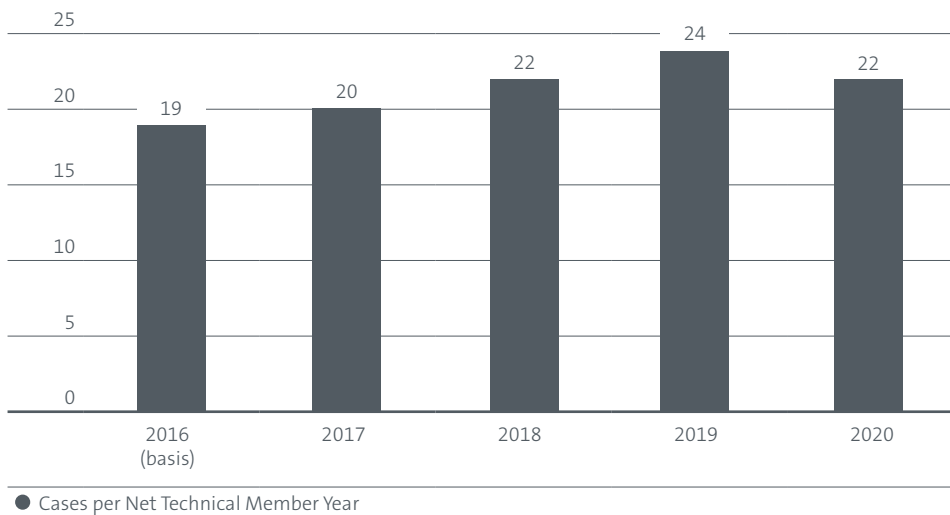
3.3. Productivity

When 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 after oral proceedings have taken place. In 2020, the BoA settled 2 461 cases with action, requiring 1 368.4 net technical member (TM) months. This represents a productivity rate of 1.80 cases per net TM month. In 2019, the corresponding figure was 2.02. In 2020 productivity thus decreased by 10.9%. The productivity increase from 1 January 2017 to 31 December 2020 was 13.9%.

The productivity increase from 1 January 2017 to 31 December 2020 was 13.9%.

Figure 2

Cases settled with an action per net technical member year



The increase in productivity since 2017 is due to a concerted effort by all members of the boards and their support staff. Even under the difficult conditions imposed by the pandemic, the productivity of the BoA was significantly superior to the period before 2017, which highlights the efforts of the staff. It also shows that the measures taken by the PBoA to increase efficiency continue to yield results.

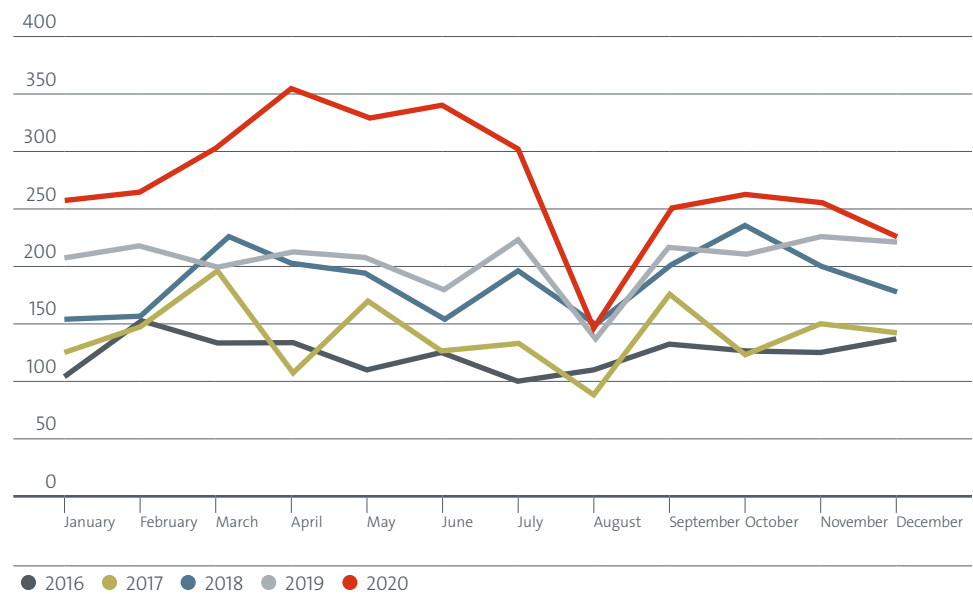
An increase in productivity to levels prior to the start of the COVID-19 pandemic will mainly depend on being able to return to a normal working environment, in particular on being able to schedule and hold oral proceedings at the normal pace. In addition, any further increase in productivity is conditional on the expected positive effects of the RPBA 2020 and of the introduction of the new staggered reimbursement possibilities of the appeal fee (see sections 5.2 and 5.3 below) materialising. The required modernization of the IT landscape in the Boards of Appeal will also play an important role.

An increase in productivity to levels prior to the start of the COVID-19 pandemic will mainly depend on being able to return to a normal working environment.

During the period in which few or no oral proceedings were conducted due to the pandemic, members were able to write communications for future oral proceedings, which will tend to increase the future productivity of the BoA after 2020. In April, a month in which – as a consequence of the COVID 19 pandemic – no oral proceedings were held at all, the total number of first communications issued was 353, which is more than triple the number in the same month in 2017. The increase – 34% – in the number of first communications issued is clearly visible in the following graph:

Figure 3

Number of first communications per month



3.4. Pendency time

In 2020, not only did the number of pending cases decrease considerably, but the BoA also succeeded in reducing pendency time. Whilst in 2019 90% of cases were settled in 65 months, in 2020 only 60 months were needed. As the figures below show, this positive trend can be seen in all technical fields.

It should be noted in this context that the BoA workload and its fluctuations depend heavily on the output of the administrative departments of the Office, in particular the examining divisions and opposition divisions. As noted above, in 2020, a total of 2 059 technical appeal cases were received, 37.5% fewer than in 2019. It is expected that this COVID-19-related shortfall of incoming appeals, which are mainly inter-partes, will arrive with the BoA once opposition divisions increase production again.

Figure 4

Timeliness results (90% of cases settled in months)

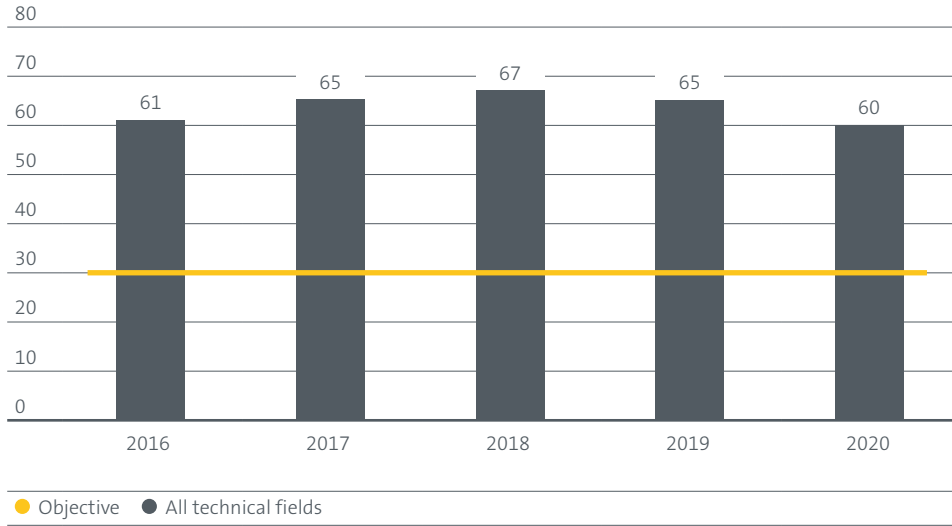
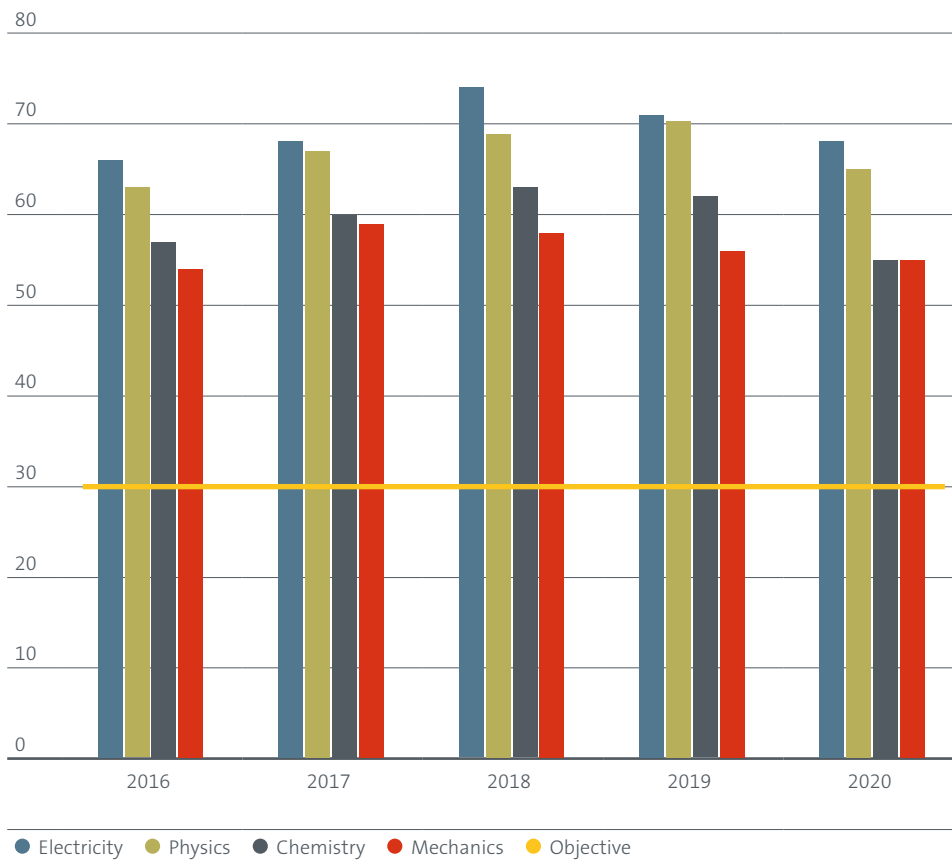


Figure 5

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





The absolute number of pending cases significantly decreased, and the timelines results were considerably improved.

The percentage of pending appeal cases older than 30 months (backlog cases) increased in 2020, reaching 36.7% by the end of the year. This percentage is explained by the decrease in the number of new cases, the impossibility to close old planned cases for which oral proceedings had to be postponed and the need to adapt the prioritisation of cases to the new situation. The absolute number of pending cases significantly decreased, and the timeliness results were considerably improved irrespective of these particularly challenging circumstances (see Figure 4).

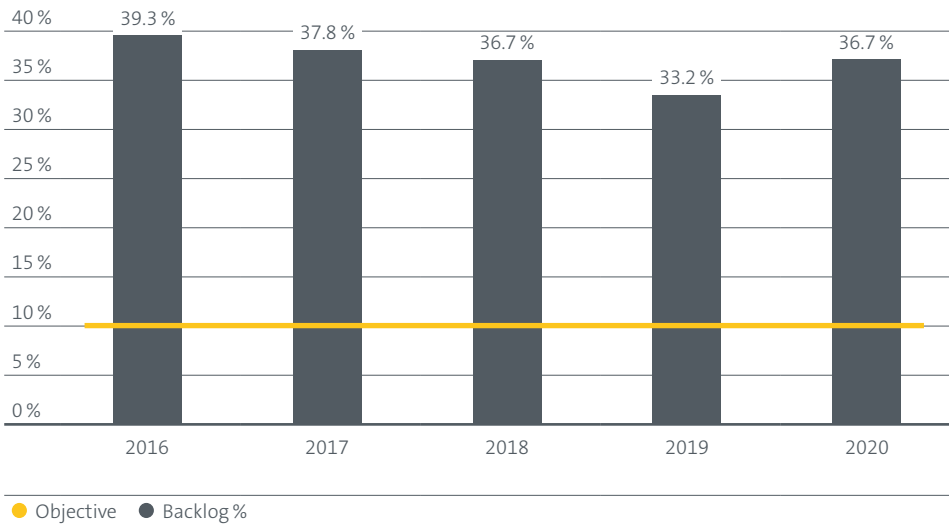
Table 2

Pending cases per age group

		0-12 months	13-18 months	19-24 months	25-30 months	Backlog Over 30 months	Total pending
2019	Pending cases	2 812	1 076	1 318	961	3 067	9 234
	Percentage	30.5%	11.7%	14.3%	10.4%	33.2%	100.0%
2020	Pending cases	1 766	1 159	1 402	912	3 041	8 280
	Percentage	21.3%	14.0%	16.9%	11.0%	36.7%	100.0%

Figure 6

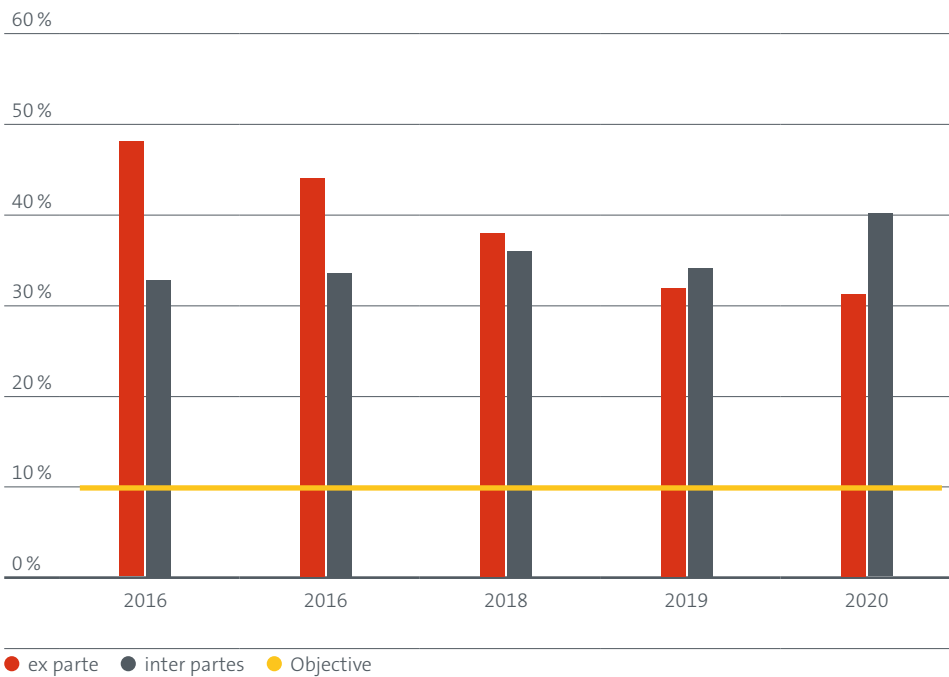
Percentage of backlog¹ cases



¹ The backlog consists of pending cases that are not settled within 30 months

Figure 7

Percentage of backlog cases per proceeding type



The above achievements should be seen in the context of the impact of the pandemic on the working conditions for BoA staff, which has been immense. Awareness of and enhanced focus on the well-being of all staff under the new conditions has and will continue to be essential. In the light of all the changes occurred, the relentless commitment and tireless efforts of all colleagues are all the more impressive.

Awareness of and enhanced focus on the well-being of all staff under the new conditions is essential.

4. Quality

4.1. Quality-focused decision-making

The legal and technical quality of the decisions taken by the BoA has been a central priority since the beginning of the BoA's activity. Users, and the public in general, 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 mandated a working group to provide a definition of quality as well as practical working aids for BoA members with regard to workflow in appeal proceedings and decision.

The first document drafted by the working group, which outlines guiding principles for quality-focused decision-making, is available on the BoA [website](#).

This document was finalised by the PBoA after discussions with epi and BusinessEurope and after considering the advice received from both the Presidium of the Boards of Appeal and the BOAC. It lists the following as the most important elements in the quality of BoA decisions:

- In the proceedings leading up to the decision: transparency, respect of the right to a fair trial, timeliness, and completeness of examination of relevant factual and legal issues while paying regard to the respective purposes of *ex parte* and *inter partes* appeal proceedings.
- For the written, reasoned decision itself: clarity, clear reasoning, succinctness, responsiveness to the relevant arguments of the parties, particularly those of the losing party, proper analysis of the factual and legal issues, compliance with the right to be heard, and consideration of diverging lines of case law.

The working group has also drafted a second document aimed at giving board members, especially new ones, guidance as to the workflow in appeal proceedings. This guidance, which takes into account the recent changes in practice in the wake of the RPBA 2020, covers such diverse issues as the admissibility check, the drafting of a *votum* and the double-checking of certain formal aspects while avoiding duplication of work. After consultation of the Presidium of the Boards of Appeal, the document will be made available to all board members.

A third document – a practical working aid which will identify the principles of good decision drafting and provide examples of best practice – is currently being prepared by the working group. It will include recommendations on structuring decisions and avoiding redundant discussions.

The President of the Boards of Appeal has mandated a working group to provide a definition of quality as well as practical working aids for BoA members.

4.2. Performance evaluation and objective-setting

The first performance evaluation cycle started in 2018. The second full performance evaluation cycle, for 2019, ended in mid-2020. As with the first cycle, the BOAC was provided with a report on the practical implementation of the new performance evaluation system (see BOAC/8/20).

Among other things, the report once again highlighted the PBoA's in-depth personal involvement in the annual performance evaluation cycle and the fact that the whole evaluation process was carried out manually.

During the performance evaluation cycle for 2019, he personally conducted about 85 individual meetings, reviewed about 220 individual written opinions and issued about 155 individual evaluation reports.

In May 2020, an electronic tool called SuccessFactors, an SAP application, was introduced. This tool allowed the objective-setting exercise for 2021 to be administered electronically. All future steps in the 2021 cycle, as well as the written opinions and performance evaluations for 2020, will be handled via the tool. An e-learning tutorial was made available to users. The implementation of the tool ran smoothly and chairs as well as members quickly got accustomed to it. The introduction of the electronic tool required some amendments to the guidelines for the evaluation of the performance of members and chairs of the BoA (see BOAC/5/20).

4.3. Professional development

Professional development as a key contributor to the high quality of the work performed by the BoA was continued in 2020 in an online format.

Professional development as a key contributor to the high quality of the work performed by the BoA was continued in 2020 in an online format.

The Professional Development Committee of the BoA started organising its talks and presentations in the form of webinars. A webinar on the application of new Rule 103 EPC, for instance, was attended by 145 colleagues.

Thanks to continued support from experienced chairs and members, the introductory training for new members on aspects of procedure and substantive law, decision-writing and judicial ethics now take place online via a tool called WebEx.

The module on basic legal drafting, which is part of a full training programme on English writing skills in collaboration with the EPO's Language Service, was also organised as a webinar and attended by 40 members of BoA staff. A webinar on advanced legal drafting is currently in preparation.

The annual chair day, which this year looked at how other courts see the role of social media users holding a judicial function, took place on 23 October 2020 via Skype. After a welcome by the PBoA, a general introduction on the topic of social media was given by the supervisor of digital transformation at Swiss radio and television channel SRF, followed by a presentation by the press officer and head of the press department of the "Oberlandesgericht München" on ethical principles for judges in the handling of social media.

4.4. 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 BoA website (<https://www.epo.org/law-practice/case-law-appeals.html>). This website gives users access to a number of BoA publications, the decisions database, up-to-date information, communications of the BoA and texts of importance for appeal proceedings.

As an addition to the case law book, the 9th edition of which covers BoA case law up to 2018, the BoA also publish regular case law updates in the Official Journal. Supplementary publication 4, OJ EPO 2020, takes account of decisions made available in 2018 and 2019 (<https://www.epo.org/law-practice/legal-texts/official-journal/2020/etc/se4.html>).

The BoA website is subject to continuous improvement. The main goal is to give users easy access to BoA case law. At the beginning of 2020, a new “selected decisions” service was introduced (<https://www.epo.org/law-practice/case-law-appeals/selected-decisions.html>). This service alerts users to newly published decisions for which the board has provided a headnote or catchword. Usually, a board will use a headnote or catchword if it wishes to provide a brief summary of a particular point of law or draw attention to an important part of the reasons of the decision.

At the beginning of 2020, a new “selected decisions” service was introduced.



In addition, links to these selected decisions are added to the regularly updated HTML version of the case law book (9th edition, July 2019; <https://www.epo.org/law-practice/legal-texts/html/caselaw/2019/e/index.html>). The decision numbers are inserted in the relevant chapter and linked to the decision headnote or catchword, which can be displayed by hovering over the link with the mouse.

Starting with decisions from 2019, the HTML version of the case law book now also provides links to the summaries reported in the OJ “case law” supplementary publication. As with selected decisions, the links to the summaries in the supplementary publication are placed in the relevant chapters of the book. The text of the summaries (in English, French and German) can be accessed by hovering over the link with the mouse.

This new service helps readers to identify new decisions within their thematic context and brings together the content of the case law book and the OJ “case law” supplementary publication.

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.

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.

In 2020, the minutes of oral proceedings were issued within seven calendar days in 84.5% of cases, and the written decision was despatched within three months in 79.8% of cases. Since 1 January 2020, where the decision on the appeal is announced orally, it is mandatory under Article 15(9)(a) of the amended Rules of Procedure to put it in writing and despatch it within three months of the date of the oral proceedings. If the board is unable to do so, it has to inform the parties and the PBoA of when the decision will be despatched.

5.2. RPBA 2020

5.2.1. Background and aims

The revised Rules of Procedure of the Boards of Appeal entered into force on 1 January 2020.

The revised Rules of Procedure of the Boards of Appeal (“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 BoA website (<https://www.epo.org/law-practice/case-law-appeals/procedure.html>) and in Supplementary publication 2, OJ EPO 2020, which contains a table setting out all the amendments to the RPBA and detailed explanatory remarks on the individual articles (<https://www.epo.org/law-practice/legal-texts/official-journal/2020/etc/se2.html>).



5.2.2. Annual list of cases

Article 1(2) RPBA 2020 states that a list of cases in which the BoA are likely to hold oral proceedings or issue a communication or a decision in written proceedings in the following working year must be published in advance of that year. The list is based on a working plan drawn up by each chair for their board. Its purpose is to increase efficiency and make the work of the BoA more transparent and predictable. The list for 2021 was published on the BoA website in October 2020 (<https://www.epo.org/law-practice/case-law-appeals/about-the-boards-of-appeal/annual-list-of-cases.html>).

The list of cases for 2021 was published on the BoA website in October 2020.

5.2.3. Acceleration of appeal proceedings

Article 10(3)-(6) RPBA 2020 expressly allows parties and national courts to request the acceleration of appeal proceedings. Valid reasons for such requests are, in particular, the fact 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.

5.2.4. New timescale for boards to issue written decisions

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” normally means despatching the written decision within three months of the date of the oral proceedings. Typical cases where the board had to inform the parties and the PBoA of the dispatchment of the decision at a later date are, for example, the sickness of a member, a particularly complex case, or a decision that is foreseen for publication in the EPO Official Journal.

5.3. Additional opportunities for reimbursement of the appeal fee

The Administrative Council 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 ability of the BoA 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, which came into force on 1 April 2020.

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 rate of reimbursement is high at the beginning and decreases over the appeal's lifetime.

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. A board will normally issue 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%.

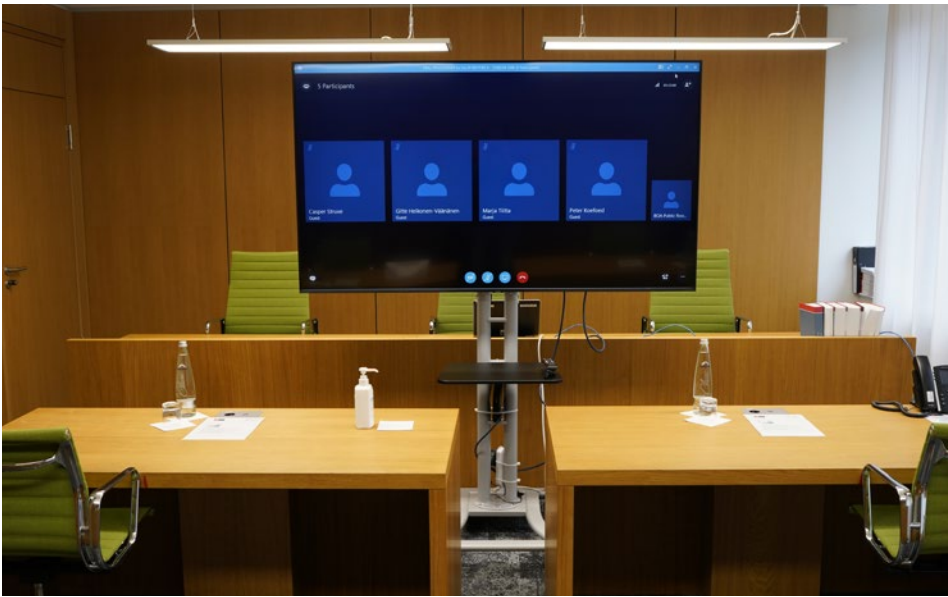
Since 1 April 2020, 560 such communications have been despatched. In 30 cases, withdrawals led to a reimbursement of 75%.

As to the new 25% reimbursement, its purpose is to offer appellants an incentive to withdraw their appeal even at a very late stage. They will 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.

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 the proceedings are scheduled to take place, the 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%.

Since 1 April 2020, the 25% reimbursement option (both for the withdrawal of the appeal and the withdrawal of the request for oral proceedings) was applied in 380 cases. In 28 of these cases a decision was issued but no oral proceedings took place due to the withdrawal of the request for oral proceedings.



5.4. Oral proceedings by videoconference

The COVID-19 pandemic necessitated a re-prioritisation of BoA activities. The PBoA set up an internal working group, composed of chairs, members and support staff, to provide advice on measures to be taken in order to enable parties to participate in oral proceedings by videoconference. Based on the recommendations of the working group, different set-ups for oral proceedings by videoconference have been introduced:

- In “regular” oral proceedings by videoconference, the board members are located together in a room on the premises in Haar, while the other participants (parties, representatives, accompanying persons) attend by videoconference.
- In the so-called mixed mode oral proceedings, some parties, representatives and/or accompanying persons attend by videoconference while others are physically present in the oral proceedings room together with board members.
- In the so-called distributed oral proceedings all members, representatives and/or accompanying persons attend by videoconference.
- In some oral proceedings, one or more of the board members also attend by videoconference.

During the videoconferences the board members and the parties can see and talk to each other, and good communication between all participants is possible.

At the BoA premises in Haar, in 2020 four rooms have been made available for oral proceedings by videoconference and two for mixed mode oral proceedings. These rooms, equipped with special IT equipment, allow the board members to sit together in one room while all the participants (“regular” oral proceedings by video conference), or some of the participants (mixed mode) attend by videoconference.

Enabling members of the public to attend oral proceedings which are held by videoconference was a particular challenge. Currently, members of the public can follow oral proceedings by videoconference on-line or in separate rooms equipped with large screens and speakers. Following strict hygienic concepts, these rooms are allocated in a specific area within the BoA premises in Haar.

During the videoconferences the board members and the parties can see and talk to each other, and good communication between all participants is possible.

Members of the public can follow oral proceedings by videoconference on-line or in separate rooms.

Oral proceedings by videoconference were introduced at the BoA in May 2020, initially for *ex parte* cases without interpreting. Experiences have been very positive, and the arrangement was subsequently extended to *inter partes* cases with two parties but without interpreting. Interpreting for oral proceedings held by videoconference was introduced on 18 November 2020. In the period to the end of 2020, 5 oral proceedings with interpreting were held by videoconference.

By the end of 2020
173 oral proceedings
were held by
videoconference, plus 15
held by mixed-mode.

Between May and August 2020, 44 oral proceedings were held by videoconference, while by the end of 2020 the total had risen to 173 oral proceedings held by videoconference, plus 15 held by mixed-mode.

The successful introduction of oral proceedings by videoconference in response to the constraints of the COVID-19 situation has provided an incentive to expressing the legal framework for the conduct of oral proceedings by videoconference, including the possibility of the board not requiring the parties' consent, in the Rules of Procedure of the Boards of Appeal. To this end, a new Article 15a, entitled "Oral proceedings by videoconference", has been drafted for insertion in the RPBA 2020. The BOAC and the PBoA presented proposed new Article 15a, along with some explanatory remarks, to the user community for comment in an online consultation which ran from 13 to 27 November 2020. The proposal for amendment of the RPBA 2020 was additionally discussed at a meeting on 27 November 2020 which was chaired by the President of the Boards of Appeal and attended by the members of epi and BusinessEurope, members of the BOAC, members of the BoA, including Presidium members, and representatives of the President of the EPO.



After approval by the
Administrative Council,
new Article 15a RPBA
enters into force
on 1 April 2021.

Following an analysis of the results of the user consultation, the BOAC has adopted the new Article 15a RPBA. After approval by the Administrative Council, new Article 15a RPBA enters into force on 1 April 2021. The already existing discretionary power of the Boards of Appeal to hold oral proceedings by videoconference remains unaffected by the new provision. Accordingly, Boards may summon parties to oral proceedings by videoconference for a date before 1 April 2021 and convert oral proceedings scheduled to take place on the premises before that date to oral proceedings by videoconference, even without requiring the parties' agreement to this format.

The BOAC has expressed its intention to evaluate the experience gained from the use of videoconferencing in oral proceedings before the Boards of Appeal. This evaluation is envisaged to be initiated at the latest 18 months after the date of the entry into force of proposed new Article 15a RPBA. The user community will also be consulted on how the new provision operates in practice.

The user community will be consulted on how the new provision operates in practice.



5.5. Further measures

Measures have also 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). At the end of 2020, the number of technical members on the boards varied from four to eight. The number largely depends on workload distribution, recruitment and the competencies of the individual members. In boards with additional members, the deputy chair often acts as the chair in certain cases, which allows that board to offer a higher number of oral proceedings.

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

Although the BoA 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 EPO, pragmatic solutions are being found which ensure that the interests of the BoA 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, like iPads, by members. The use of tablets in particular could potentially provide 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

By the end of 2020, 22 out of a total of 39 additional posts had been filled.

The Administrative Council approved 16 additional technically qualified member posts for 2020. By the end of 2020, 22 out of a total of 39 additional posts had been filled.

In addition, new chairs and members were recruited to fill posts that had become vacant due to retirement or replacement. All in all, five chairs, four legally qualified members, 18 technically qualified members (seven in mechanics, five in chemistry, two in physics and four in electricity), one expert registrar, five registrars and one lawyer in the Legal Research Service took up their duties in 2020.

As at 31 December 2020 there were 196 chairs and members of the boards.

As at 31 December 2020 there were 196 chairs and members of the boards. The 138 technically qualified and 30 legally qualified members were divided among 28 technical boards and the Legal Board of Appeal. The total number of BoA staff was 256, an increase of 5.1% over the previous year.

Following the BoA budget request for 2020 (see BOAC/13/20), three Job Group 4 posts have been included in the 2021 budget, bearing in mind that since 2017 support services have been reduced by six posts.

6.1. Staff survey

In 2020, two Office-wide staff engagement surveys were conducted in the context of the COVID-19 situation. The first one, entitled “Strong together – working during COVID-19”, was carried out in May to assess how people were coping during these unprecedented times. The participation rate for the BoA was 75%. The second survey on “Shaping the new normal” was conducted in September 2020 and had a number of additional questions specifically about the functioning of the BoA. It was completed by 78% of BoA staff.

The results of this survey were presented to the Presidium by consultants from Willis Towers Watson and published on the intranet along with information about equipment, ergonomics and well-being. A discussion of the results of the survey with regard to the “new normal” at the BoA will take place in the Presidium at a later date.

Also, in the context of the staff survey it is important to emphasise that an awareness of and enhanced focus on the well-being of all staff under the new conditions will continue to be essential.

6.2. Consultation procedure

The consultation procedure for proposals which concern the conditions of employment of board members and which are made by the PBoA in the exercise of the functions and powers delegated to him by the President of the EPO was laid down by the Administrative Council. Since 2020, on such proposals, the Presidium of the Boards of Appeal must be consulted by the PBoA, which confirms a long-standing practice. This procedure was applied in 2020, when the PBoA submitted the Draft “Guidelines for the evaluation of the performance of members and chairs of the Boards of Appeal” for advice before the Presidium.

6.3. Gender and nationality distribution

As at 31 December 2020, BoA members came from 19 different Contracting States. 35% of members were German, 12% French, 11% Italian and 9% British.

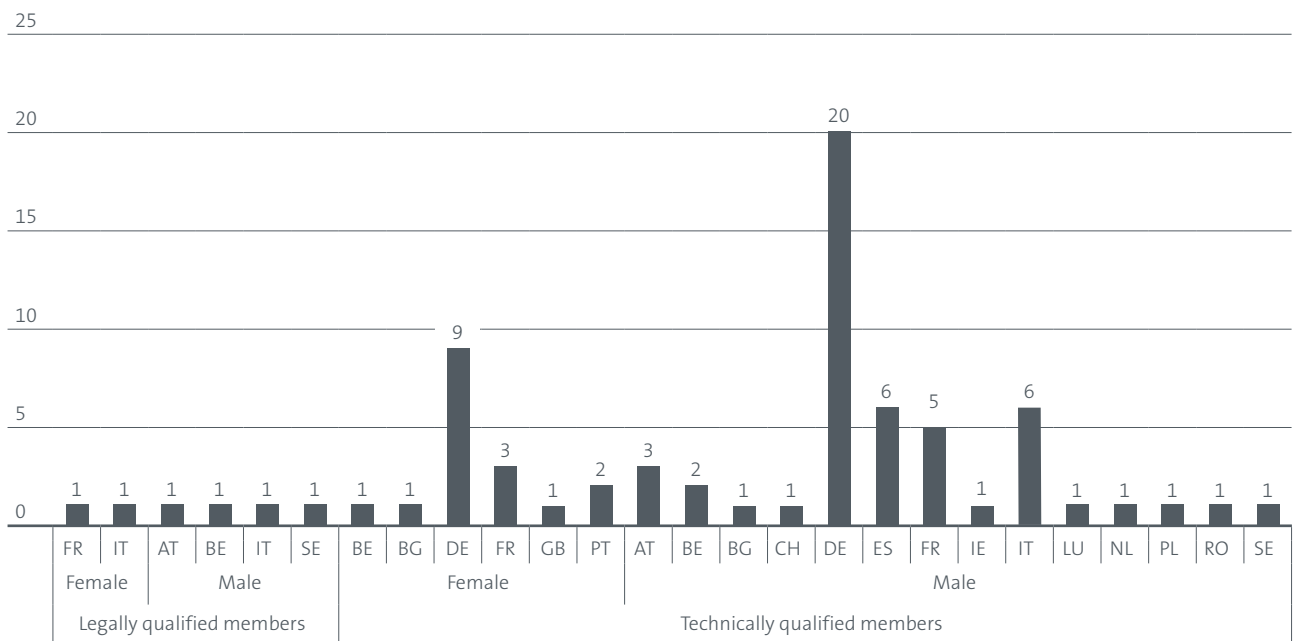
Since the PBoA took office, new staff has been recruited from 16 different Contracting States, including Bulgaria, Luxembourg, Poland and Rumania.

26% of these newly recruited members were female.

As at 31 December 2020, BoA members came from 19 different Contracting States.

Figure 8

Gender and nationality distribution of newly recruited members since the PBoA took office



7. Enlarged Board of Appeal

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

7.1. Referrals under Article 112 EPC

In 2020, the Enlarged Board did not receive any new referrals under Article 112 EPC.

On 14 May 2020, the Enlarged Board issued opinion G 3/19 (“Pepper”).

In 2020, the Enlarged Board did not receive any new referrals under Article 112 EPC.

On 14 May 2020, the Enlarged Board issued opinion G 3/19 (“Pepper”) on whether the non patentability of essentially biological processes for the production of plants or animals also extends to plant or animal products that are exclusively obtained by means of an essentially biological process. The opinion was given in response to a referral by the President of the EPO.

After re phrasing the question, the Enlarged Board answered the point of law as follows:

“Taking into account developments after decisions G 2/12 and G 2/13 of the Enlarged Board of Appeal, the exception to patentability of essentially biological processes for the production of plants or animals in Article 53(b) EPC has a negative effect on the allowability of product claims and product-by-process claims directed to plants, plant material or animals, if the claimed product is exclusively obtained by means of an essentially biological process or if the claimed process features define an essentially biological process.

This negative effect does not apply to European patents granted before 1 July 2017 or European patent applications which were filed before that date and are still pending”.

In 2020, two referrals were pending before the Enlarged Board of Appeal:

- The board in case T 318/14 has referred points of law which are pending under G 4/19 (“Double patenting”).
- The board in case T 489/14 has referred points of law which were pending under G 1/19¹.

¹ On 10 March 2021 the Enlarged Board of Appeal issued decision G 1/19 (“Simulations”).

7.2. Petitions for review under Article 112a EPC

In 2020, the Enlarged Board received 14 petitions for review.

In its business distribution scheme for 2020, the Enlarged Board had created 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. However, due to the COVID 19 pandemic, no use has been made of this possibility so far.

A total of 20 petitions for review are currently pending. 5 petitions for review were settled in 2020.

Five petitions for review were settled in 2020.

8. Contact with national courts, users and representatives

In 2020, the COVID 19 situation made it impossible to pursue the usual contacts with the national courts, users and representatives in the same manner. Many meetings, events and conferences had to be cancelled due to travel and contact restrictions all over the world. Nevertheless, the PBoA and the members of the boards kept in touch with representatives from industry (nominated by BusinessEurope) and the patent profession (nominated by epi), holding videoconference meetings with them and involving them in discussions on how best to handle oral proceedings by videoconference.

The President of the Boards of Appeal and the members of the boards kept in touch with representatives from industry and the patent profession.

In view of the ongoing contact restrictions, this topic has become paramount for the BoA to be able to continue, albeit with some limitations, to serve users and society at large. This dialogue is based on years of fruitful exchange based on trust between the BoA and these user associations.

In the second half of 2020, activities resumed in the form of virtual meetings. The PBoA and members of the boards welcomed 20 high-level national European judges for an expert workshop on patentability-related issues. This workshop was launched in 2019 to great success and it was decided to make it an annual event. The PBoA and members of the boards also met with a delegation from the International Federation of Intellectual Property Attorneys (FICPI). In addition, the PBoA attended the European Judges Forum as well as the Intellectual Property Judges Forum organised by the World Intellectual Property Organization (WIPO). Members of the boards also participated in these events.

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

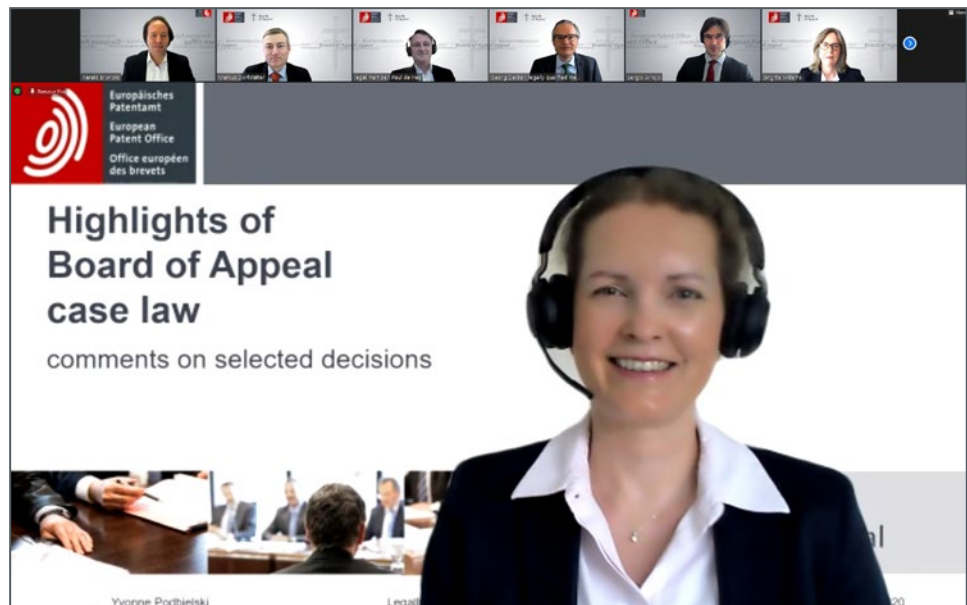
As every year, the BoA Registry and the Registry of the Boards of Appeal at the European Union Intellectual Property Office (EUIPO) met to share and discuss relevant topics and experiences.

Together with the EPO's Patent Academy, the BoA organised their annual "EPO Boards of Appeal and key decisions" conference for patent law practitioners, this time in online format. As in previous years, it was booked to capacity, with about 400 practitioners attending.

The BoA organised their annual "EPO Boards of Appeal and key decisions" conference.

At the request of the European Patent Academy, board members and members of the Legal Research Service of the BoA gave 14 talks and presentations at conferences, seminars and workshops organised by the Office. Due to the pandemic, this number was significantly lower than in previous years. However, the BoA were glad to be able to contribute in however a limited way to guaranteeing a high level of expertise and quality for the benefit of a demanding professional audience.

All these activities continue to have the unreserved support of the BoA, as they increase the overall outreach of the EPO and raise knowledge and awareness of patents and industrial property.



9. Statistics

9.1. Breakdown of appeal cases by type

Table 3

Breakdown of appeal cases by type

	New cases					
	2020		2019		2018	
Enlarged Board of Appeal	14		12		12	
Referrals	0		4		1	
Petitions for review	14		8		11	
Legal Board of Appeal	29		14		16	
Technical Boards of Appeal	2 059	<i>100%</i>	3 292	<i>100%</i>	3 032	<i>100%</i>
Examination procedure (<i>ex parte</i>)	957	46.5%	1 355	41.2%	1 169	38.6%
Opposition procedure (<i>inter partes</i>)	1 102	53.5%	1 937	58.8%	1 863	61.4%
Mechanics	613	<i>29.8%</i>	1 026	<i>31.2%</i>	1 004	<i>33.1%</i>
Examination procedure	122		174		140	
Opposition procedure	491		852		864	
Chemistry	573	<i>27.8%</i>	1 053	<i>32.0%</i>	959	<i>31.6%</i>
Examination procedure	123		203		208	
Opposition procedure	450		850		751	
Physics	171	<i>8.3%</i>	331	<i>10.0%</i>	278	<i>9.2%</i>
Examination procedure	104		223		173	
Opposition procedure	67		108		105	
Electricity	702	<i>34.1%</i>	882	<i>26.8%</i>	791	<i>26.1%</i>
Examination procedure	608		755		648	
Opposition procedure	94		127		143	
Disciplinary Board of Appeal	3		19		18	
Total	2 105		3 337		3 078	

Settled cases					Pending cases				
2020		2019		2018		2020		2019	
6		11		15		22		14	
1		2		0		2		3	
5		9		15		20		11	
26		17		16		16		13	
3 013	<i>100%</i>	3 254	<i>100%</i>	2 733	<i>100%</i>	8 280	<i>100%</i>	9 234	<i>100%</i>
1 331	<i>44.2%</i>	1 351	<i>41.5%</i>	1 189	<i>43.5%</i>	3 263	<i>39.4%</i>	3 637	<i>39.4%</i>
1 682	<i>55.8%</i>	1 903	<i>58.5%</i>	1 544	<i>56.5%</i>	5 017	<i>60.6%</i>	5 597	<i>60.6%</i>
928	<i>30.8%</i>	973	<i>29.9%</i>	835	<i>30.6%</i>	2 530	<i>30.5%</i>	2 872	<i>30.5%</i>
199		132		107		313		397	
729		841		728		2 217		2 475	
927	<i>30.8%</i>	1 078	<i>33.1%</i>	857	<i>31.4%</i>	2 407	<i>29.1%</i>	2 742	<i>31.4%</i>
238		281		229		390		500	
689		797		628		2 017		2 242	
355	<i>11.8%</i>	349	<i>10.7%</i>	292	<i>10.7%</i>	934	<i>11.3%</i>	1 172	<i>10.7%</i>
257		231		209		567		769	
98		118		83		367		403	
803	<i>26.6%</i>	854	<i>26.3%</i>	749	<i>27.4%</i>	2 409	<i>29.1%</i>	2 448	<i>27.4%</i>
637		707		644		1 993		1 971	
166		147		105		416		477	
15		12		20		11		23	
3 060		3 294		2 784		8 329		9 284	

Figure 9

Number of new cases

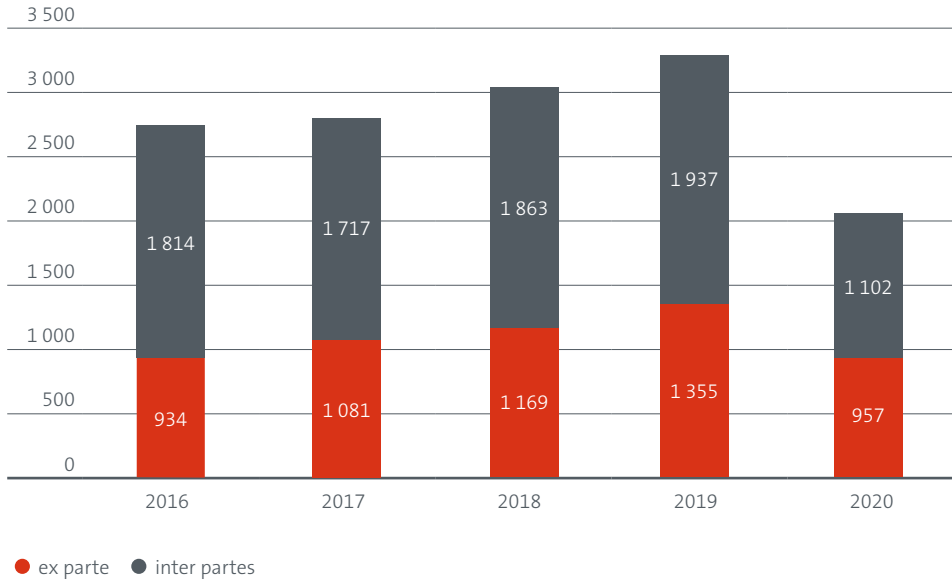


Figure 10

Number of new cases per technical field

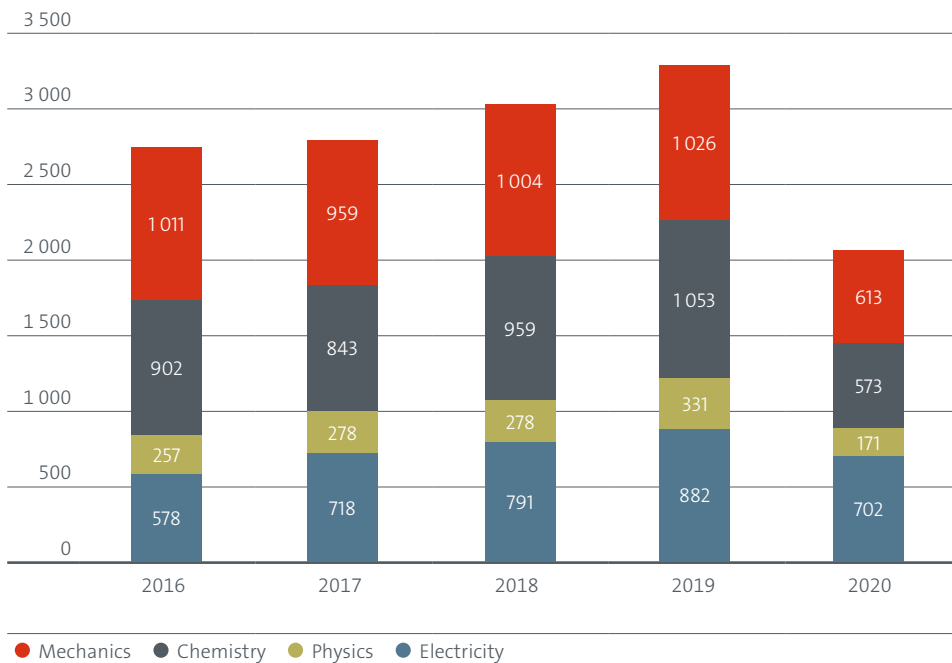


Figure 11

Number of settled cases

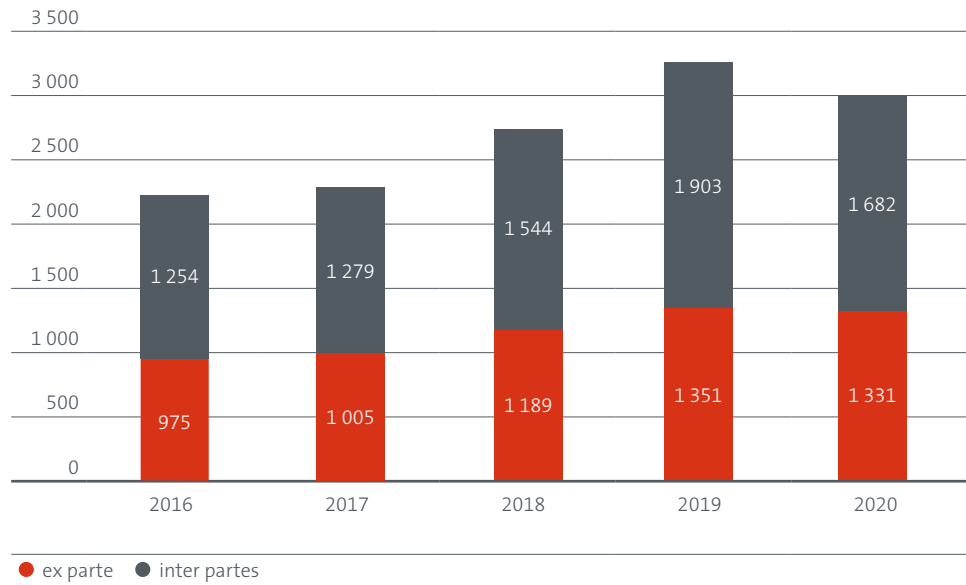


Figure 12

Number of cases settled per technical field

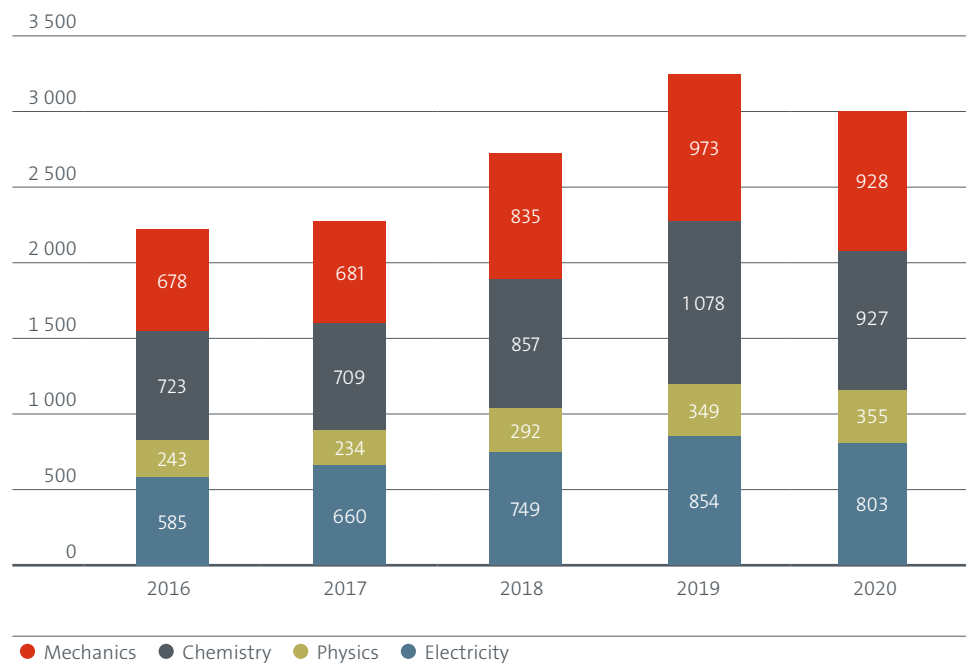


Figure 13

Number of cases pending at 31 December 2020

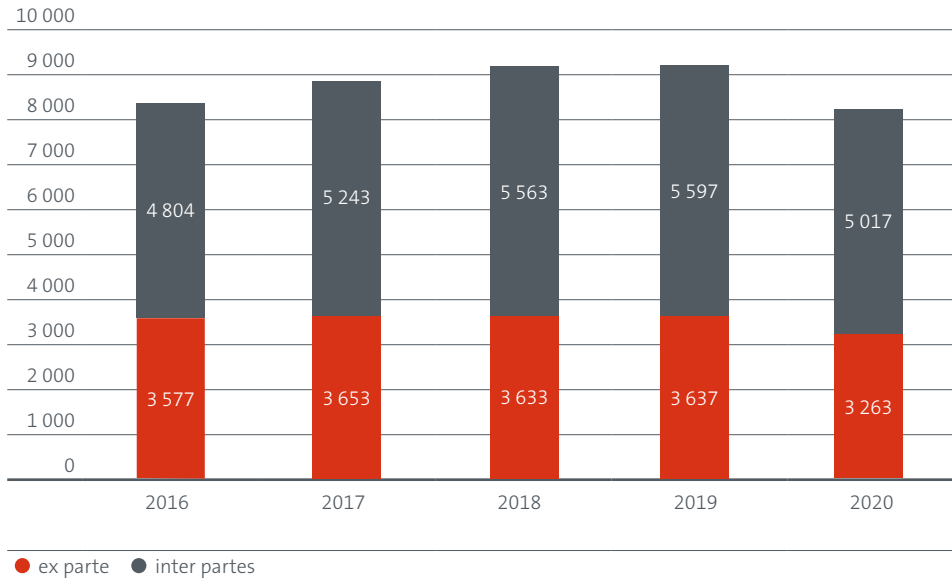
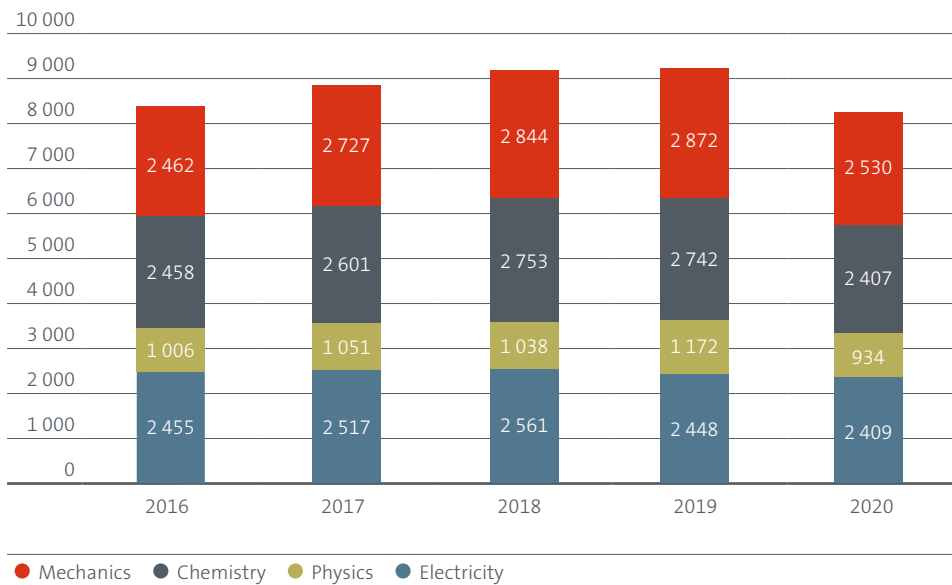


Figure 14

Number of cases pending at 31 December 2020 per technical field



9.2. Outcome of proceedings before the technical boards of appeal

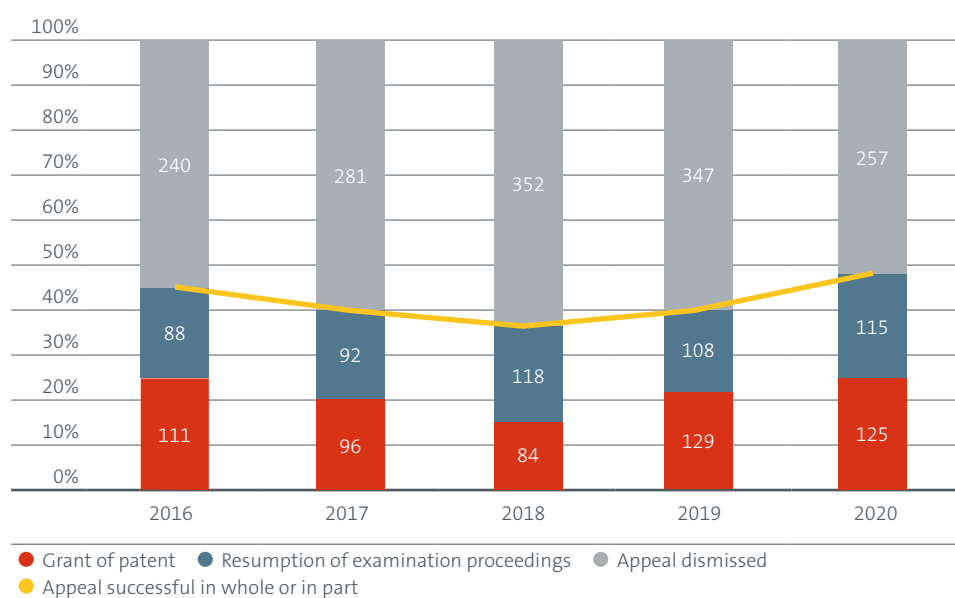
A total of 1 331 *ex parte* cases were settled in 2020.

A total of 1 331 *ex parte* cases were settled in 2020 (2019: 1 351). 533 of them were settled by a decision. The remaining 798 were settled without a decision. In 503 of the latter (2019: 369), the appeal was withdrawn after a substantive communication by the board.

497 *ex parte* cases (37%) 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 some other reason. The outcome of these 497 cases is shown in Fig. 15.

Figure 15

Ex parte cases settled after a decision on the merits



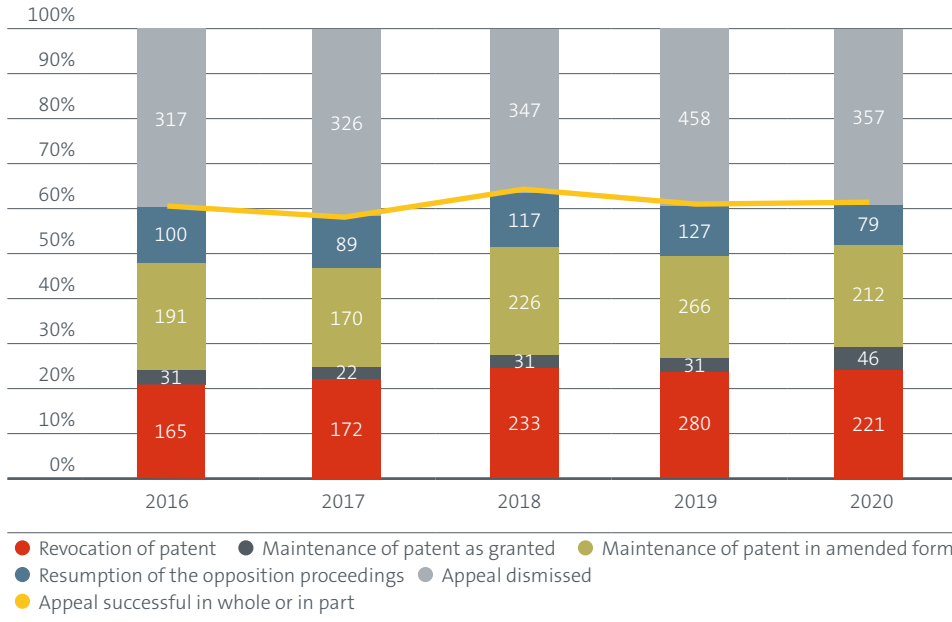
A total of 1 682 *inter partes* cases were settled in 2020.

A total of 1 682 *inter partes* cases were settled in 2020 (2019: 1 903). 969 of them were settled by a decision. The remaining 713 were settled without a decision. In 453 of the latter (2019: 274), the appeal was withdrawn after a substantive communication by the board.

915 *inter partes* cases (54%) 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 some other reason. The outcomes of these 915 cases are shown in Fig. 16 (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 16

Inter partes cases settled after a decision on the merits



The increase in the number of withdrawals compared with 2019 – 36% for *ex parte* and 65% for *inter partes* cases – is noticeable. The reasons for this increase may be related to the RPBA 2020, which include the mandatory dispatch of a substantive communication, in most cases with a preliminary opinion (see 5.2.1 above), the reform of the appeal fee (see 5.3 above), the increased number of communications which have been produced (see 3.3 above), and reasons related to the extraordinary circumstances created by the COVID 19 pandemic.



9.3. 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 by professional representatives of their Rules of Professional Conduct. It is composed of two legally qualified members of the BoA and one European professional representative in EQE cases, and three legally qualified members of the BoA and two European professional representatives in disciplinary cases.

Table 4

Proceedings before the Disciplinary Board of Appeal

	2020	2019
New cases	3	19
European qualifying examination	1	15
Professional representatives code of conduct	2	4
Settled cases	15	12
European qualifying examination	15	10
Professional representatives code of conduct	0	2
Pending cases	11	23
European qualifying examination	5	19
Professional representatives code of conduct	6	4

9.4. Breakdown by language of proceedings

Table 5

Breakdown by language of proceedings

	Total	English	German	French
Appeals filed before the technical boards in 2020	2 059	73.6%	22.1%	4.3%
Oral proceedings scheduled for 2020	2 340	71.2%	25.3%	3.5%
Oral proceedings held in 2020	920	66.8%	30.2%	3.0%

9.5. Staff statistics and distribution of responsibilities

9.5.1. Total number of BoA staff

At the end of 2020 the BoA had a total of 256 staff, a 5.1% increase over the previous year.

At the end of 2020 the BoA had a total of 256 staff.

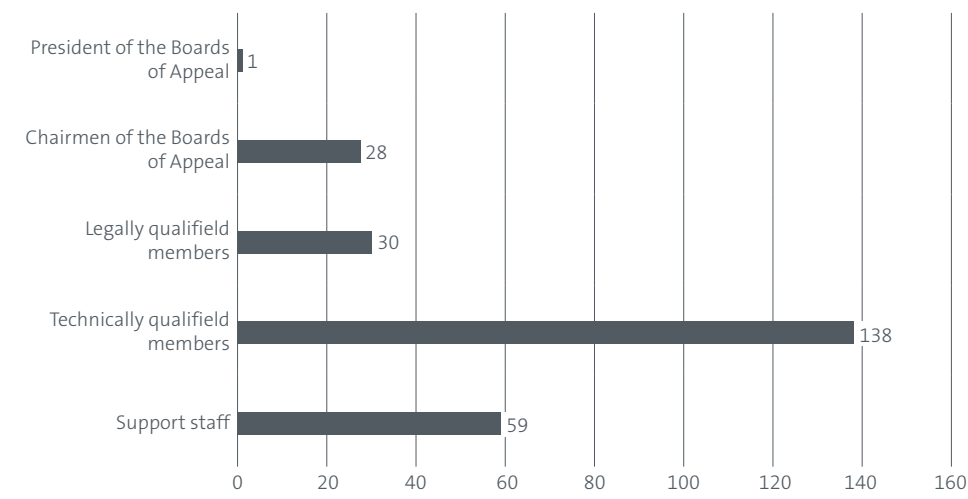
9.5.2. Breakdown of staff by function

As at 31 December 2020, 196 staff were working as chairs and members of the boards. The remainder were involved in management/administrative support.

196 staff were working as chairs and members of the boards.

Figure 17

Breakdown of staff by function



9.5.3. Breakdown of staff by age and gender

The average age of chairs and members is 55. The biggest age group, for both male and female staff, is 51 to 55.

For support staff, the average age is 51. The biggest age group, for both male and female staff, is 46 to 50.

Figure 18

Age pyramid, chairpersons and members

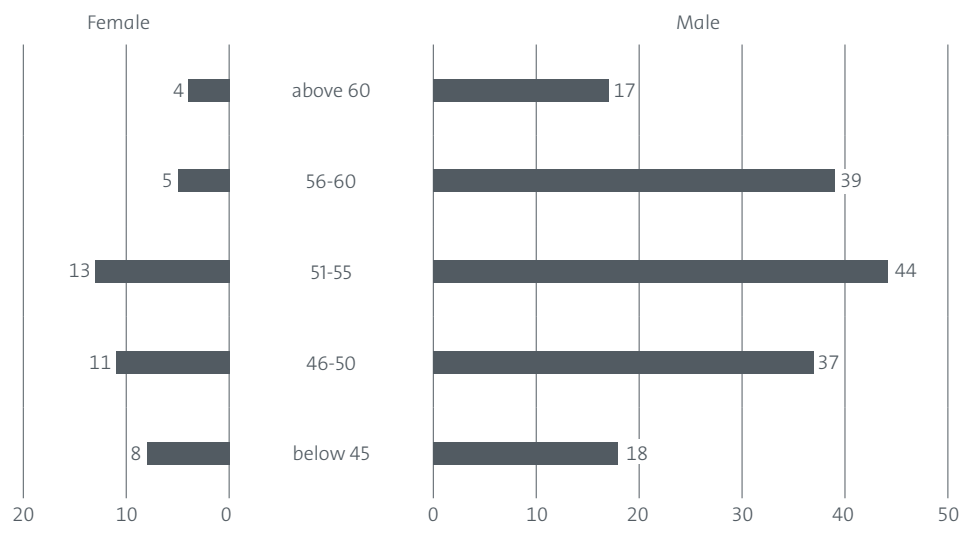
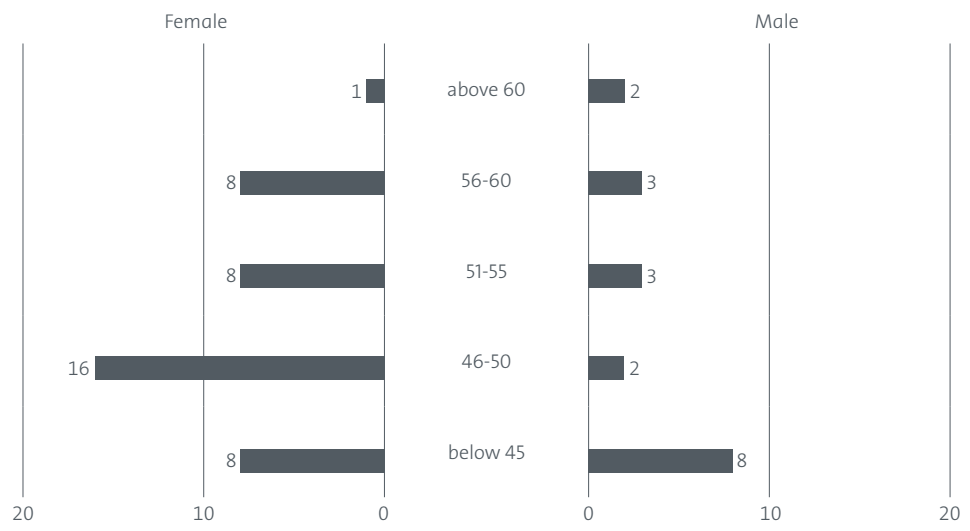


Figure 19

Age pyramid, support staff



9.5.4. Breakdown of staff by nationality (1st nationality)

At the end of 2020, BoA staff came from 22 different Contracting States. Based on their first nationality, 35% were German, 12.5% French and 9.5% British.

Figure 20

Breakdown of chairs and members by nationality

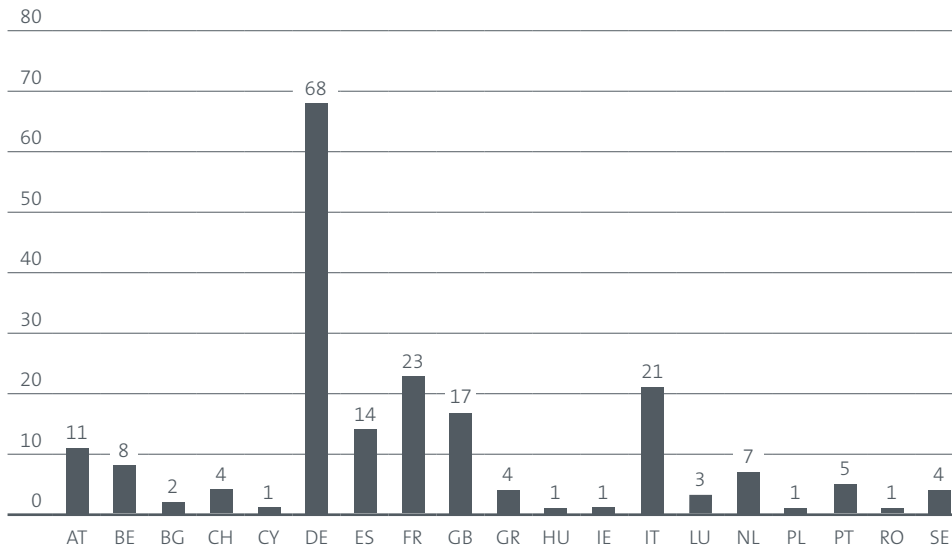
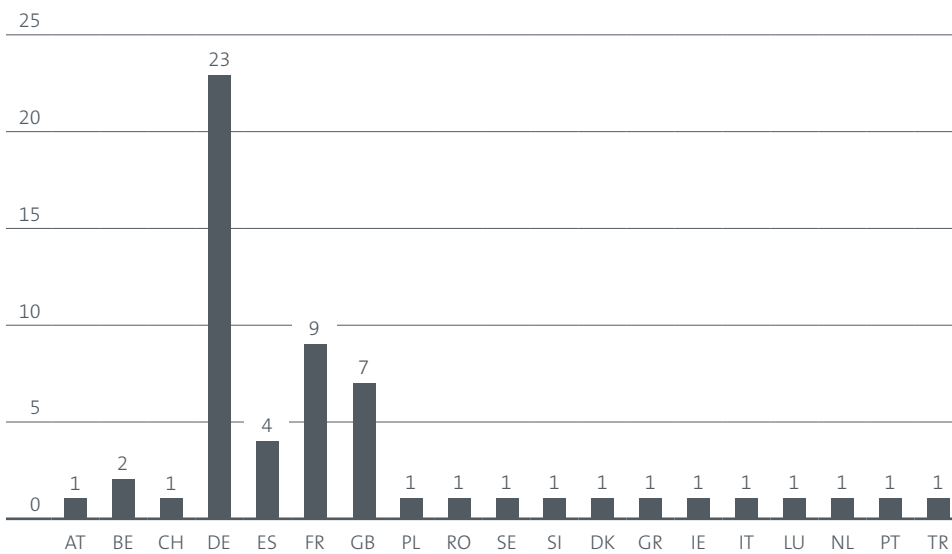


Figure 21

Breakdown of support staff by nationality

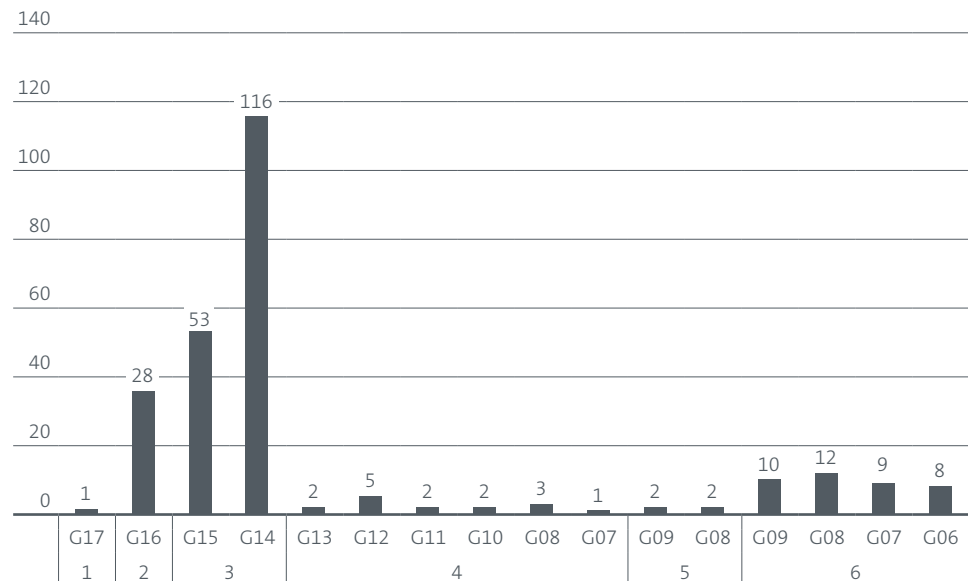


9.5.5. Breakdown of staff by job group and grade

In 2020, 169 staff were in job group 3, 116 of these in grade 14 and 53 in grade 15.

Figure 22

Breakdown of staff by job group and grade



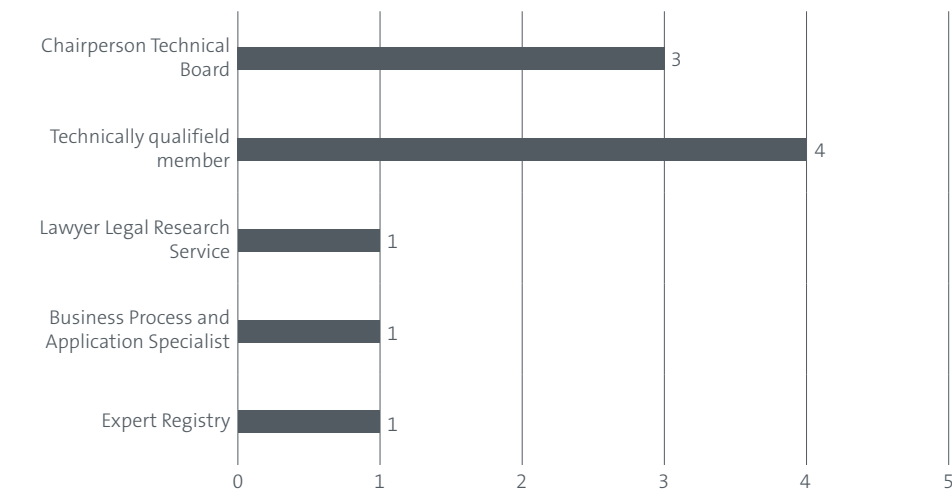
9.5.6. Job opportunities, recruitment, nationality and gender

The BoA published 10 vacancy notices in 2020. Of those for technically qualified members, one was for mechanics, one for chemistry, one for electricity and one for physics/electricity.

A total of 486 applications were received.

Figure 23

Breakdown of vacancy notices by function



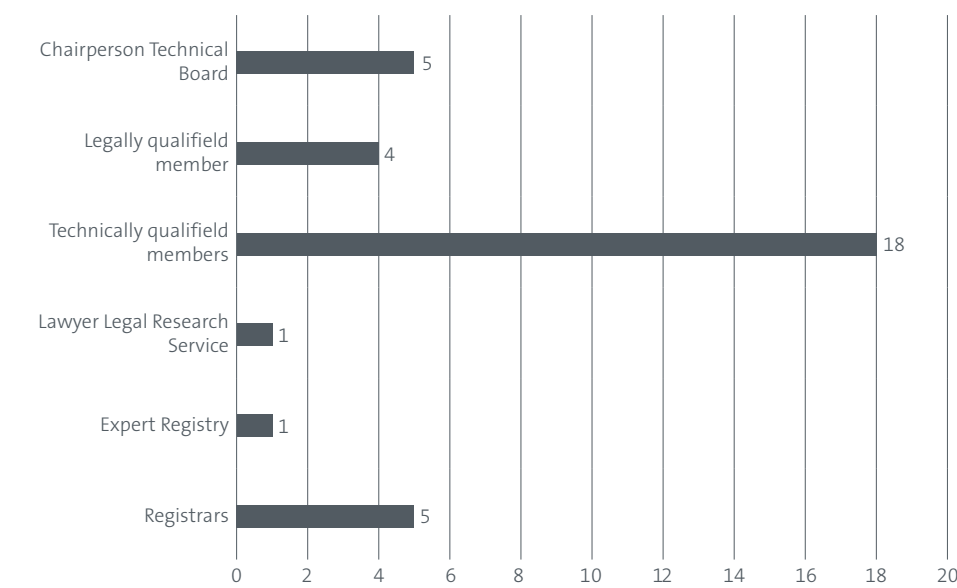
(b) Recruitment by function

34 people were recruited to the BoA in 2020.

34 people were recruited to the BoA in 2020.

Figure 24

Breakdown of recruitments by function



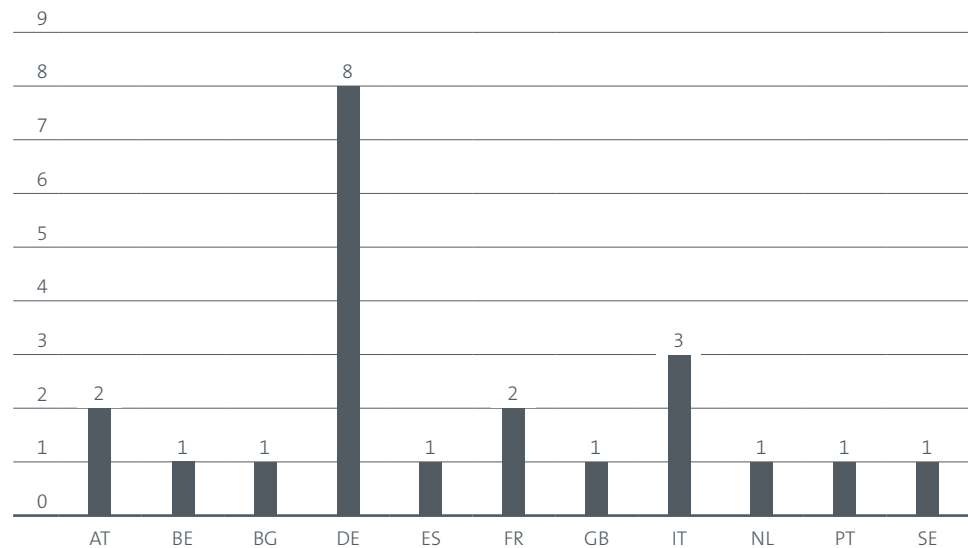
(c) Breakdown of newly recruited technically and legally qualified members by nationality

Among the staff who joined the BoA in 2020, eleven different nationalities were represented.

Among the staff who joined the BoA in 2020, eleven different nationalities were represented. The largest group had German nationality, followed by Italian, French and Austrian.

Figure 25

Breakdown of technically and legally qualified members recruited in 2020 by nationality



(d) Age and gender of newly recruited technically and legally qualified members

The average age of the newly recruited technically and legally qualified members was 47. The youngest was 38 and the oldest 56. Of the newly recruited members, 7 were female and 15 were male.

9.5.7. Staff on part-time home working

In 2020, 91 staff (36%) were on the part-time home working scheme, 53 of whom were male and 38 female. In the wake of the pandemic, all staff were encouraged to use the possibility of teleworking.

