

Annual Report 2013

# **Federal Patent Court**

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## **Annual Report of the Federal Patent Court 2013**

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St. Gallen, 5 February 2014

Mr President

Distinguished members of the National Council and the Council of States

In keeping with Art. 3 para. 3 of the Patent Court Act (PatCA, SR 173.41), we hereby submit the present Annual Report describing our activities in 2013.

Please accept, Mr 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:

Dieter Brändle

First Court Clerk:

Jakob Zellweger

## Foreword

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The Federal Patent Court began its activities on 1 January 2012. Taking over responsibility from the cantonal courts, the Federal Patent Court is now the court of first instance for all civil law disputes on patents. It is exclusively competent for patent infringement and patent validity cases. Other civil actions relating to patents may also be taken to the Federal Patent Court. Examples include civil actions regarding patent license agreements or rights to a patent.

During its first year of existence, the Federal Patent Court devoted its attention to all pending patent proceedings for which the main hearings had not yet been conducted in the cantonal courts. The reporting year 2013 was marked by "business as usual". All Federal Patent Court judges, court clerks and administrative staff had a clear understanding of their tasks and also valued their work. This may explain why there was no staff turnover during the reporting year.

The Federal Patent Court's efforts to settle proceedings in an expeditious and cost-effective manner were largely successful. The technical expertise of its judges enabled most cases to be handled without having to ask external experts to conduct time-consuming and expensive assessments. In addition, the court's judges with technical training clearly enjoyed a high level of acceptance from the parties, which led to an unusually high percentage of cases settled by compromise.

## Members of the court

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### Administrative Board of Judges

President:	Dieter Brändle
Second permanent judge:	Tobias Bremi
Vice-President:	Frank Schnyder

### Non-permanent judges with technical training

Natalia Clerc  
Roland Dux  
Giovanni Gervasio  
Barbara Herren  
Timothy Holman  
Emmanuel Jelsch  
Hanny Kjellsaa-Berger  
Alfred Koepf  
Herbert Laederach  
Christoph Müller  
Markus A. Müller  
Peter Rigling  
André Roland  
Werner A. Roshardt  
Regula Rüedi  
Philipp Rüfenacht  
Christophe Saam  
Frank Schnyder  
Kurt Stocker  
Kurt Sutter  
Daniel Vogel  
Prisca von Ballmoos  
Erich Wäckerlin  
André Werner  
Marco Zardi

### Non-permanent judges with legal training

Daniel M. Alder  
Philippe Ducor  
Christoph Gasser  
Christian Hilti  
Simon Holzer  
Daniel Kraus  
Thomas Legler  
Rudolf Rentsch  
Ralph Schlosser  
Mark Schweizer  
Christoph Willi

## Caseload

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In 2012, the Federal Patent Court received a total of 32 regular proceedings and 11 summary proceedings from cantonal courts, which amounted to practically all of the pending cantonal cases to be handled; during the reporting year, the Federal Patent Court received only 1 regular proceeding from the cantons.

In contrast, the number of cases submitted directly to the Federal Patent Court increased considerably. The Federal Patent Court received 22 regular proceedings (11 in 2012) and 11 summary proceedings (6 in 2012).

During the reporting year, the Federal Patent Court handled 18 regular proceedings (17 in the previous year), of which 16 were settled by compromise (11 in the previous year). This 89% ratio of cases settled by compromise will probably remain an exception. The Federal Patent Court sees itself as a service provider to the private sector. Each patent case is an obstacle for all of the parties concerned and the aim is to overcome this obstacle. One means of achieving this objective is to issue a judgment but a better alternative is for the parties to reach a compromise. The Federal Patent Court therefore strives to reach mutually acceptable compromises in its handling of cases. During instruction hearings, which take place after the first exchange of briefs, the court delegation provides the parties with a preliminary legal as well as - and especially - a technical assessment of the dispute. The Federal Patent Court expects that this approach will result in a settlement by compromise in around 50% of the

cases, either during the hearing itself or shortly afterwards. This is fairly remarkable considering that similar patent courts in Germany, the Netherlands and the United Kingdom rarely reach such an outcome. That said, it is unlikely that an average ratio exceeding the 50% threshold can be achieved over time.

A total of 5 summary proceedings (11 in the previous year) were settled during the reporting year, 1 of which was settled by compromise. As was to be expected, the descriptions referred to in Art. 77 para. 1 let. b PatA were time consuming since numerous steps had to be completed: the first step – generally taken after the defendant has taken a stance on the claim – is to decide whether a description is needed. If so, the second step is to actually carry out the description on site. The third and final step is to enter the description into the official record of the proceedings. This is done before the description is given to the applicant and after discussion with the defendant to determine which observations should be blackened out (i.e. to protect the defendant's trade secrets) and which parts are not relevant to the patent infringement claim. Each of these steps requires a certain amount of time.

Also in regular proceedings, the Federal Patent Court has had to contend with unavoidable delays, in particular in cases where: briefs had to be delivered abroad; a change of a party position was contested; multiple amendments were made to a patent claim and or to prayers for relief; judges had to be selected to sit on panels making sure there is no conflict of interest (based on the requirements of FSC 139 III 433); and,

in particular, dates had to be scheduled for instruction and main hearings. The Federal Patent Court feels that it is important that not only the parties' legal counsels and patent attorneys be present at hearings but also representatives of the parties who are familiar with the case and who have the power to act on behalf of the party to settle cases by compromise. This can lead to delays, particularly in case foreign parties are involved in the dispute (i.e. in over 50% of the cases).

## **Non-permanent judges**

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The system of non-permanent judges with technical or legal training has proven to be effective. The possibility of staffing panels with qualified legal and technical experts from a given field ensures that these panels are highly competent. The litigants also appreciate this, as can be seen in the relatively high percentage of cases settled by compromise.

## Languages

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The language of proceedings used in all 23 of the ordinary proceedings submitted to the Federal Patent Court during the reporting year was German, in accordance with the language in which the complaints were filed. In two of the cases – but nevertheless only after receiving a reply to the complaint – litigants mutually agreed to invoke their right to use English in submissions and hearings instead of an official language of Switzerland. 10 of the summary proceedings were handled in German and only 1 in French. The distribution of languages was similar for protective briefs: 24 were drafted in German and 3 in French. Not a single proceeding was in Italian.

## Finances

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The profit and loss statement of the Federal Patent Court shows a total expenditure of CHF 1,687,424 and total income of CHF 566,176, before payment from the Swiss Federal Institute of Intellectual Property (IPI). The remaining amount to be covered by the IPI by virtue of Art. 4 PatCA therefore stands at CHF 1,121,248. This figure is considerably lower than in the previous reporting year. Both the forecasted income from court fees and the forecasted expenditure were considerably lower than what had been set out in the cost estimate for 2013. This difference can be explained by the fact that no historical figures were available at the time when the cost estimate was prepared.



## Cooperation

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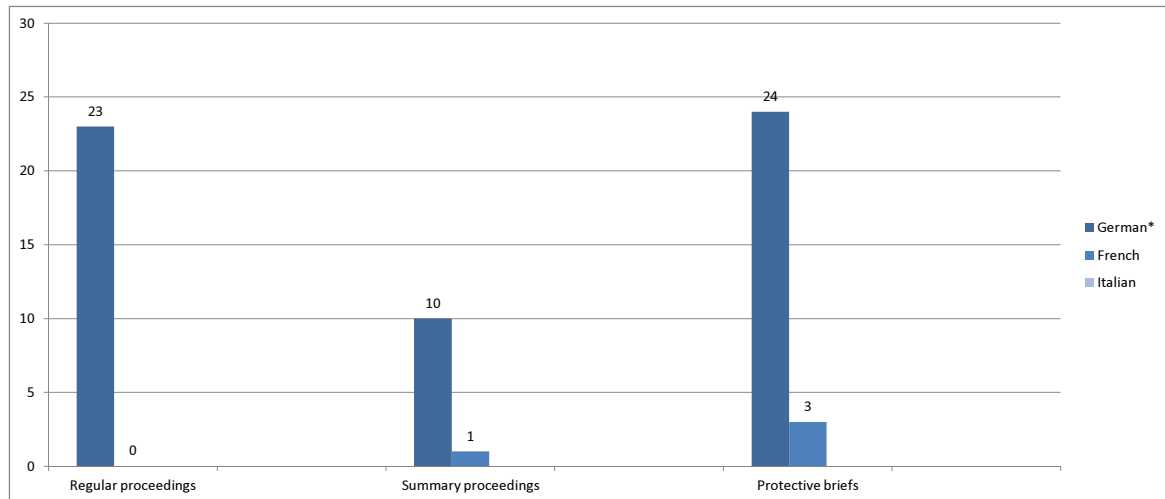
The Federal Patent Court greatly appreciated the support that it received in supervisory meetings with the Federal Supreme Court in Lucerne on 10 April 2013 and in St. Gallen on 30 October 2013. Cooperation with the Federal Administrative Court also went smoothly. Nevertheless, the rather lengthy decision-making processes within the large-size Federal Administrative Court and the very short decision-making processes at the Federal Patent Court sometimes made it more difficult to achieve the desired level of harmony. The annual meeting between the Administrative Board of Judges of the Federal Patent Court and the administrative commissions of the Federal Criminal Court and the Federal Administrative Court enabled pending issues affecting all three federal courts to be discussed in an informal and relevant manner.

## Number and type of case

	Action taken					Outcome of proceedings			
	Cases still pending before 1 Jan. 2013	Cases transferred to FPC from cantonal courts	Cases submitted directly to FPC in 2013	Cases settled in 2013	Cases still pending on 31 Dec. 2013	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	12	0	11	5	18	0	5	0	0
Nullity of patent without counter-claim of infringement of patent	7	0	8	8	7	1	7	0	0
Infringement and nullity of patent	2	0	0	1	1	0	1	0	0
Right to a patent	1	1	3	2	3	1	1	0	0
Claim	3	0	0	2	1	0	2	0	0
Other	1	0	0	0	1	0	0	0	0
<b>Total</b>	<b>26</b>	<b>1</b>	<b>22</b>	<b>18</b>	<b>31</b>	<b>2</b>	<b>16</b>	<b>0</b>	<b>0</b>
<b>Summary proceedings</b>									
Injunction/safeguarding of interests	0	0	6	3	3	2	1	0	0
Description	0	0	1	1	0	1	0	0	0
Seizure	0	0	0	0	0	0	0	0	0
Evidence secured	0	0	1	0	1	0	0	0	0
Description and evidence secured	0	0	2	1	1	1	0	0	0
Other	0	0	1	0	1	0	0	0	0
<b>Total</b>	<b>0</b>	<b>0</b>	<b>11</b>	<b>5</b>	<b>6</b>	<b>4</b>	<b>1</b>	<b>0</b>	<b>0</b>
<b>Protective briefs</b>									
	Transfer from 2012	Received in 2013	Period of protection expired	Relevant up to 2014					
Swiss patents (incl. supplementary protection certificates)	1	3	3	1					
European patents (incl. supplementary protection certificates)	15	25	21	19					
<b>Total*</b>	<b>16</b>	<b>27</b>	<b>23</b>	<b>20</b>					

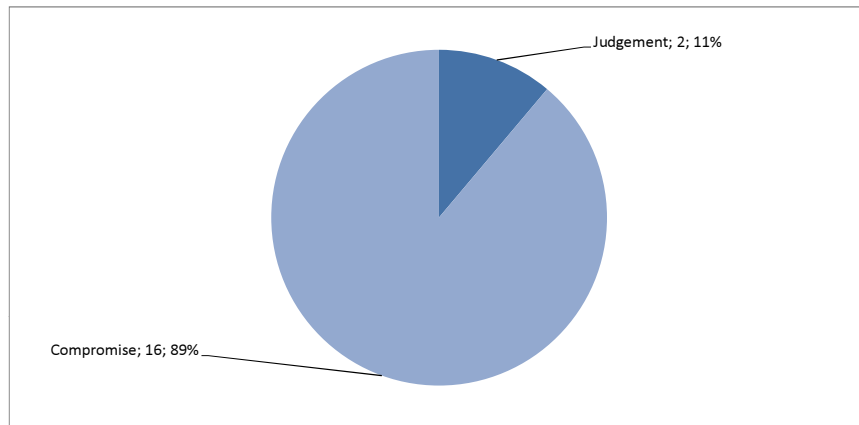
\* In some cases, European and Swiss patents in same protective letter

**Cases by language of proceedings in 2013**



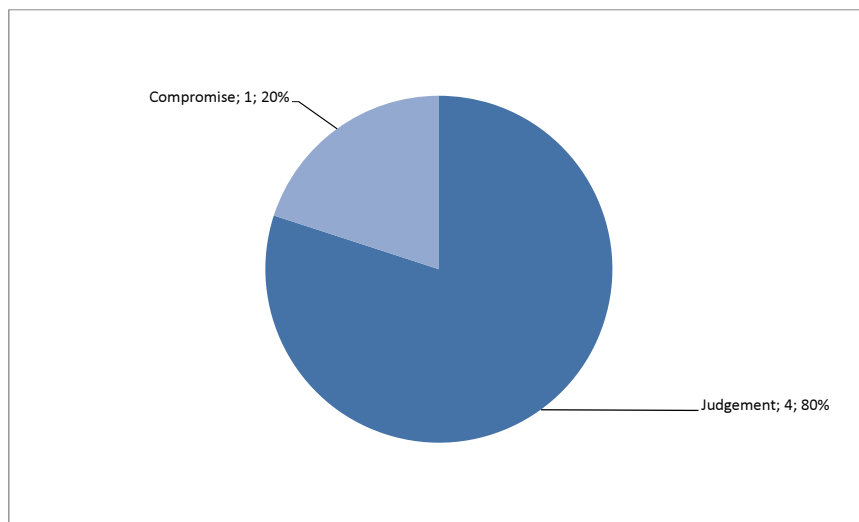
\*including 2 cases where English was used during proceedings

**Approach used to settle cases in 2013 (regular proceedings)**



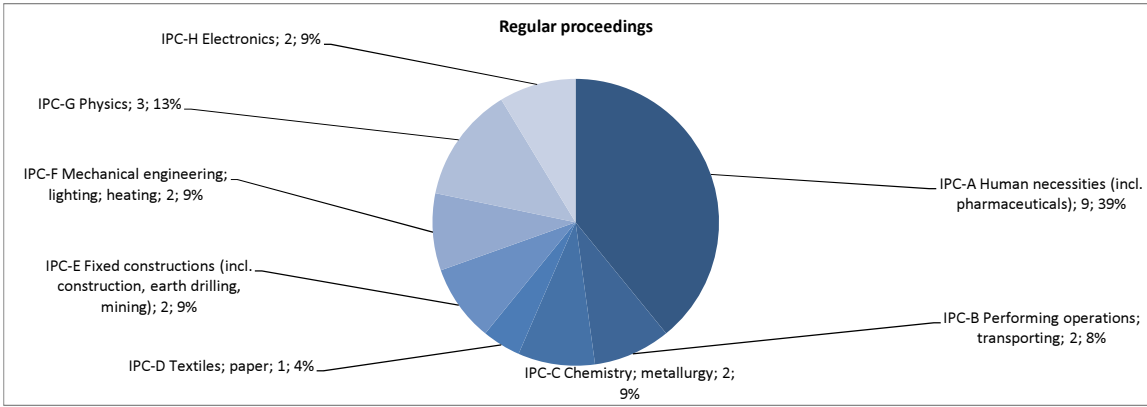
Total 18  
100%

**Approach used to settle cases in 2013 (summary proceedings)**

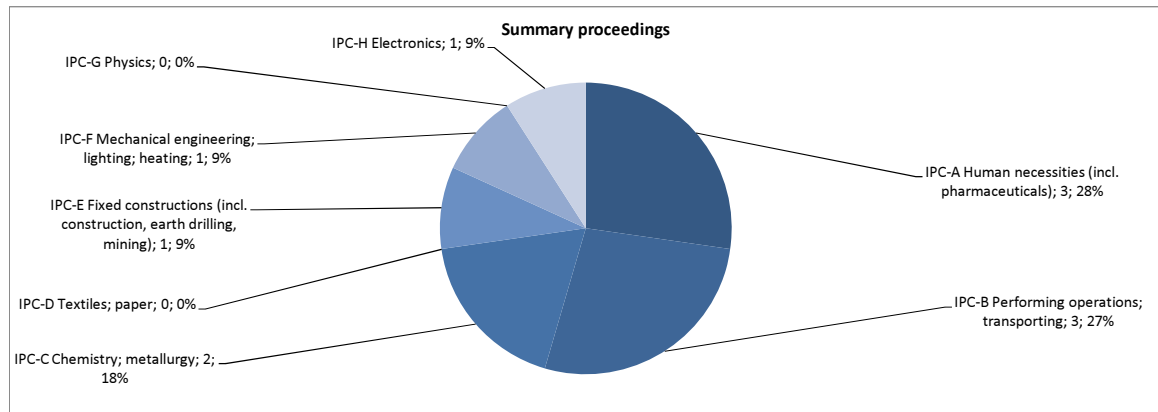


Total 5  
100%

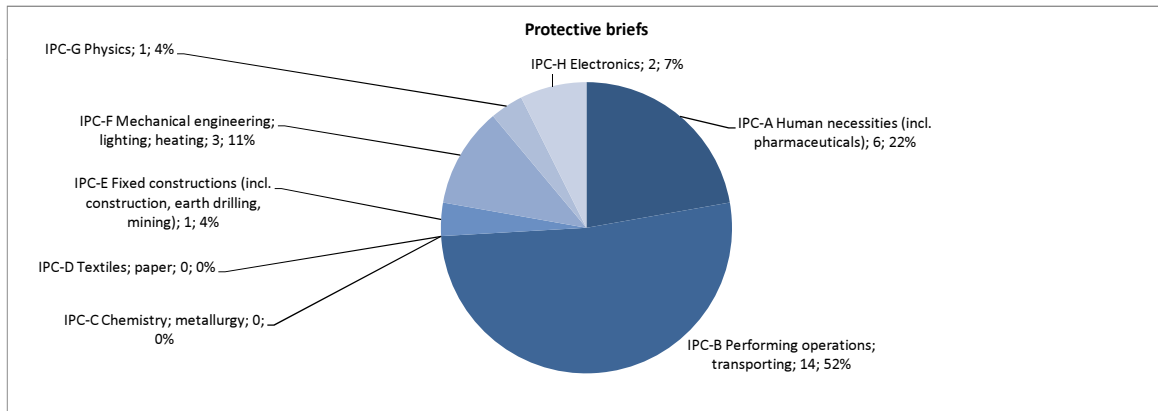
**Cases by technical field**



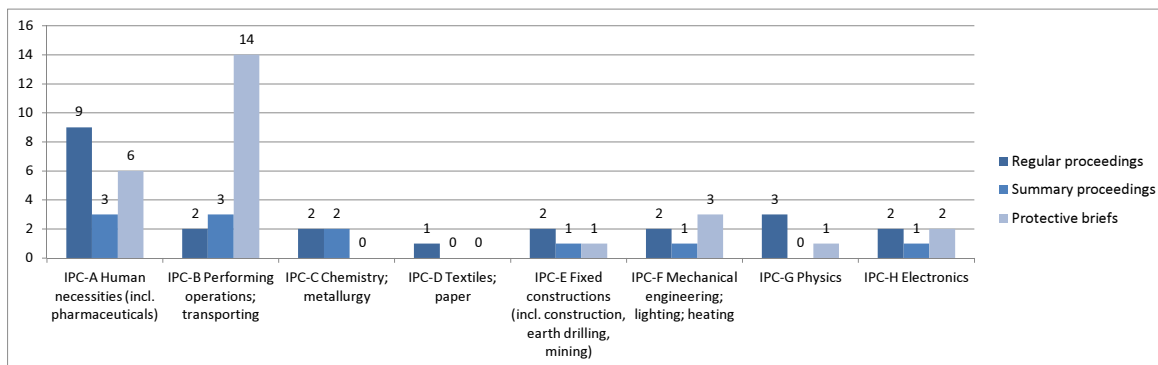
Total: 23\*



Total: 11\*



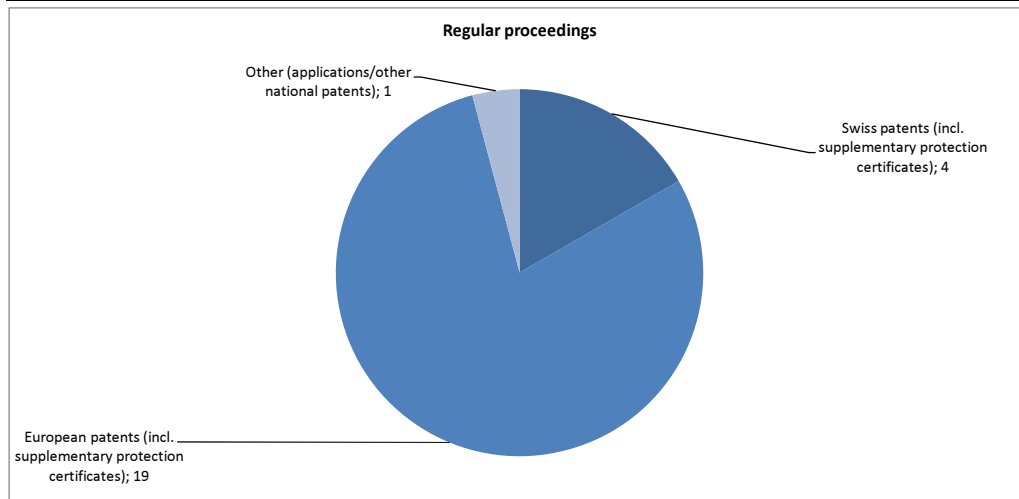
Total: 27\*



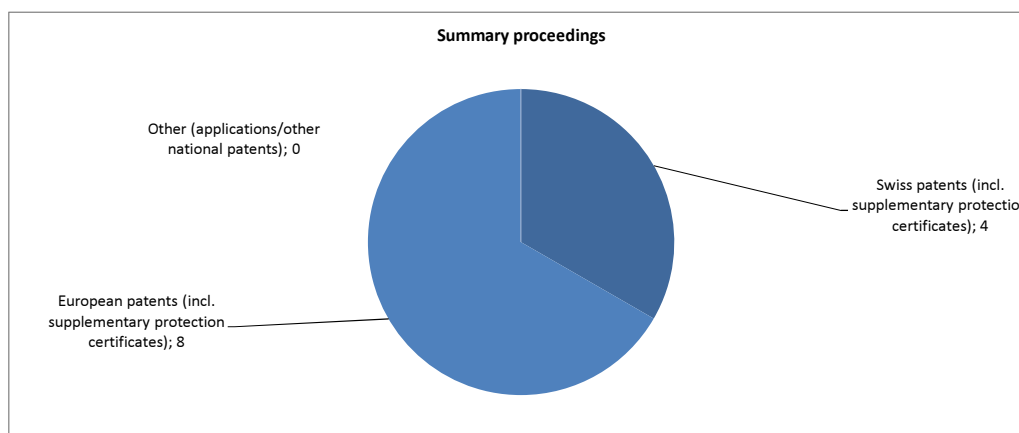
IPC = International Patent Classification

\* Some cases related to several technical fields simultaneously

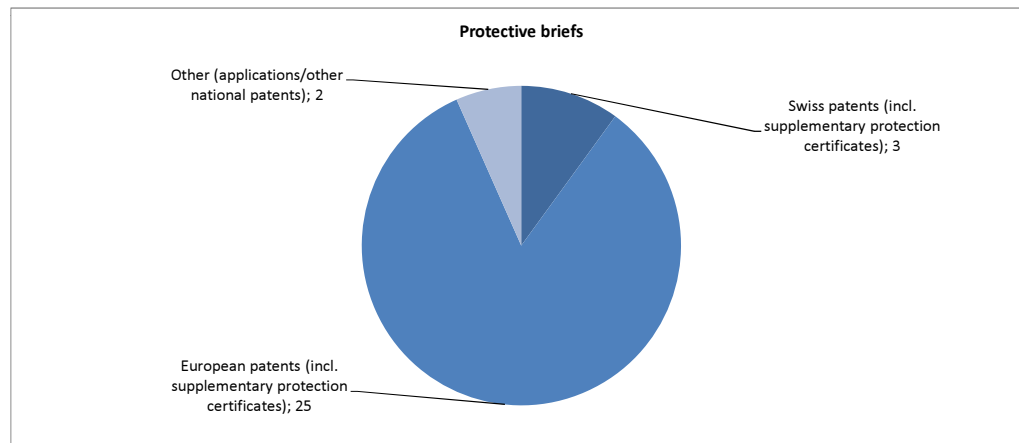
**Cases by intellectual property rights**



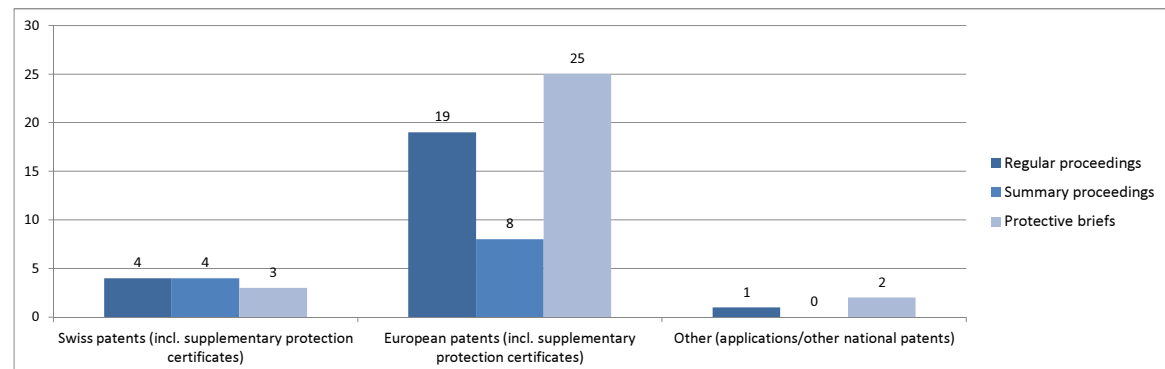
**Total: 23\***



**Total: 11\***



**Total: 27\***



\* Some cases related to both a Swiss and European 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 2013	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 2013
<b>Regular proceedings</b>												
Infringement of patent without counter-claim of nullity of patent	1	1	1	-	2	5	2	2	5	5	4	18
Nullity of patent without counter-claim of infringement of patent	1	-	-	1	6	8	4	3	-	-	-	7
Infringement and nullity of patent	-	-	-	1	-	1	-	-	-	-	1	1
Right to a patent	-	1	-	-	1	2	1	-	2	-	-	3
Claim	-	-	1	-	1	2	-	-	-	1	-	1
Other	-	-	-	-	-	0	-	-	-	1	-	1
<b>Total</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>10</b>	<b>18</b>	<b>7</b>	<b>5</b>	<b>7</b>	<b>7</b>	<b>5</b>	<b>31</b>
<b>Summary proceedings</b>												
Injunction/safeguarding of interests	2	-	1	-	-	3	-	1	2	-	-	3
Description	-	1	-	-	-	1	-	-	-	-	-	0
Seizure	-	-	-	-	-	0	-	-	-	-	-	0
Evidence secured	-	-	-	-	-	0	-	1	-	-	-	1
Description and evidence secured	-	1	-	-	-	1	1	-	-	-	-	1
Other	-	-	-	-	-	0	1	-	-	-	-	1
<b>Total</b>	<b>2</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>5</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>6</b>

## Average duration of cases

	<b>Cases settled</b>			<b>Cases still pending</b>		
	Average duration (days)			Average duration (days)		
	In cantonal courts	In FPC	Total	In cantonal courts	In FPC	Total
<b>Regular proceedings</b>						
Infringement of patent without counter-claim of nullity of patent	1713	243	928	375	394	477
Nullity of patent without counter-claim of infringement of patent	879	413	1072	-	80	80
Infringement and nullity of patent	-	440	440	1335	649	1984
Right to a patent	567	453	964	-	229	229
Claim	3937	326	2294	-	573	573
Other	-	-	-	36	633	633
<b>Average</b>	<b>1252</b>	<b>343</b>	<b>1062</b>	<b>479</b>	<b>329</b>	<b>420</b>
<b>Summary proceedings</b>						
Injunction/safeguarding of interests	-	114	114	-	198	198
Description	-	140	140	-	-	-
Seizure	-	-	-	-	-	-
Evidence secured	-	-	-	-	169	169
Description and evidence secured	-	151	151	-	70	70
Other	-	-	-	-	83	83
<b>Average</b>	<b>-</b>	<b>121</b>	<b>121</b>	<b>-</b>	<b>153</b>	<b>153</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	5	-	-	-	5	6	-	-	6
Nullity of patent without counter-claim of infringement of patent	7	-	1	-	8	-	2	2	2
Infringement and nullity of patent	1	-	-	-	1	1	1	1	2
Right to a patent	1	-	1	-	2	1	1	1	2
Claim	2	-	-	-	2	1	1	1	2
Other	-	-	-	-	0	-	-	-	-
<b>Total</b>	<b>16</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>18</b>	<b>9</b>		<b>5</b>	<b>14</b>
<b>Summary proceedings</b>									
Injunction/safeguarding of interests	1	2	-	-	3	-	1	-	1
Description	-	1	-	-	1	-	-	-	0
Seizure	-	-	-	-	0	-	-	-	0
Evidence secured	-	-	-	-	0	-	-	-	0
Description and evidence secured	-	1	-	-	1	-	1	-	1
Other	-	-	-	-	0	-	-	-	-
<b>Total</b>	<b>1</b>	<b>4</b>			<b>5</b>		<b>2</b>		<b>2</b>
<b>Overall total</b>	<b>17</b>	<b>4</b>	<b>2</b>	<b>0</b>	<b>23</b>	<b>9</b>	<b>2</b>	<b>5</b>	<b>16</b>