

Annual Report 2018

# **Federal Patent Court**

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# Executive Summary

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Compared to the previous year, the total number of incoming cases decreased slightly to 29 (34 in the previous year). The number of ordinary proceedings declined (22, 26 in the previous year), while the number of summary proceedings remained virtually unchanged (7, 8 in the previous year).

During the reporting year the Federal Patent Court handled 23 ordinary proceedings, of which 11 were disposed of by settlement and 5 by judgment. A total of 6 summary proceedings were disposed of during the reporting year, 4 of which were decided by judgment and 2 were declared groundless. The number of cases pending at the end of the year remained unchanged (39, 39 in the previous year).

Income from court fees rose to an all-time high of CHF 965,741 (672,804 in the previous year). This improved the Federal Patent Court's coverage ratio from 44.3% to 54.4% despite higher expenses (CHF 1,776,342, CHF 1,519,014 in the previous year). This rise in expenses can be attributed to a CHF 140,000 increase in remuneration for the non-permanent judges who took charge of more proceedings because the President had recused himself on numerous occasions as well as to expenditure of CHF 65,000 for legal aid in one case.

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## **Annual Report of the Federal Patent Court 2018**

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St. Gallen, 1 February 2019

Mrs President

Distinguished members of the National Council and the Council of States

In keeping with Art. 3 para. 3 of the Patent Court Act, we hereby submit the present Annual Report covering our activities in 2018.

Please accept, Mrs President, distinguished members of the National Council and the Council of States, the assurances of our highest consideration.

On behalf of the Federal Patent Court

President:

Mark Schweizer

First Court Clerk:

Susanne Anderhalden

## Members of the court

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### Administrative Commission

President:	Mark Schweizer
Second permanent judge:	Tobias Bremi
Vice-President:	Frank Schnyder

### Non-permanent judges with technical training

Natalia Clerc  
Roland Dux  
Giovanni Gervasio  
Barbara Herren  
Michael Kaufmann  
Alfred Koepf  
Christoph Müller  
Markus A. Müller  
Lorenzo Parrini  
Peter Rigling  
André Roland  
Werner A. Roshardt  
Regula Rüedi  
Philipp Rüfenacht  
Christophe Saam  
Frank Schager  
Frank Schnyder  
Andreas Schöllhorn Savary  
Martin Sperrle  
Hannes Spillmann  
Kurt Stocker  
Michael Störzbach  
Kurt Sutter  
Daniel Vogel  
Prisca von Ballmoos  
Diego Vergani  
André Werner  
Marco Zardi

### Non-permanent judges with legal training

Daniel M. Alder  
Lara Dorigo  
Philippe Ducor  
Christoph Gasser  
Andri Hess  
Christian Hilti  
Simon Holzer  
Stefan Kohler  
Daniel Kraus  
Thomas Legler  
Rudolf Rentsch  
Ralph Schlosser  
Christoph Willi

The following non-permanent judges with technical training resigned at the end of 2017: Timothy Holman, Emmanuel Jelsch, Hanny Kjellsaa-Berger and Herbert Läderach. Five judges with technical training – Michael Kaufmann, Lorenzo Parrini, Frank Schager, Michael Störzbach and Diego Vergani – and three non-permanent judges with legal training – Lara Dorigo, Andri Hess and Stefan Kohler – took office during the reporting year. The former non-permanent judge with legal training Mark Schweizer has been President of the Federal Patent Court since 1 January 2018.

## Caseload

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By the end of 2018, 37 ordinary and 2 summary proceedings were pending at the Federal Patent Court (38 and 1 respectively in the previous year).

The number of incoming cases fell slightly year on year to 29 (34 in the previous year). The number of ordinary proceedings declined (22, 26 in the previous year), while the number of summary proceedings remained virtually unchanged (7, 8 in the previous year). Due to the economic importance of summary proceedings (generally involving preliminary measures to prohibit the sale of a given product, mostly pharmaceuticals), these proceedings are handled with practically the same level of intensity as ordinary proceedings, which results in a correspondingly high processing workload for the court.

During the reporting year, the Federal Patent Court disposed of 23 ordinary proceedings (15 in the previous year), of which 11 were settled (10 in the previous year), 7 were declared groundless and 5 were terminated by judgment (5 in the previous year). More cases disposed of meant higher income from court fees, which reached a new high. 4 of the 5 judgments were appealed to the Federal Supreme Court (3 appeals were rejected, the fourth is still pending). Two appeals against judgments from the previous year were rejected. Over the first seven years of activity, the ratio of cases settled stands at around 70%. The high ratio of cases settled is due to the practice of holding an instructional hearing at a relatively early stage of the procedure, during which a court delegation provides the parties with a preliminary legal and technical assessment of the dispute and tries to foster a settlement. Because the judges with technical expertise clearly enjoy a high level of acceptance from the parties, the ratio of cases settled after these hearings has remained at a constantly high level. As far as we can tell,

no other country has achieved comparable ratios. This helps to avoid the duration and costs of full proceedings, and the parties save a considerable amount of time and money. Compared to similar patent courts in Germany, France, the Netherlands and the United Kingdom, this constitutes a quality of the Federal Patent Court which over time should have a positive impact on the number of incoming cases. The high ratios are likely to also compare favourably to the EU's Unified Patent Court, if and once it is established.

A total of 6 summary proceedings (9 in the previous year) were terminated during the reporting year, of which 2 were declared groundless (0 in the previous year), and 4 (5 in the previous year) were terminated by judgment. One judgment was appealed to the Federal Supreme Court and the appeal is still pending.

## Revision of the PatCA as of 1 August 2018

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Among other things, the amendments to the Patent Court Act (PatCA) which came into force on 1 August 2018 allow the second permanent judge to take charge of proceedings (Art. 23 para. 2 PatCA). This should make coordination easier in cases where the President has recused himself. No practical experience of the new regulation has been gained to date because the President did not have to recuse himself in any cases received after 1 August 2018 during the reporting year.



## **Non-permanent judges**

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The system of non-permanent judges and judges with legal and technical expertise is still proving extremely effective. The possibility of composing panels of qualified legal and technical experts from a given field ensures that these panels are highly competent and able to provide the parties with judgments that will be accepted and form the basis for compromise solutions.

The non-permanent judges were required to take charge of more proceedings because the President had to recuse himself on many occasions during the reporting year. This increased their remuneration by approximately CHF 140,000. The fact that these proceedings were being headed by non-permanent judges did not influence their duration; the number of cases pending remained unchanged and the average duration of ordinary proceedings reduced from 541 days in the previous year to 438, while the length of proceedings for preliminary measures increased only slightly from 108 to 143 days.

## **Languages**

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During the reporting year, 20 of the ordinary proceedings submitted to the Federal Patent Court were handled in German, 2 cases in French. In the summary proceedings, German was used in seven cases, French in one case. None of the cases were handled in Italian. In four ordinary proceedings and two summary proceedings, litigants mutually agreed to invoke the legal right conferred upon them by the Patent Court Act to use English in submissions and hearings instead of an official language of Switzer-

land. Parties clearly show great interest in pleading their cases in English. This can be explained by the fact that English is the working language used not just by many foreign companies involved in court cases here but also by the R&D and patent divisions of a number of Swiss companies, and that frequently the main state-of-the-art documents are also in English.

## **Administrative office**

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The staff continues to be made up of two office managers (equivalent to a combined workweek percentage of 130%) and two court clerks (equivalent to a combined workweek percentage of 100%). Ms Isabelle Kuster, one of the office managers, left at the end of August during the reporting year and was replaced by Ms Magali Ender with effect from 1 October 2018. Ms Agnieszka Taberska, whose main role is as court clerk in Division II of the Federal Administrative Court, is now brought in as second court clerk on a case-by-case basis when required.

## Premises

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The office space of the Federal Patent Court, like the hearing rooms that the Federal Administrative Court shares with the Federal Patent Court, serve their intended purpose; there is no need to change the current arrangements.

When the Federal Patent Court needs to conduct proceedings away from St. Gallen, the cantons where the proceedings are to be held provide the hearing rooms. Two main hearings were held in the courtroom of the Hôtel de Ville in Neuchâtel during the reporting year. This was greatly appreciated by the parties, who were based in the French-speaking part of Switzerland. Instructional hearings took place in both St. Gallen and Zurich.

## Finances

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The profit and loss statement of the Federal Patent Court shows a total expenditure of CHF 1,776,342 and a total income of CHF 965,741 before payments from the Swiss Federal Institute of Intellectual Property (IPI). The remaining amount to be covered by the IPI according to Art. 4 PatCA therefore stands at CHF 810,600, down slightly on the previous year (CHF 846,210). This rise in expenses can be attributed to an increase of some CHF 140,000 in remuneration for the non-permanent judges who took charge of more proceedings because the President had recused himself on numerous occasions as well as to CHF 65,000 in legal fees reimbursed to a party entitled to legal aid.

## Cooperation

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The Federal Patent Court greatly appreciates the support that it received in supervisory meetings with the Federal Supreme Court in Lucerne on 6 April and in St. Gallen on 9 November. As in previous years, cooperation with the Federal Administrative Court went very smoothly at all levels.

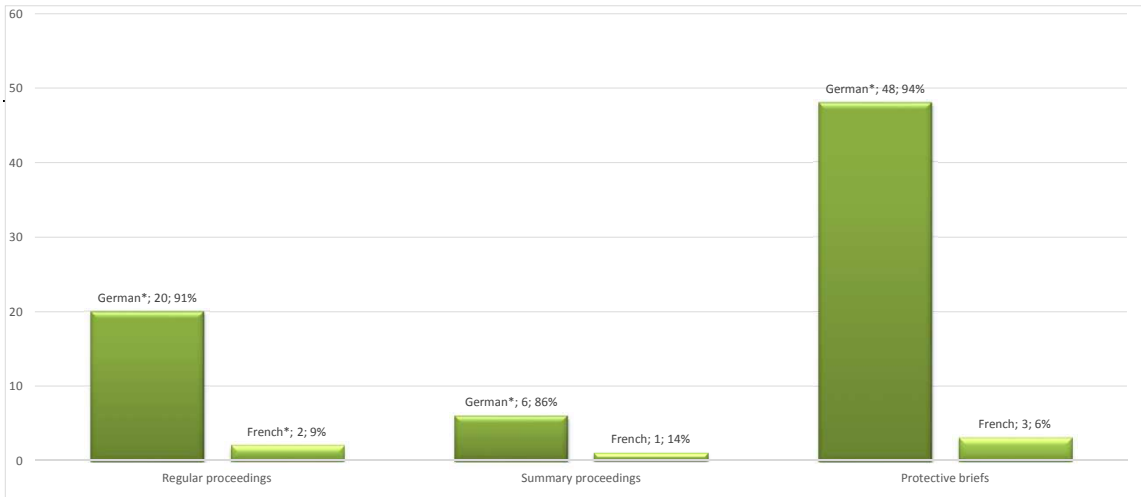
## Statistics

### Number and type of case

	Action taken				Outcome of proceedings			
	Cases still pending before 01.01.2018	Cases submitted to FPC in 2018	Cases settled	Cases still pending on 31.12.2018	Case settled by judgment	Case settled by compromise	Case declared inadmissible	Case declared groundless
<b>Regular proceedings</b>								
Infringement of patent without counter-claim of nullity of patent	18	13	14	17	1	7	0	6
Nullity of patent without counter-claim of infringement of patent	8	5	2	11	0	1	0	1
Infringement and nullity of patent	6	2	2	6	2	0	0	0
Right to a patent	3	1	3	1	1	2	0	0
Claim	1	0	1	0	0	1	0	0
Other	2	1	1	2	1	0	0	0
<b>Total</b>	<b>38</b>	<b>22</b>	<b>23</b>	<b>37</b>	<b>5</b>	<b>11</b>	<b>0</b>	<b>7</b>
<b>Summary proceedings</b>								
Injunction/safeguarding of interests	1	5	4	2	2	0	0	2
Description	0	0	0	0	0	0	0	0
Seizure	0	0	0	0	0	0	0	0
Evidence secured	0	0	0	0	0	0	0	0
Description and evidence secured	0	1	1	0	1	0	0	0
Other	0	1	1	0	1	0	0	0
<b>Total</b>	<b>1</b>	<b>7</b>	<b>6</b>	<b>2</b>	<b>4</b>	<b>0</b>	<b>0</b>	<b>2</b>
<b>Protective briefs</b>								
	Transfer from 2017	Received in 2018	Period of protection expired	Relevant up to 2019				
Swiss patents (incl. supplementary protection certificates)	2	9	5	5				
European patents (incl. supplementary protection certificates)	17	45	32	30				
Other (applications, other national patents)	0	0	0	0				
<b>Total*</b>	<b>19</b>	<b>51</b>	<b>36</b>	<b>34</b>				

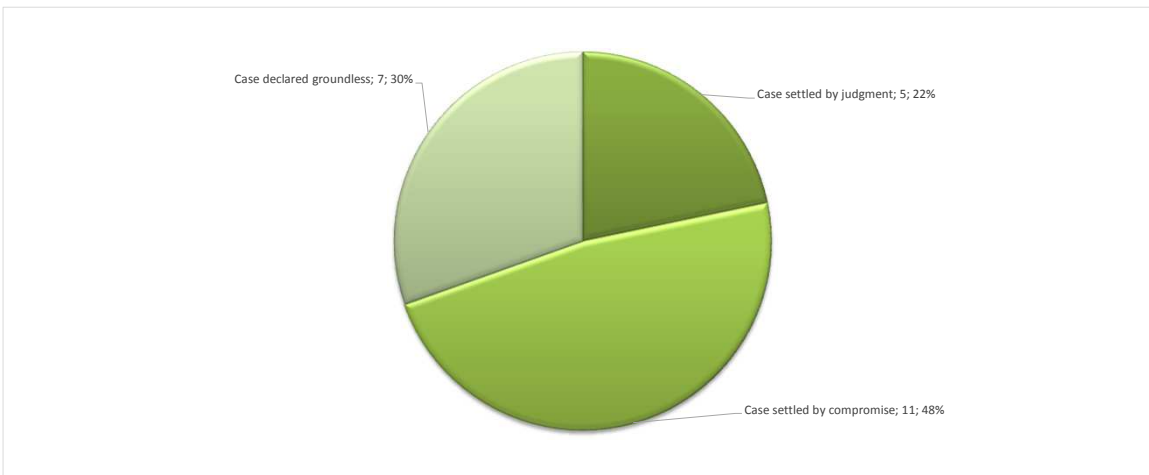
\* in some cases, European and Swiss patents in same protective letter

**Cases by language of proceedings in 2018**



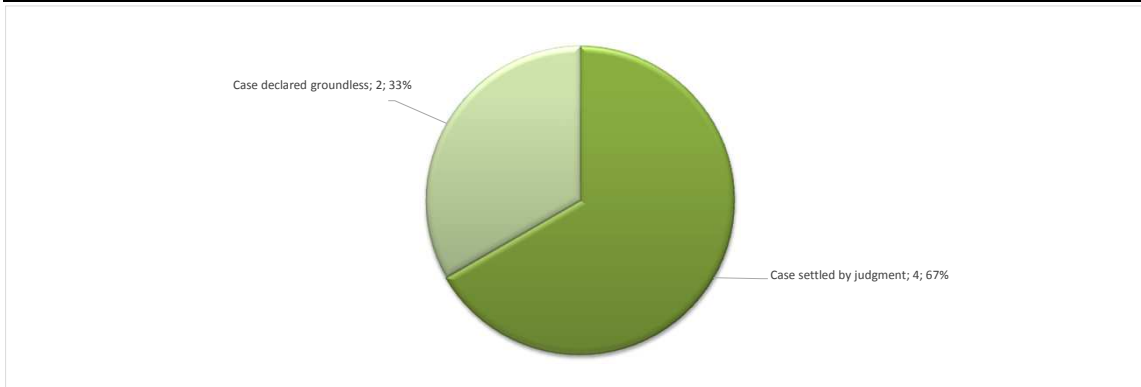
\*including 20 cases where English was used during proceedings (4 regular proceedings, 2 summary proceedings, 14 protective briefs)

**Approach used to settle cases in 2018 (regular proceedings)**



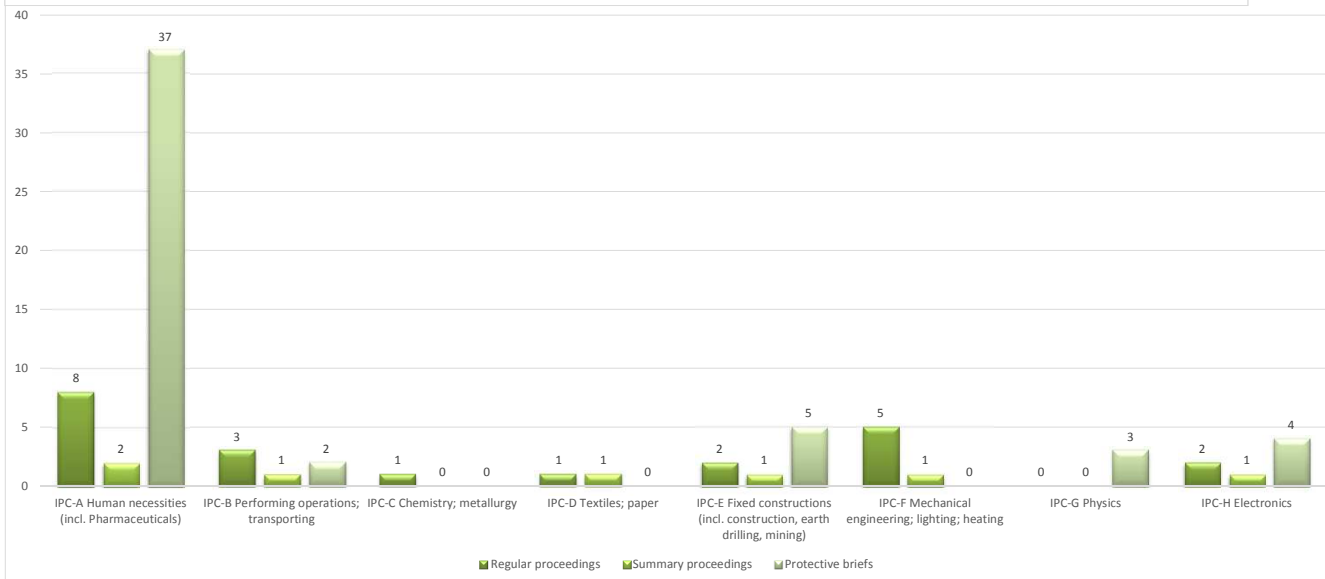
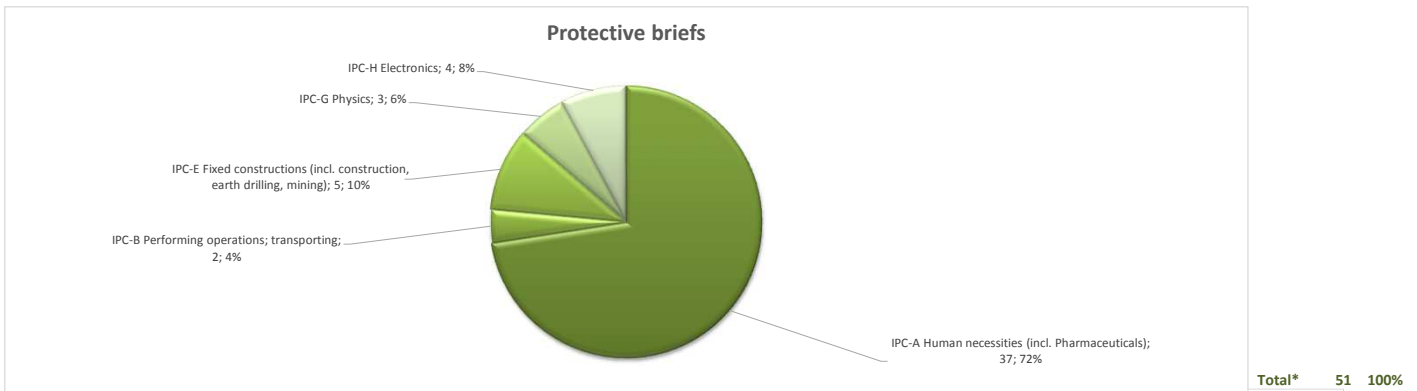
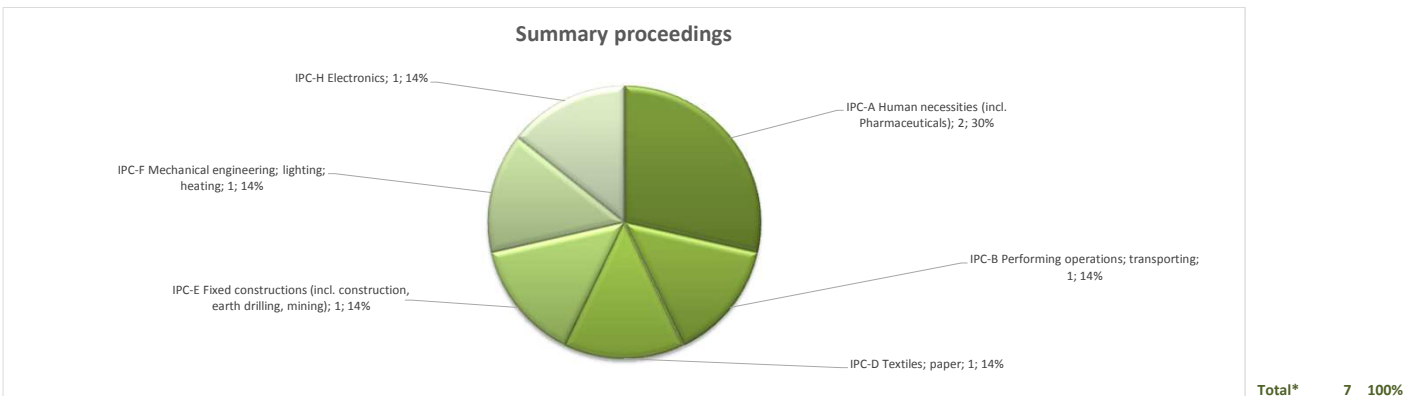
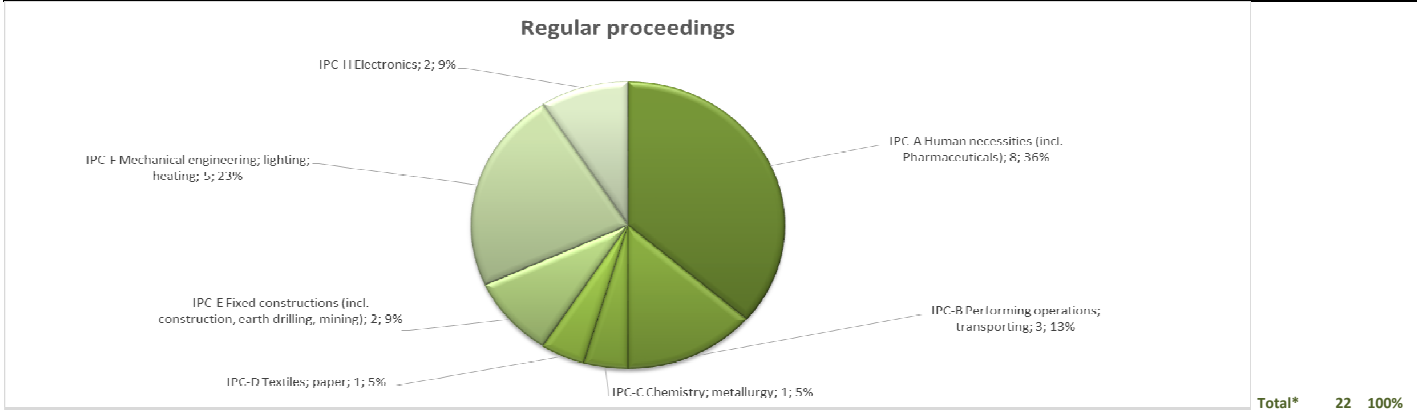
Total 23 100%

**Approach used to settle cases in 2018 (summary proceedings)**



Total 6 100%

Cases by technical field

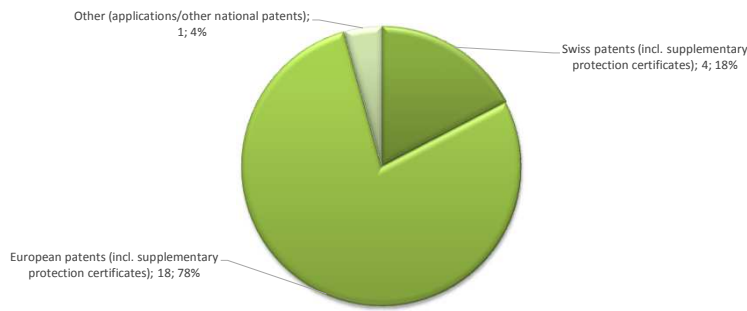


IPC = International Patent Classification

\* some cases related to several technical fields simultaneously

Cases by intellectual property rights

Regular proceedings



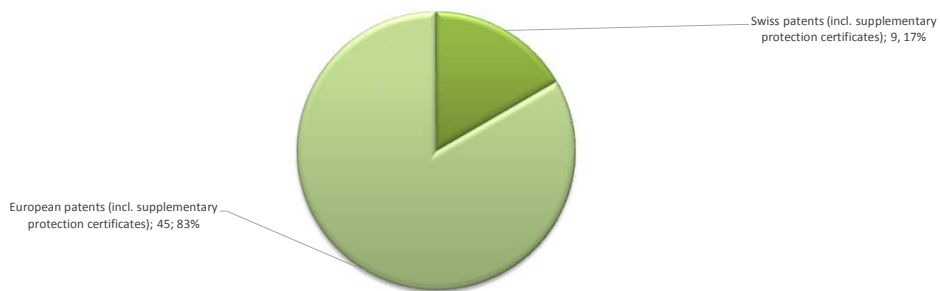
Total\* 22 100%

Summary proceedings

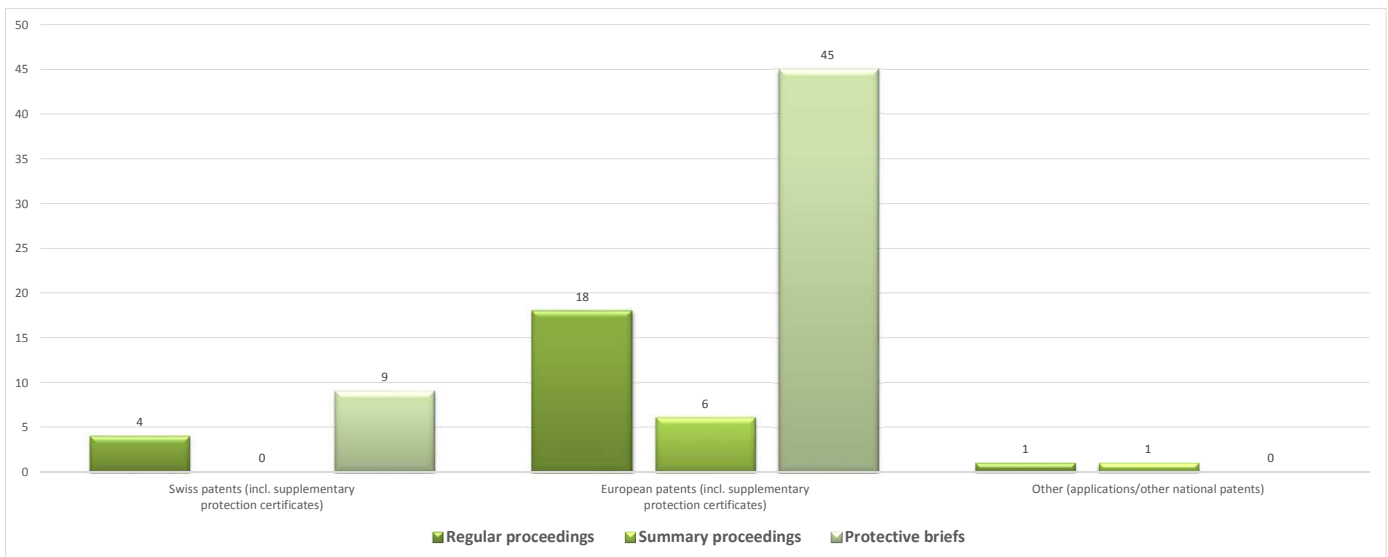


Total\* 7 100%

Protective briefs



Total\* 51 100%



\* some cases related to both a Swiss and European and/or other patent

## Duration of cases

	Cases settled						Cases still pending					
	1 to 3 months	4 to 6 months	7 to 12 months	1 to 2 years	over 2 years	Total cases settled in 2018	1 to 3 months	4 to 6 months	7 to 12 months	1 to 2 years	over 2 years	Total cases still pending at the end of 2018
<b>Regular proceedings</b>												
Infringement of patent without counter-claim of nullity of patent	1	2	4	6	1	14	3	3	4	6	1	17
Nullity of patent without counter-claim of infringement of patent	0	0	1	0	1	2	1	2	2	3	3	11
Infringement and nullity of patent	0	0	0	0	2	2	0	1	1	2	2	6
Right to a patent	0	0	2	0	1	3	0	0	1	0	0	1
Claim	0	0	0	1	0	1	0	0	0	0	0	0
Other	0	0	1	0	0	1	0	0	1	1	0	2
<b>Total</b>	<b>1</b>	<b>2</b>	<b>8</b>	<b>7</b>	<b>5</b>	<b>23</b>	<b>4</b>	<b>6</b>	<b>9</b>	<b>12</b>	<b>6</b>	<b>37</b>
<b>Summary proceedings</b>												
Injunction/safeguarding of interests	1	2	1	0	0	4	1	1	0	0	0	2
Description	0	0	0	0	0	0	0	0	0	0	0	0
Seizure	0	0	0	0	0	0	0	0	0	0	0	0
Evidence secured	0	0	0	0	0	0	0	0	0	0	0	0
Description and evidence secured	0	1	0	0	0	1	0	0	0	0	0	0
Other	0	1	0	0	0	1	0	0	0	0	0	0
<b>Total</b>	<b>1</b>	<b>4</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>6</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>2</b>

## Average duration of cases

	Cases settled		Cases still pending	
	Average duration (days)		Average duration (days)	
<b>Regular proceedings</b>				
Infringement of patent without counter-claim of nullity of patent	354		319	
Nullity of patent without counter-claim of infringement of patent	545		448	
Infringement and nullity of patent	826		527	
Right to a patent	499		259	
Claim	561		0	
Other	324		467	
<b>Average</b>	<b>438</b>		<b>397</b>	
<b>Summary proceedings</b>				
Injunction/safeguarding of interests	156		78	
Description	0		0	
Seizure	0		0	
Evidence secured	0		0	
Description and evidence secured	106		0	
Other	130		0	
<b>Average</b>	<b>143</b>		<b>78</b>	

Approach used to settle case (panel of judges/decision)

	Single judge	Three-member panel	Five-member panel	Seven-member panel	Total	Instruction hearings	Hearings in relation to preliminary measures	Main hearings	Total hearings
<b>Regular proceedings</b>									
Infringement of patent without counter-claim of nullity of patent	13	1	0	0	14	12		1	13
Nullity of patent without counter-claim of infringement of patent	2	0	0	0	2	4		2	6
Infringement and nullity of patent	0	0	2	0	2	3		2	5
Right to a patent	2	0	1	0	3	1		1	2
Claim	1	0	0	0	1	0		0	0
Other	0	0	1	0	1	0		1	1
<b>Total</b>	<b>18</b>	<b>1</b>	<b>4</b>	<b>0</b>	<b>23</b>	<b>20</b>		<b>7</b>	<b>27</b>
<b>Summary proceedings</b>									
Injunction/safeguarding of interests	2	2			4		1		1
Description	0	0			0		0		0
Seizure	0	0			0		0		0
Evidence secured	0	0			0		0		0
Description and evidence secured	0	1			1		0		0
Other	0	1			1		1		1
<b>Total</b>	<b>2</b>	<b>4</b>			<b>6</b>		<b>2</b>		<b>2</b>
<b>Overall total</b>	<b>20</b>	<b>5</b>	<b>4</b>	<b>0</b>	<b>29</b>	<b>20</b>	<b>2</b>	<b>7</b>	<b>29</b>



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