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SUBJECT: Management Report of the President of the Boards of Appeal

SUBMITTED BY: President of the Boards of Appeal

ADDRESSEES: Administrative Council (for information)

SUMMARY

The present document corresponds to BOAC/2/19 e, which received a favourable opinion at the 6th meeting of the Boards of Appeal Committee on 23 January 2019. As foreseen in Article 3(b) of the Act of Delegation, the President of the European Patent Office was given the opportunity to comment on the draft management report.

Recommendation for publication: yes.



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Management Report of the President of the Boards of Appeal

2018



Boards
of Appeal

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1. Executive summary

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

2. Structural reform of the Boards of Appeal

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

The aim of the reform was to increase the organisational and managerial autonomy of the Boards of Appeal, the perception of their independence, and their efficiency (see CA/43/16 Rev. 1). It confirmed the status of the boards as an independent judicial body, whose responsibility it is to serve the parties to appeal proceedings, users of the European patent system and society at large by handing down final decisions on the granting of European patents.

3. Production, productivity and pendency time

3.1 Workload and production

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

Because of the large increase in the number of appeal cases received, the number of pending cases is still growing. At 31 December 2018, 9 196 technical appeal cases were pending, which was 300 (3.4%) more than at 31 December 2017.

Table 1

Appeal proceedings by case

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

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

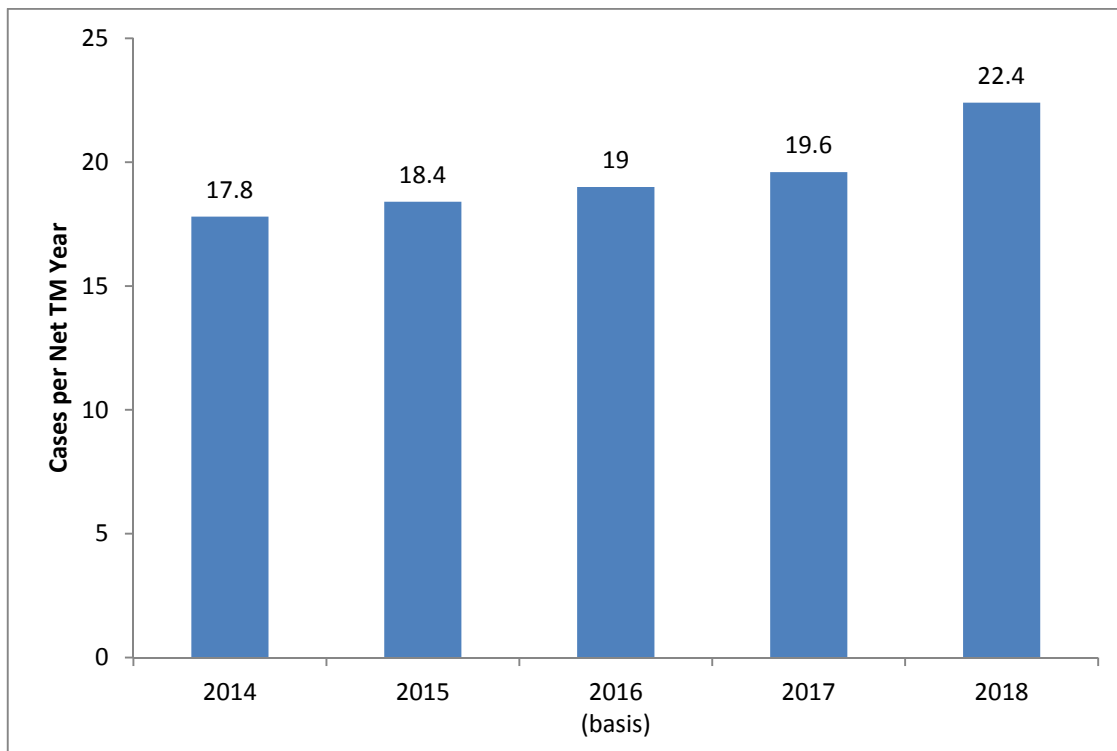
3.2 Productivity

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

The Boards of Appeal have thus exceeded their objective of increasing productivity by 16% between 1 January 2017 and 31 December 2018. Only cases settled with an action have been taken into account for these figures. The increase in productivity is due to a concerted effort by all members of the Boards of Appeal and their support staff. It also shows that the measures taken by the PBoA to increase efficiency are yielding results.

Fig. 1

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



3.3 Five-year objective and timeliness

With a view to reducing the backlog, an overall five-year objective has been drawn up by the PBoA, which has been given the support of the BOAC. The objective is to settle 90% of cases within 30 months of receipt and to reduce the number of pending cases to less than 7 000. This objective will be achieved by (i) increasing the efficiency/productivity of the Boards of Appeal by 32% as from 1st January 2017 and (ii) the allocation of additional resources for a limited period of time. Because of a higher than expected number of new appeals in particular, the PBoA has proposed, and the BOAC agreed, to adjust the objective to reduce the number of pending cases to less than 7 000 from currently 9 196 by 2023, rather than by 2022.

Despite the significant increases in productivity that have already been achieved, backlog and pendency times will continue to grow in the short term, due to the large increase in incoming cases. The workload of the Boards of Appeal and the fluctuations thereof strongly depend on the output of the departments of the first instance.

Fig. 2

Timeliness objective

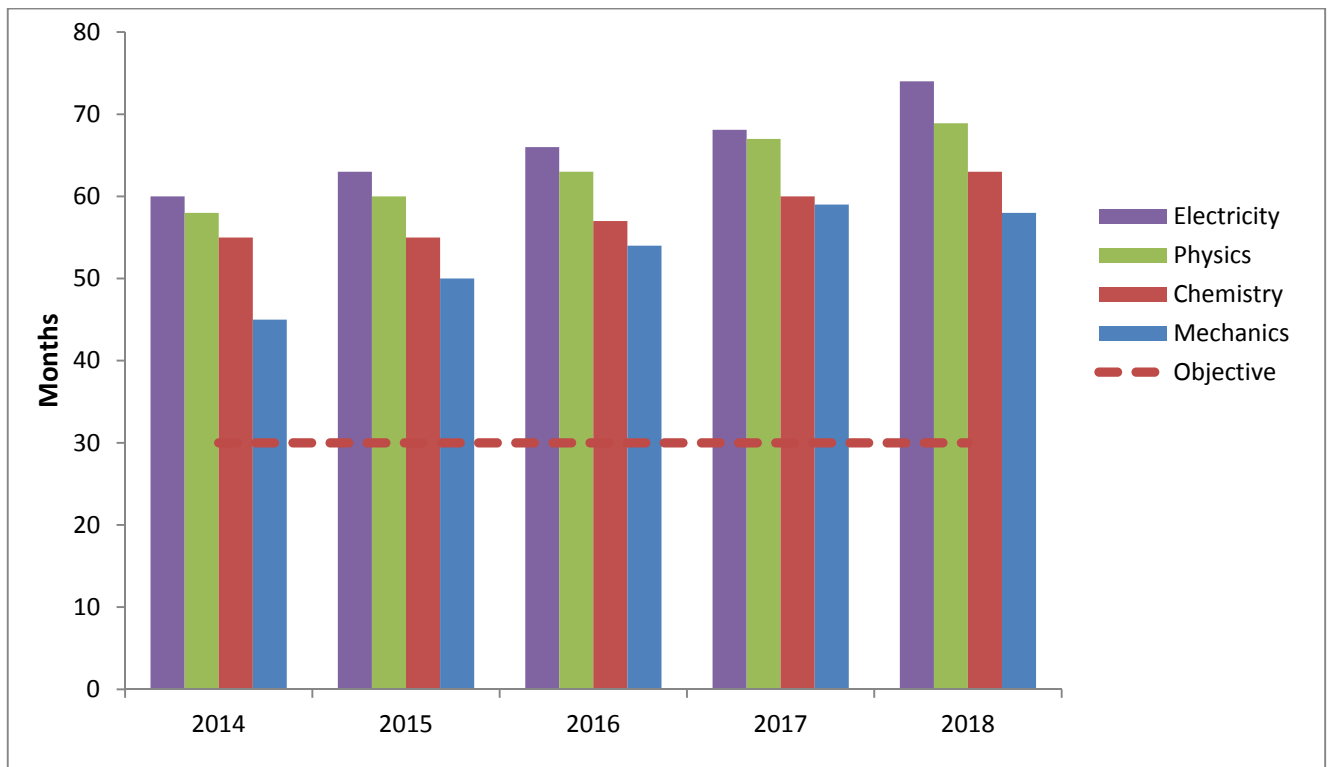
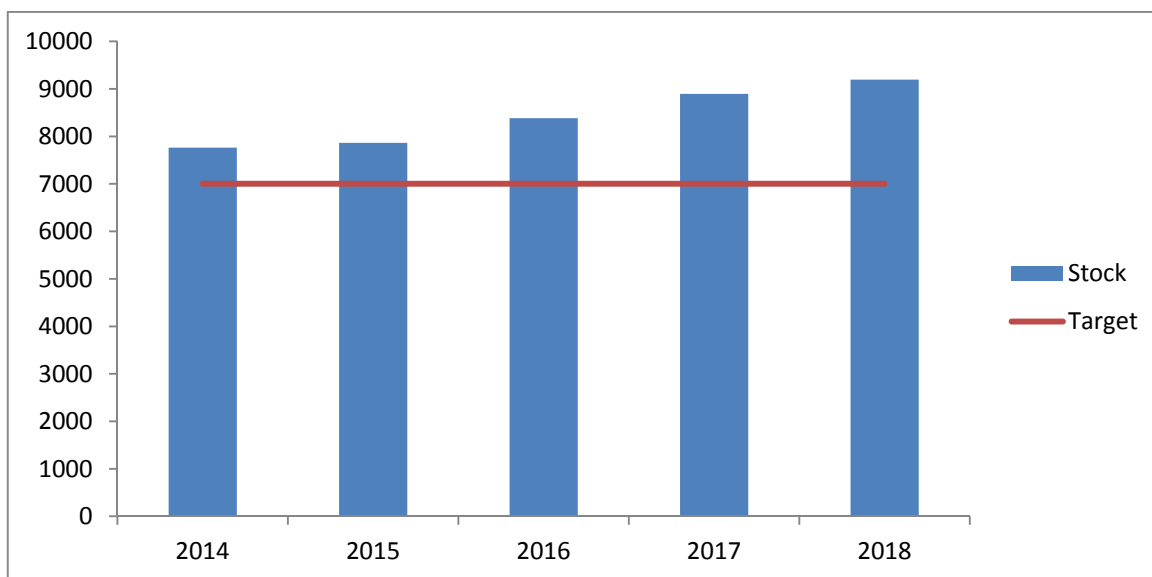


Fig. 3

Number of pending cases



In view of these developments, improving the productivity of the Boards of Appeal by 32% will not on its own be sufficient to deal with the backlog of cases in a timely manner.

4. Staffing

In 2018, 4 chairpersons, 1 legally qualified member and 24 technically qualified members took up their new function in the Boards of Appeal.

At 31 December 2018, there were 166 chairpersons and members of the Boards of Appeal. The 111 technically qualified and 27 legally qualified members were divided among 28 technical Boards of Appeal and the Legal Board. The total number of staff of the Boards of Appeal was 225.

As set out in the Boards of Appeal budget request for 2019 (see BOAC/11/18), significant additional resources in terms of manpower and facilities will be necessary in the coming years to achieve the five-year objective drawn up by the PBoA (see point 3.3 above), while at the same time maintaining the high quality of the appeal system under the EPC, which is essential to the functioning of the patent litigation system in Europe. The Administrative Council has demonstrated its support for the Boards of Appeals' objective by endorsing the PBoA's request for 23 additional technical member posts in the 2019 budget, and by having positively taken note of the inclusion of another 16 technical member posts in the 2020 budget. The increase of productivity, which results in a higher number of oral proceedings, and the recruitment of additional technical members, make it necessary that the office space available to the Boards of Appeal in their new premises in Haar, will need to be increased.

5. Measures to increase efficiency

5.1 Performance evaluation and objective setting

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

In view of these provisions, a comprehensive performance evaluation system for members and chairpersons of the Boards of Appeal has been set up by the PBoA (see BOAC/4/18). This entered into force on 1 January 2018. Performance evaluation is based on observable competencies, grading and the setting of objectives.

The PBoA has a central role in the evaluation of the performance of members and chairpersons of the Boards of Appeal. Each year, he sets individual objectives for all chairpersons, and is personally responsible for drawing up the evaluation reports for all chairpersons and members of the Boards. Chairpersons provide the PBoA with an opinion on the performance of the members allocated to their boards.

The evaluation criteria against which performance is assessed are specific to the judicial function of the Boards of Appeal and based on best practices in the contracting states to the EPC, as well as on recommendations from international judicial bodies. While both qualitative and quantitative indicators are used to ensure that a comprehensive assessment can be made, the focus is on quality. The BOAC was formally consulted on the evaluation criteria, and the Administrative Council took note thereof (see CA/PV 153).

5.2 Revision of the Rules of Procedure of the Boards of Appeal

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

- (i) efficiency, by reducing the number of issues to be treated,
- (ii) predictability for the parties and
- (iii) harmonisation.

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

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

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

5.3 Further measures taken to increase efficiency

Having regard to the objective of reducing pendency times and the need to increase the predictability of the duration of appeal proceedings, the PBoA has set standard timescales for issuing minutes and decisions after oral proceedings. In addition, the use of oral proceedings rooms has been made more efficient, registry tasks have been harmonised, standard clauses for decisions have been drafted, and the business distribution scheme has been amended with a view to increasing flexibility and co-operation between boards. Moreover, a working group has been tasked with developing additional options for the partial reimbursement of the appeal fee. In this context, it is recalled that the Council called for an ambitious increase of the cost coverage of the Boards of Appeal (CA/43/16 Rev. 1), which may not be reached through productivity gains alone.

6. New recruitment procedure

Following a proposal by the PBoA, the Administrative Council issued a decision on the procedure for the recruitment of Board members (CA/D 3/18).

The selection committee is normally chaired by the PBoA, who also appoints the committee's further members (at least four, including the chair). In order to increase transparency, when selecting legally qualified internal members of the Enlarged Board of Appeal, one of the committee's members will be appointed by the PBoA from among the judicial members of the BOAC (see BOAC/8/18). Vacancy notices have been adapted following the introduction of the structural reform of the Boards of Appeal and the performance evaluation system.

7. Quality

Users rightfully expect the highest quality from a judicial authority whose decisions are final. In order to ensure that efficiency gains are made at no material cost to the quality of the decision-making, the PBoA has announced an initiative on quality. The prime focus of the initiative is on best practices for the drafting of decisions, communications and minutes, with a focus on methodology and structure.

8. Enlarged Board of Appeal

The PBoA is Chairman of the Enlarged Board of Appeal. In 2018, the Enlarged Board received 11 petitions for review and settled 15. On 31 December 2018, 12 petitions for review were pending.

The President of the European Patent Office also referred the following point of law to the Enlarged Board of Appeal: "If notice of appeal is filed and/or the appeal fee is paid after expiry of the two-month time limit under Article 108 EPC, is the appeal inadmissible or is it deemed not to have been filed, and must the appeal fee be reimbursed?" This referral is pending under G 1/18. Third parties were given the opportunity to file written statements in accordance with Article 10 of the Rules of Procedure of the Enlarged Board, and nine *amicus curiae* briefs have been received.

9. Contacts with national courts, applicants and representatives

In 2018, the PBoA and members of the Boards of Appeal welcomed several high-level delegations from national courts, as well as users and representatives, such as members of KIPO's Intellectual Property Trial and Appeal Board, members of the American Intellectual Property Law Association (AIPLA) IP Practice in Europe Committee, and a delegation of the International Association for the Protection of Intellectual Property (AIPPI). The PBoA also met with the President of the German Federal Patent Court, and judges from the German Federal Supreme Court, the Austrian Supreme Court and the Supreme Court of China. He also attended the 40th anniversary of the European Patent Institute (epi) in Valetta, the 20th anniversary of KIPO's Intellectual Property Trial and Appeal Board in Seoul and a trilateral meeting of the Heads of the JPO, USPTO and EPO Boards of Appeal as well as a judicial symposium on IP in Tokyo. Together with members of the Boards of Appeal, he also attended the European Judges Forum in Venice. Moreover, the Boards of Appeal and the EPO's European Patent Academy organised a judicial internship training programme in which half a dozen national judges from the member states participated. These meetings and events are an important means of strengthening interaction between national judges and experts and the Boards of Appeal, and of deepening their knowledge of the respective legal and appeal systems.

As every year, the PBoA and members of the Boards of Appeal also met with representatives from industry (nominated by BUSINESSEUROPE) and the patent profession (nominated by the epi) and the US delegation of the US Bar-EPO Liaison Council. Participants at both meetings agreed that their fruitful dialogue should continue. Additionally, the Norwegian Appeal Board for IP rights and the German Chamber of Patent Attorneys were also met and welcomed by the PBoA, as were representatives from the Epi Biotech Committee, Union IP Life Sciences Committee and CIPA Life Sciences Committee.

Together with the EPO's European Patent Academy, the Boards of Appeal organised its annual conference for patent law practitioners entitled "EPO Boards of Appeal and key decisions". As in previous years, this event was booked to capacity, with about 250 practitioners attending. Additionally, the BOAC and the PBoA jointly hosted a user consultation conference (see above). At the request of the European Patent Academy, board members and members of the Legal Research Service of the Boards of Appeal gave numerous lectures at conferences, seminars and workshops organised by the EPO, guaranteeing a high level of expertise and quality for the benefit of a demanding professional audience.

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

In order to strengthen the perceived independence of the Boards of Appeal, a Boards of Appeal website was created. Accessible via the EPO's website, it provides regular news about the Boards of Appeal and the decisions they take.

The efforts of the Boards of Appeal to develop online tools to provide the public with information on case law are continuing. All decisions of the Enlarged Board of Appeal, the Legal Board of Appeal and the technical boards of appeal handed down since 1979 are available free of charge on 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 EPO Boards of Appeal Case Law 2017 was published as supplementary publication 3, OJ EPO 2018. The latest issue of the annual "Information from the Boards of Appeal", which comprises the Rules of Procedure of the Boards of Appeal, was published as supplementary publication 1, OJ EPO 2019. All publications of the Boards of Appeal, including the Case Law of the Boards of Appeal, 8th edition 2016, are available free of charge on the Boards of Appeal website (<https://www.epo.org/law-practice/case-law-appeals/publications.html>). The 9th edition of the Case Law of the Boards of Appeal will be published in 2019.

11. Statistics

11.1 General statistics

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

Table 2

Appeal procedure by case

	New cases			Settled			Pending	
	2018	2017	2016	2018	2017	2016	31.12.2018	31.12.2017
Enlarged Board of Appeal	12	10	9	15	8	18	13	16
Referrals	1	0	1	0	2	0	1	0
Petitions for review	11	10	8	15	6	18	12	16
Legal Board of Appeal	16	17	19	16	15	18	16	16
Technical boards of appeal	3 032 100%	2 798 100%	2 748 100%	2 733 100%	2 284 100%	2 229 100%	9 196 100%	8 896 100%
Examination procedure (<i>ex parte</i>)	1 169 38.6%	1 081 38.6%	934 34.0%	1 189 43.5%	1 005 44.0%	975 43.7%	3 633 39.5%	3 653 41.1%
Opposition procedure (<i>inter partes</i>)	1 863 61.4%	1 717 61.4%	1 814 66.0%	1 544 56.5%	1 279 56.0%	1 254 56.3%	5 563 60.5%	5 243 58.9%
Mechanics	1 004 33.1%	959 34.3%	1 011 36.8%	835 30.5%	681 29.8%	678 30.4%	2 844 30.9%	2 727 30.7%
Examination procedure	140	136	144	107	110	124	357	334
Opposition procedure	864	823	867	728	571	554	2 487	2 393
Chemistry	959 31.6%	843 30.1%	902 32.8%	857 31.4%	709 31.0%	723 32.5%	2 753 30.0%	2 601 29.2%
Examination procedure	208	194	208	229	192	209	576	589
Opposition procedure	751	649	694	628	517	514	2 177	2 012
Physics	278 9.2%	278 9.9%	257 9.4%	292 10.7%	234 10.3%	243 10.9%	1 038 11.3%	1 051 11.8%
Examination procedure	173	178	161	209	170	178	659	694
Opposition procedure	105	100	96	83	64	65	379	357
Electricity	791 26.1%	718 25.7%	578 21.0%	749 27.4%	660 28.9%	585 26.2%	2 561 27.8%	2 517 28.3%
Examination procedure	648	573	421	644	533	464	2 041	2 036
Opposition procedure	143	145	157	105	127	121	520	481
Disciplinary Board of Appeal	18	26	25	20	17	25	16	18
Total	3 078	2 851	2 801	2 784	2 324	2 290	9 241	8 946

Fig. 4

New cases 2018

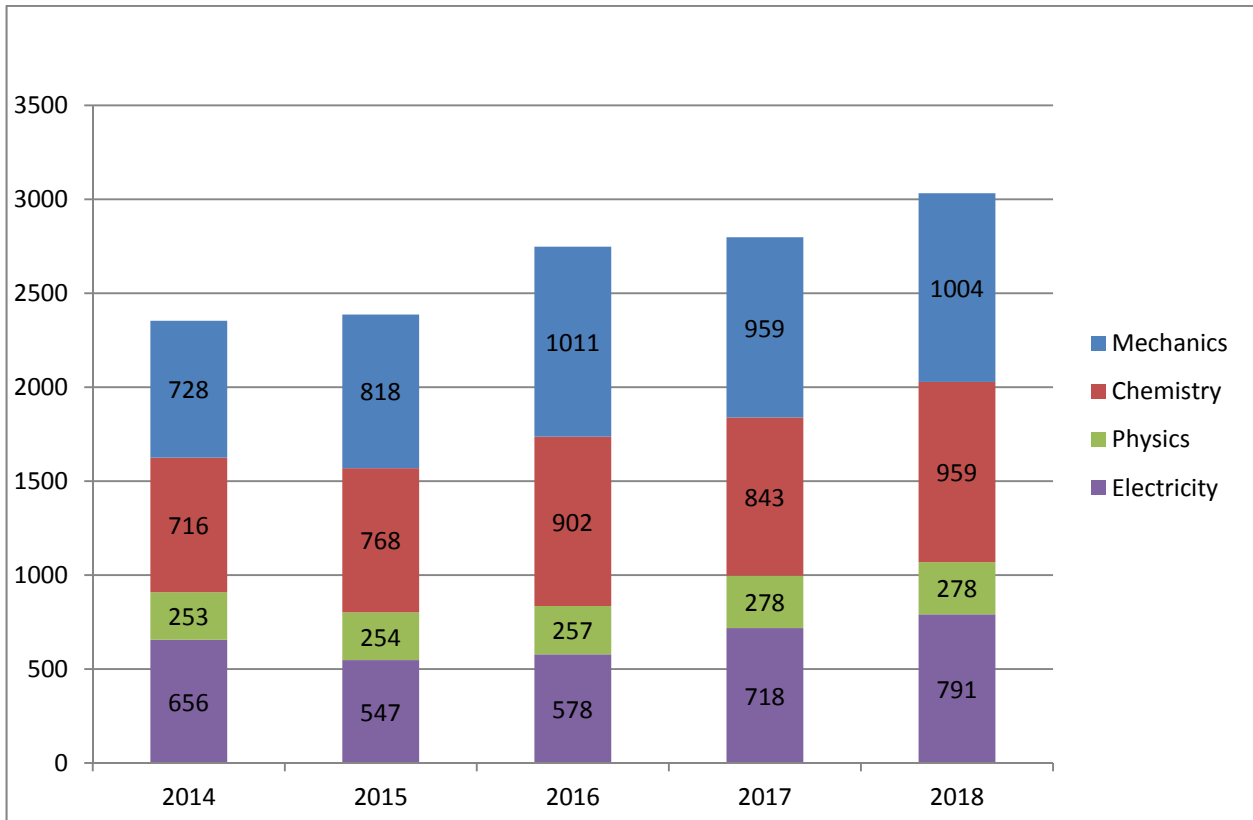
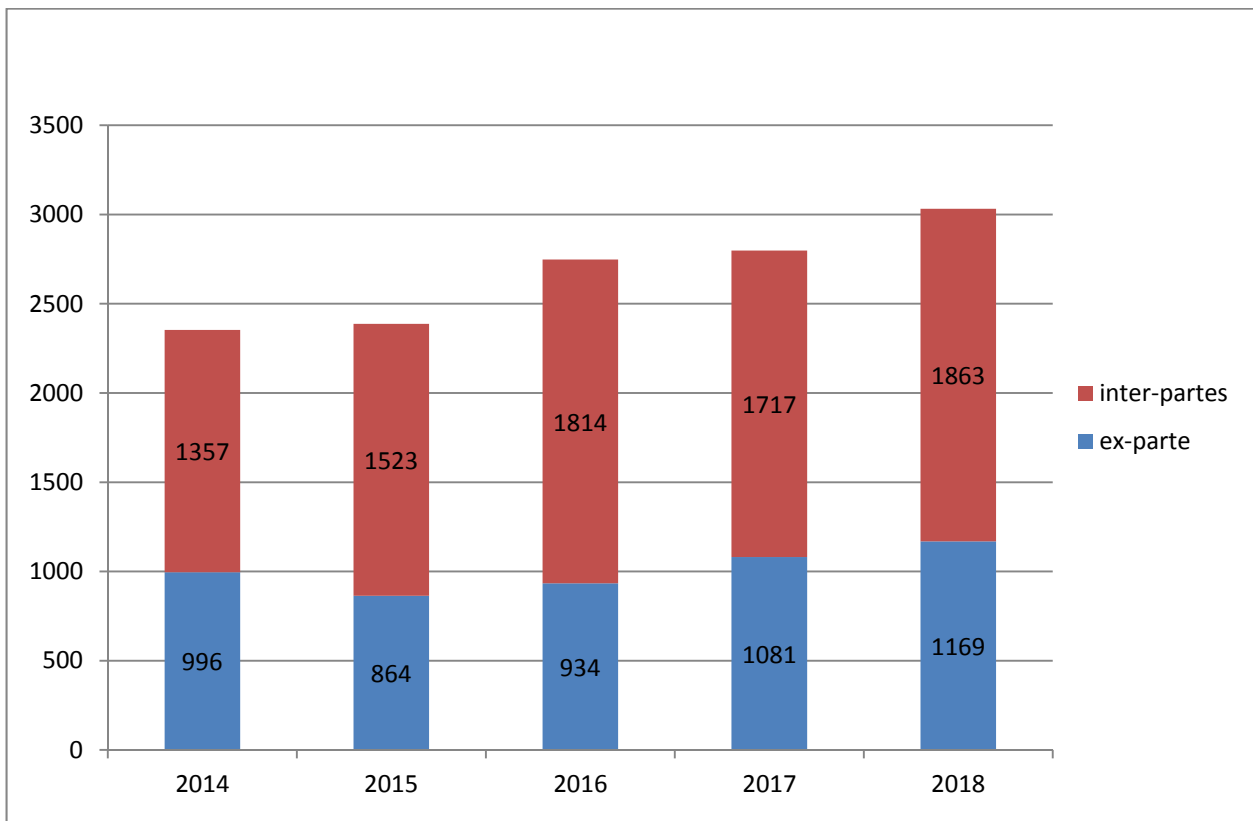


Fig. 5

Settled cases 2018

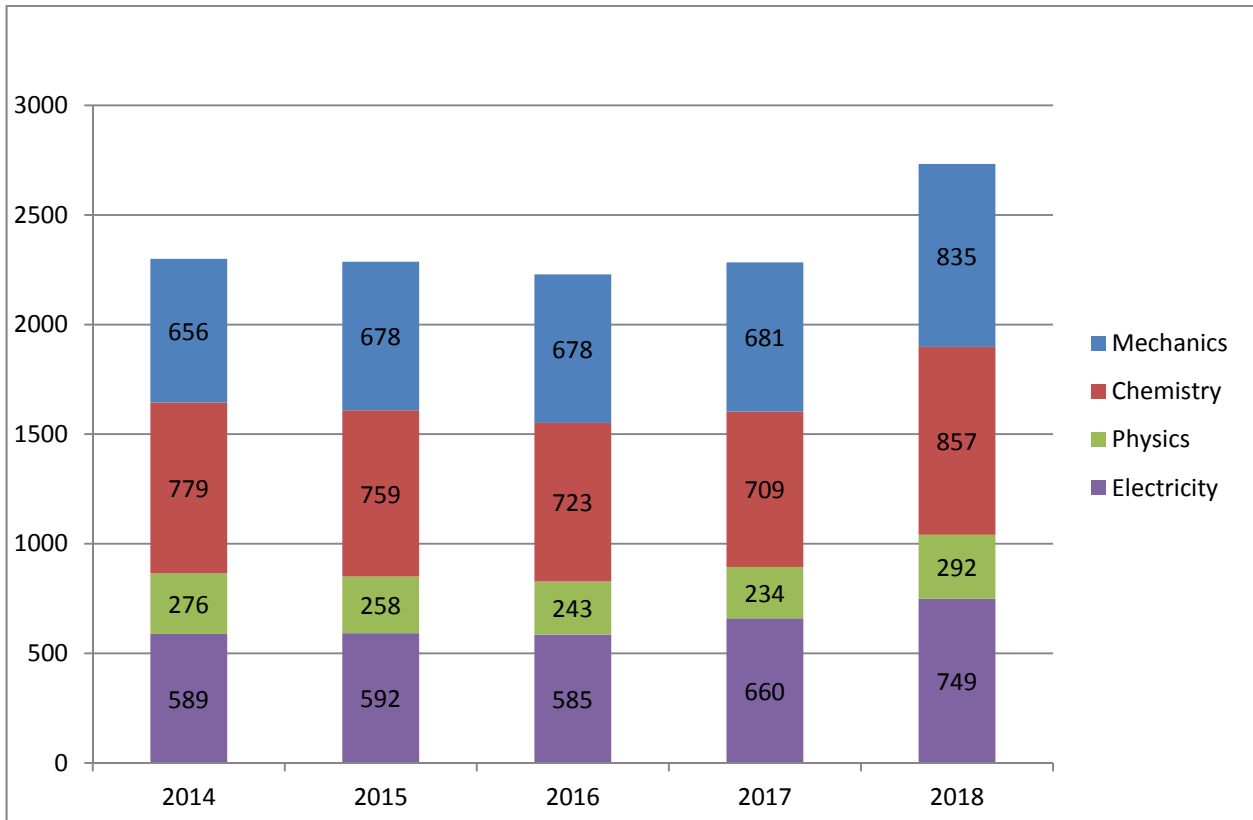
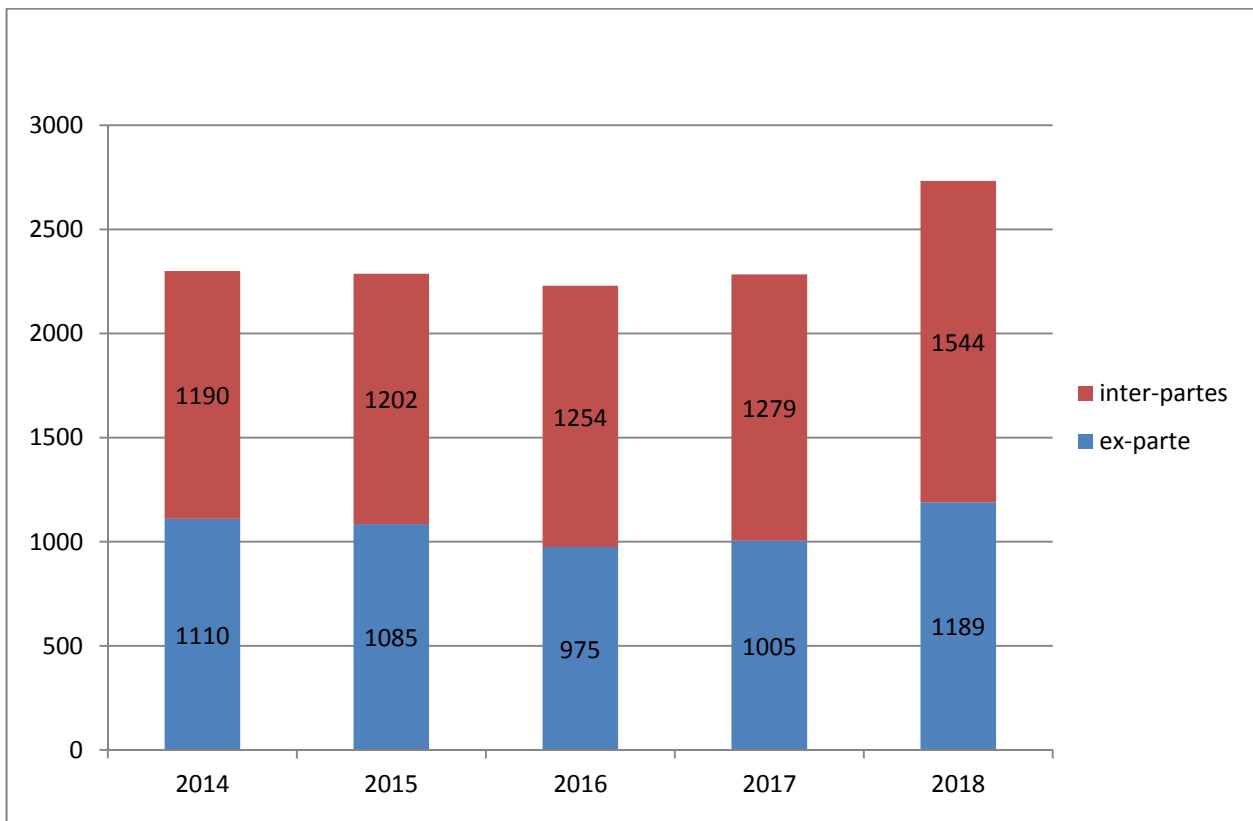
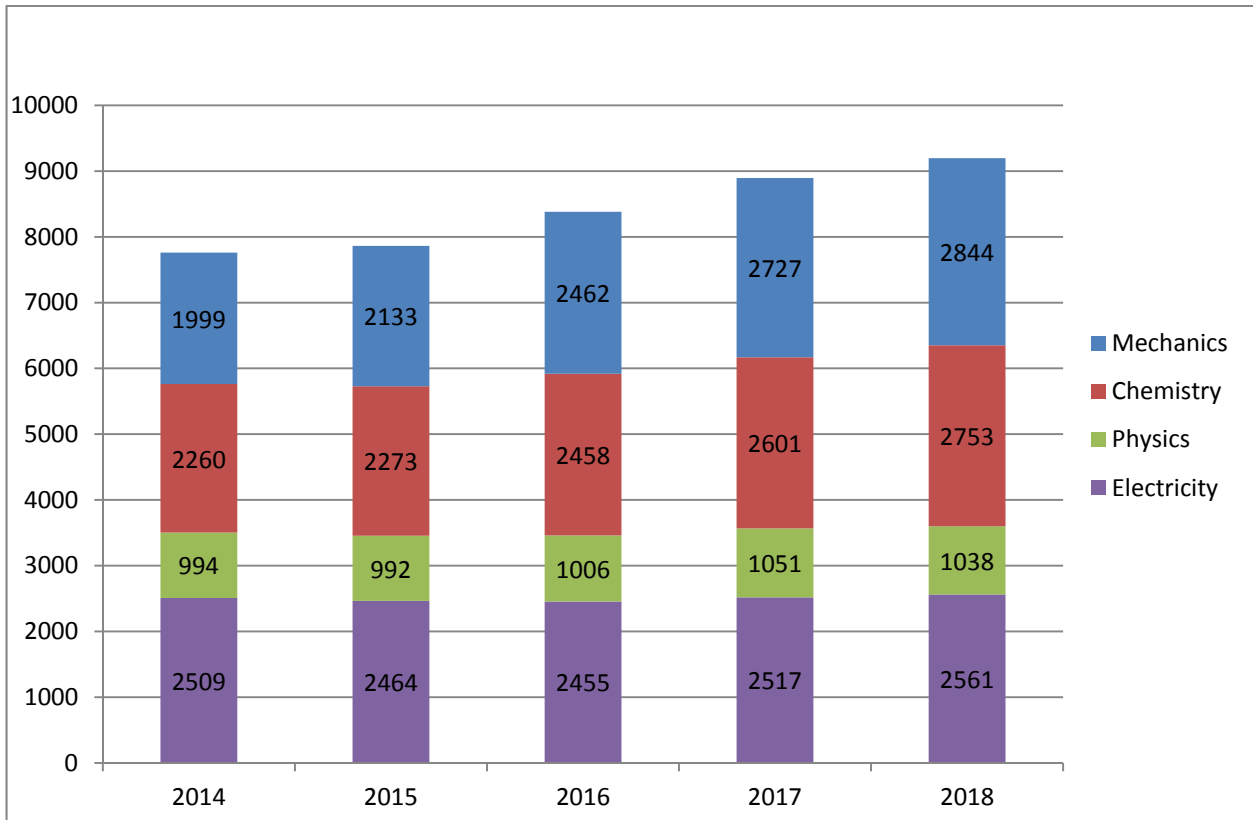
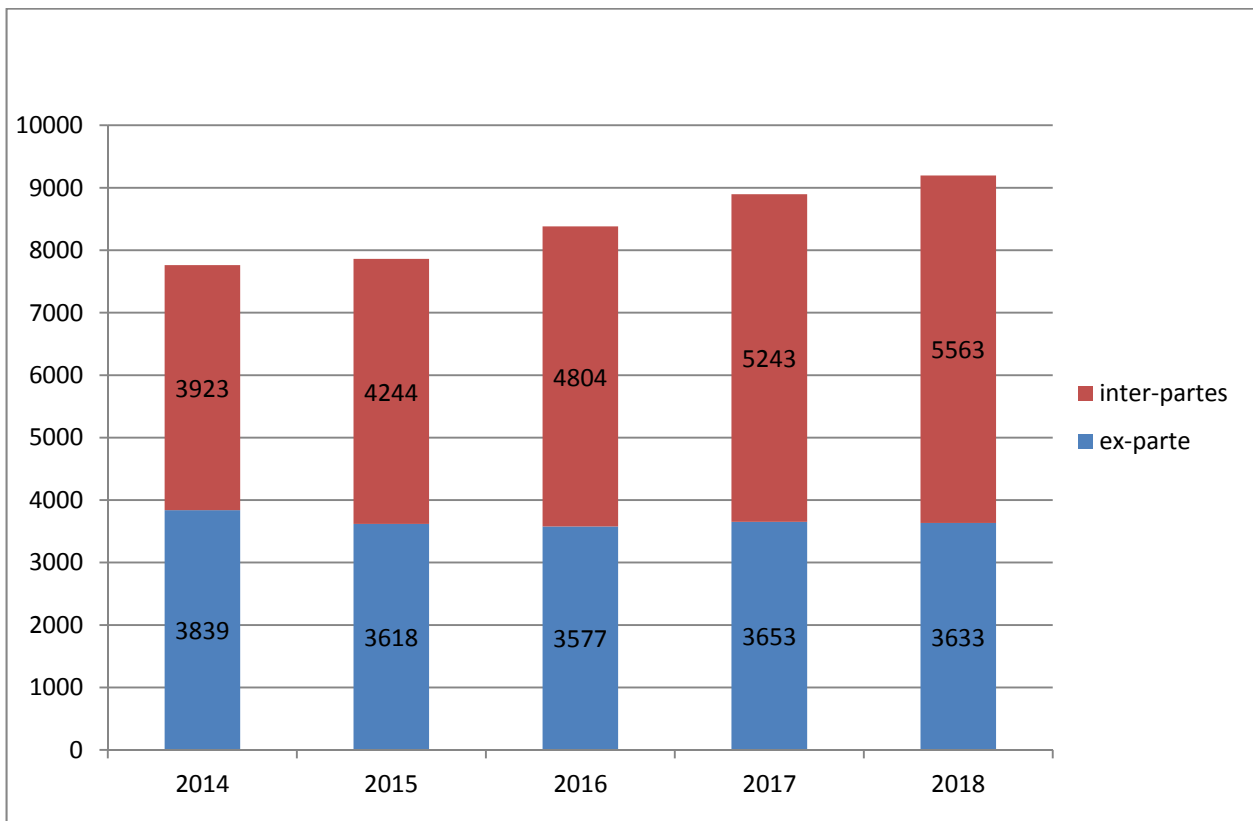


Fig. 6

Appeals pending 31 December 2018



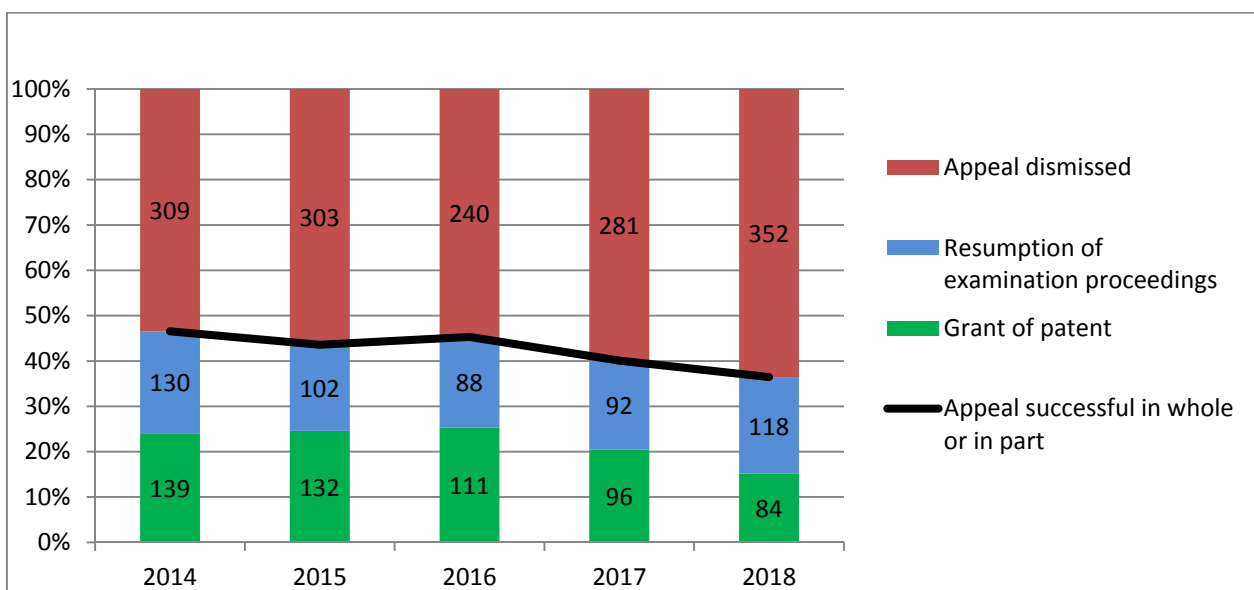
11.2 More about the Boards' activities

11.2.1 Outcome of proceedings before the technical boards of appeal

In 2018, 1 189 *ex parte* cases (2017: 1 005) were settled. 594 *ex parte* cases were settled by a decision. The remaining 595 were settled without a decision. In 276 of these cases the appeal was withdrawn, after a substantive communication by the board. 554 *ex parte* cases (47%) were settled after a decision on the merits, i.e. not terminated as a result of rejection due to inadmissibility, withdrawal of the appeal or application, or for other reasons. The outcome of these 554 cases is shown in Fig. 7. The increase in the percentage of appeals being dismissed has continued in 2018.

Fig. 7

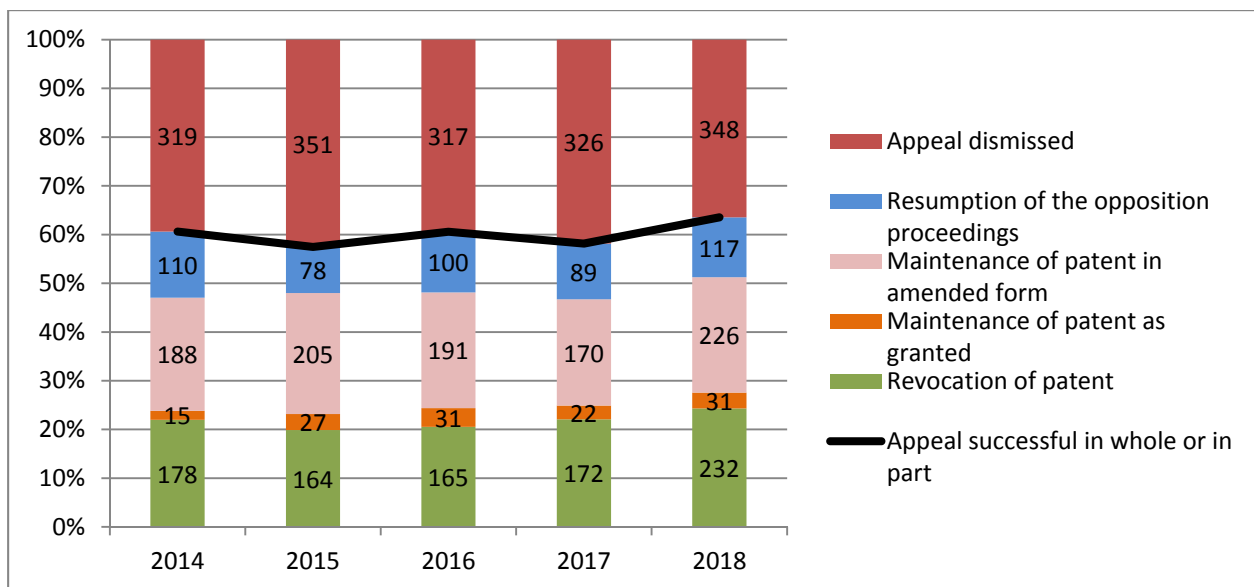
Ex parte cases settled after a decision on the merits



In 2018, 1 544 *inter partes* cases were settled (2017: 1 279). 1 010 *inter partes* cases were settled by a decision. The remaining 534 were settled without a decision. In 177 of these cases the appeal was withdrawn, after a substantive communication by the board. 954 *inter partes* cases (62%) were settled after a decision on the merits, i.e. not terminated as a result of rejection due to inadmissibility, withdrawal of the appeal or application, or for other reasons. The outcome of the 954 cases settled after a decision on the merits was as follows (no distinction is drawn between appeals by patent proprietors and appeals by opponents; furthermore, for the numbers of cases referred to below, no account is taken of the number of parties who filed an appeal against the same decision):

Fig. 8

Inter partes cases settled after a decision on the merits



11.2.2 Proceedings before the Disciplinary Board of Appeal

Table 3

Proceedings before the Disciplinary Board of Appeal

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

11.2.3 Breakdown by language of proceedings

Table 4

Breakdown by language of proceedings

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

11.3 Staff statistics and distribution of responsibilities

11.3.1 Total number of Boards of Appeal staff

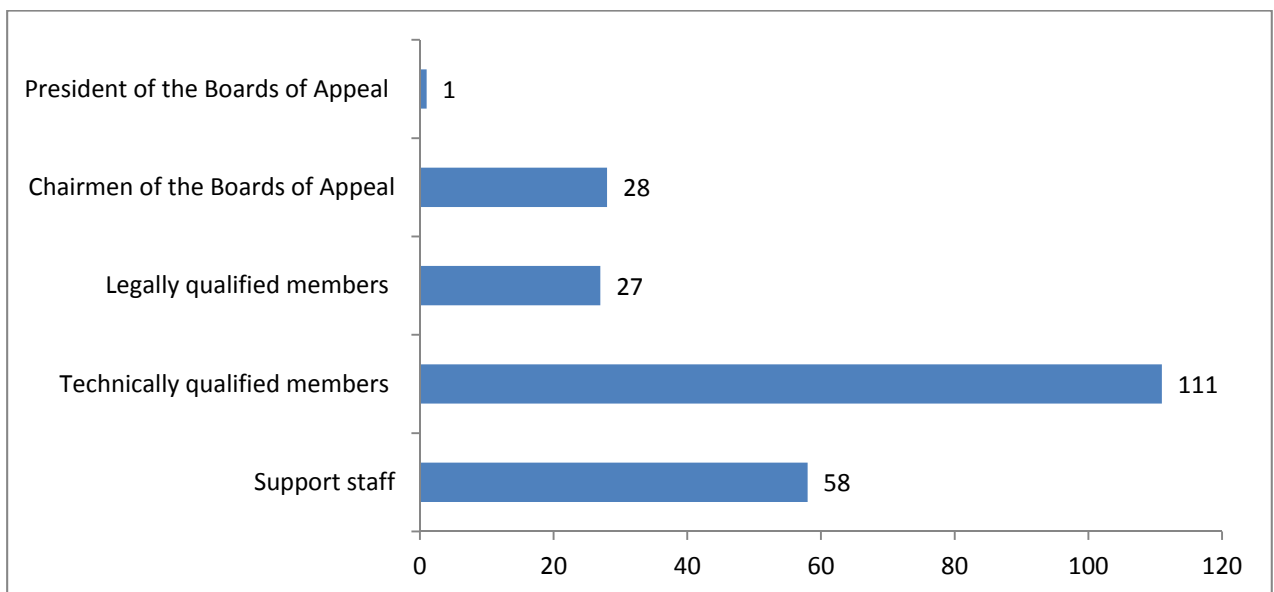
At the end of 2018 the Boards of Appeal had a total of 225 staff. The total number of staff increased by 11.4% compared with the previous year.

11.3.2 Breakdown of staff by function

On 31 December 2018, 166 employees were working as chairpersons and members of the Boards of Appeal. The remainder were involved in management/administrative support.

Fig. 9

Breakdown of staff by function



11.3.3 Breakdown of staff by age and gender

The average age of staff in the Boards of Appeal is 52 years. 55% of staff are between 50 and 60 years old.

Fig. 10

Age pyramid of chairpersons and members, 31 December 2018

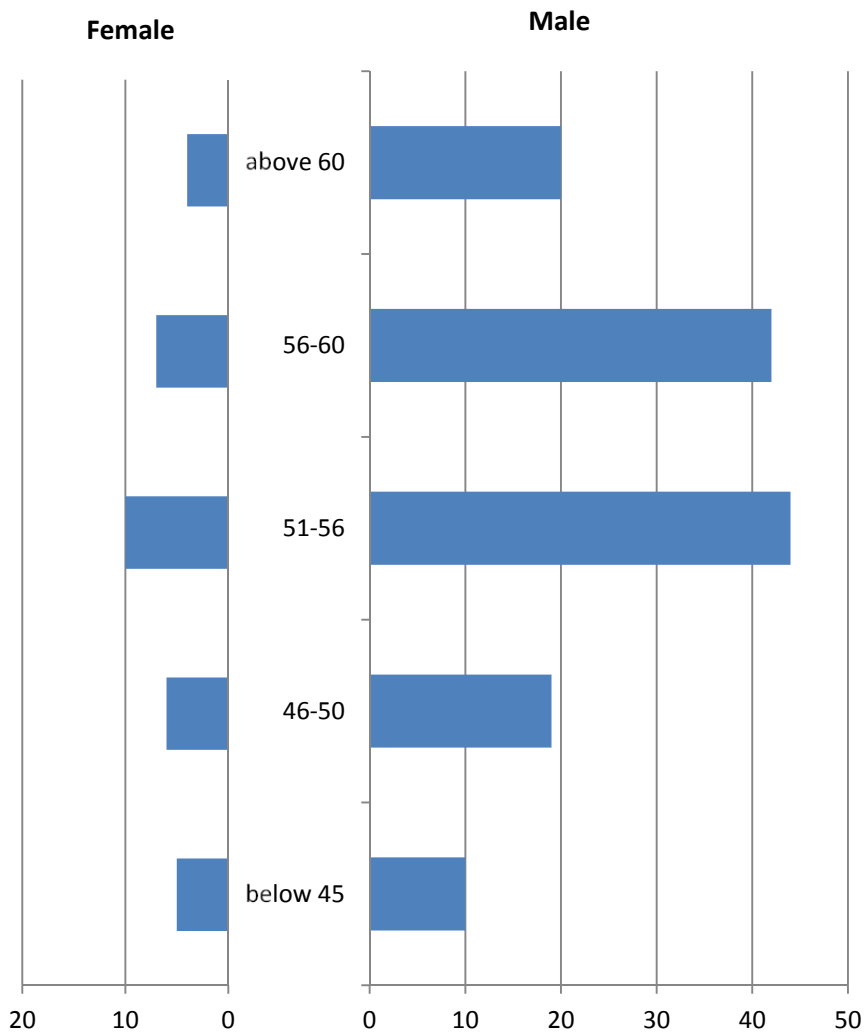
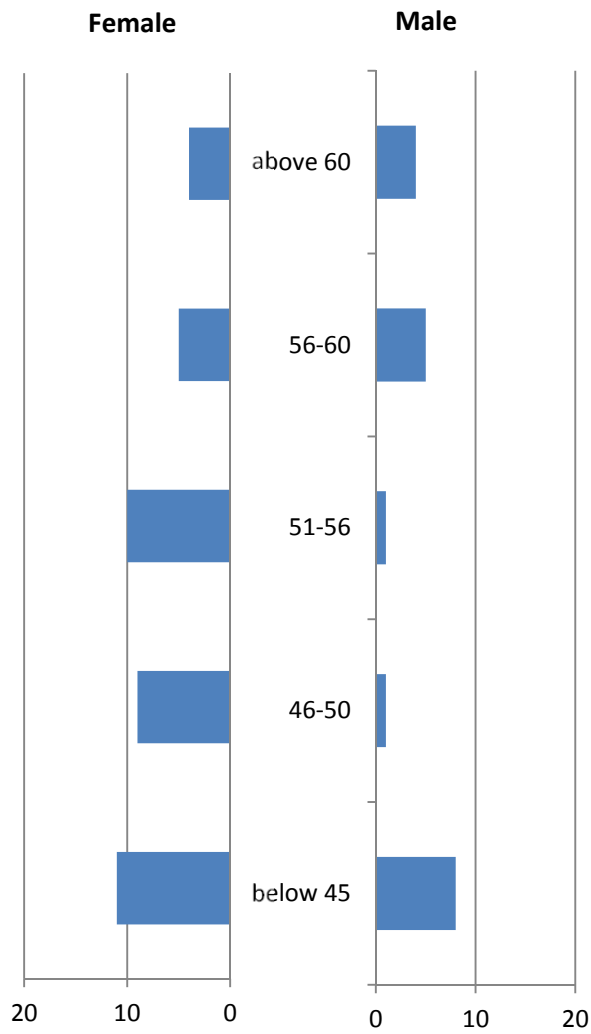


Fig. 11

Age pyramid of support staff, 31 December 2018



11.3.4 Breakdown of staff by nationality

At the end of 2018, staff from 20 different member states were represented at the Boards of Appeal.

33.3% percent of staff have German nationality, followed by 13.8% French and 10.7% British.

Table 5

Breakdown of chairpersons and members by nationality

Nationality	Headcounts	Percentage
AT	8	5%
BE	7	4%
BG	1	1%
CH	5	3%
CY	1	1%
DE	54	32%
ES	11	7%
FI	0	0%
FR	22	13%
GB	17	10%
GR	5	3%
HU	1	1%
IE	1	1%
IT	16	10%
LU	2	1%
NL	7	4%
PL	0	0%
PT	4	2%
SE	4	2%
TR	0	0%

Table 6

Breakdown of support staff by nationality

Nationality	Headcounts	Percentage
AT	2	3%
BE	2	3%
BG	0	0%
CH	1	2%
CY	0	0%
DE	22	37%
ES	5	9%
FI	1	2%
FR	9	16%
GB	6	10%
GR	1	2%
HU	0	0%
IE	0	0%
IT	3	5%
LU	1	2%
NL	1	2%
PL	1	2%
PT	1	2%
SE	1	2%
TR	2	3%

11.3.5 Breakdown of staff by job group and grade

In 2018, 139 staff were in job group 3, 107 of them in grade 14 and 32 in grade 15.

Table 7

Breakdown of staff by job group and function

Job group	Grade	Headcount
1	G17	1
2	G16	28
3	G15	32
	G14	107
4	G13	2
	G12	2
	G11	5
	G10	2
	G08	2
	G07	1
5	G10	3
	G09	1
	G07	1
6	G09	14
	G08	8
	G07	10
	G06	5
	G05	1

11.3.6 Job opportunities, recruitment, nationality and gender

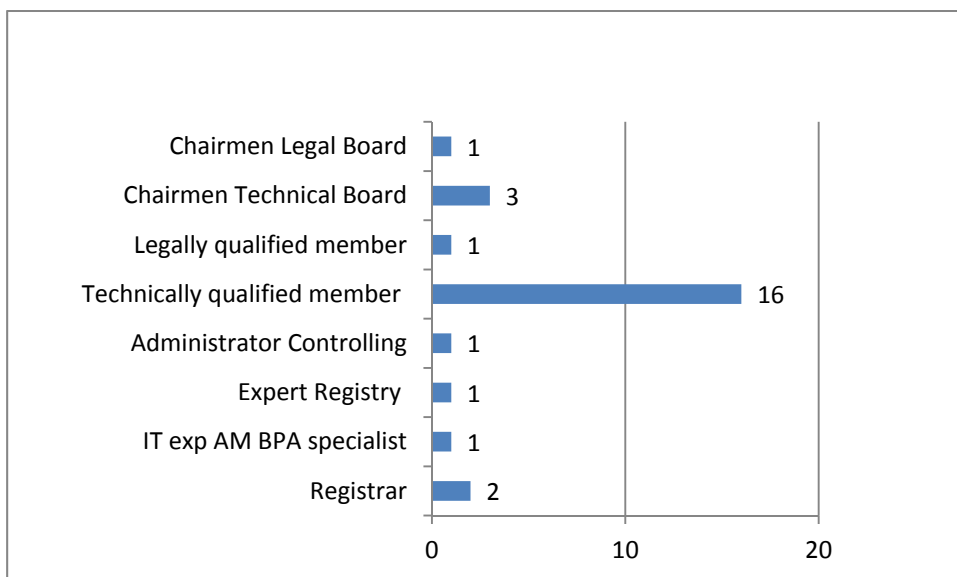
(a) Vacancy notices

By the end of 2018, 26 vacancy notices had been published by the Boards of Appeal. Of these, seven were for technically qualified members in the field of Mechanics, six in Chemistry and three in Electricity.

In total, 1 224 applications were received.

Fig. 12

Breakdown of vacancy notices by function

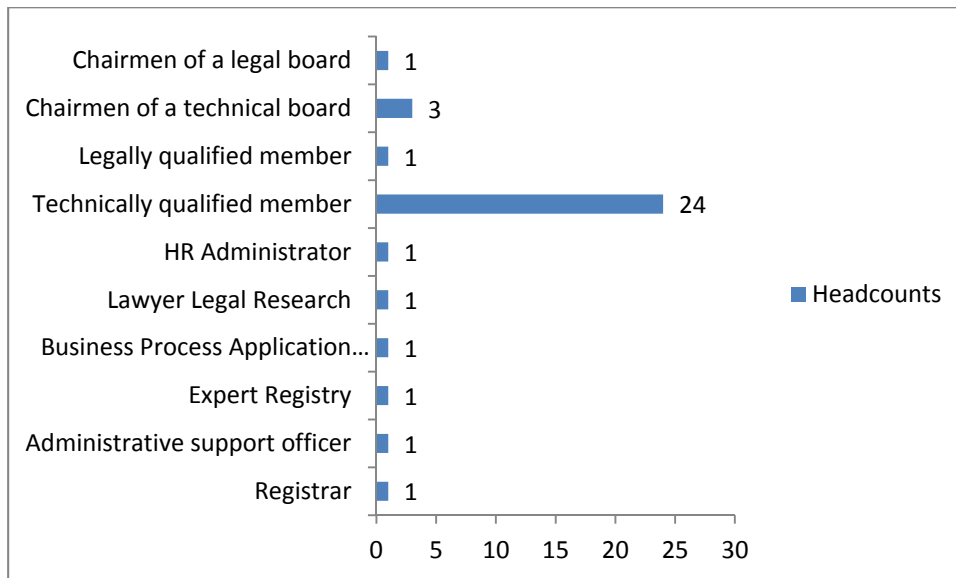


(b) Recruitment by function

By the end of 2018, 35 staff members had started a new function in the Boards of Appeal following a recruitment procedure.

Fig. 13

Recruitments by function

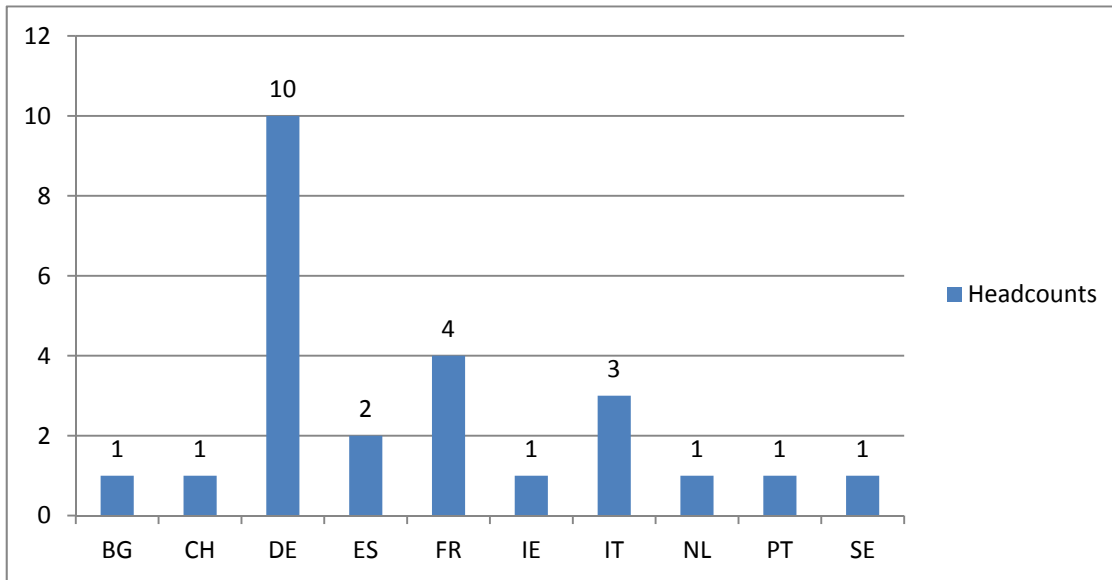


(c) Breakdown of newly recruited technically and legally qualified members by nationality

Among the members who joined the Boards of Appeal in 2018, 10 different nationalities were represented. The largest group had German nationality, followed by French and Italian.

Fig. 14

Recruited TMs and LMs 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 45 years; the youngest was 36 and the oldest 53. Seven were female and 18 male.

11.3.7 BoA staff on part-time home working

In 2018, 64 staff (28%) were on the part-time home working scheme, 37 of whom were male and 27 female.

