

Annual Report 2016

Federal Patent Court

Executive Summary

Compared to the previous year, the total number of incoming cases once again increased to 27 (23 in the previous year). The increase was attributed not so much to ordinary proceedings (18 compared to 19 in the previous year) as to summary proceedings (9 compared to 4 in the previous year).

During the reporting year, the Federal Patent Court handled 17 ordinary proceedings, of which eight were settled, seven were terminated by judgment and two were declared groundless. A total of seven summary proceedings were terminated during the reporting year, two of which were settled by compromise and five were terminated by judgment.

The Federal Patent Court continued its policy of seeking the rapid and cost-effective handling of proceedings. Thanks to the technical expertise of its judges, the Federal Patent Court was once again able to handle cases in the reporting year without having to rely on the time-consuming and costly calling in of external experts.

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Annual Report of the Federal Patent Court 2016

St. Gallen, 2 February 2017

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 2016.

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:

Susanne Anderhalden

Foreword

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 action suits relating to patents may also be taken to the Federal Patent Court (e.g. civil action suits regarding patent license agreements).

Looking back at its first five years of activity, the Federal Patent Court has managed to handle all proceedings in an optimal fashion. The court is functioning smoothly.

Members of the court

Administrative Board of Judges

President:	Dieter Brändle, Dr. iur.
Second permanent judge:	Tobias Bremi, Dr. sc. Nat. ETH
Vice-President:	Frank Schnyder, lic. iur., Dipl. Mikrotech.-Ing. ETH

Non-permanent judges with technical training

Natalia Clerc, Dipl. Phys. ETH
Roland Dux, Dr. rer. nat., Dipl. Chem.
Giovanni Gervasio, Ph.D. Phys.
Barbara Herren, Dr. phil. nat. Dipl. Chem.
Timothy Holman, MA Chem. (Oxon)
Emmanuel Jelsch, Dipl. Biochemie-Pharmacologie
Hanny Kjellsaa-Berger, Dr. rer. nat., Dipl. Chem.
Alfred Koepf, Dr. sc. nat. ETH
Herbert Laederach, Dr. sc. techn., Dipl. Masch.-Ing. ETH
Christoph Müller, Dipl. Ing. Phys. EPFL
Markus A. Müller, Dr. sc. techn. ETH, Dipl. El.-Ing. ETH
Peter Rigling, Dipl. El.-Ing. ETH, MSBME
André Roland, Dipl. Phys.
Werner A. Roshardt, Dipl. Phys. ETH
Regula Rüedi, Dr. sc. nat., Dipl. Chem. ETH
Philipp Rüfenacht, Dr. phil. nat., Dipl. Phys.
Christophe Saam, Dipl. El.-Ing. ETH
Frank Schnyder, lic. iur., Dipl. Mikrotech.-Ing. ETH
Andreas Schöllhorn Savary, Dr. phil. II, Dipl. Biochem.
Martin Sperrle, Dr. sc. nat., Dipl. Chem. ETH
Hannes Spillmann, Dr. sc. nat., Dipl. Chem.
Kurt Stocker, Dipl. Phys. ETH
Kurt Sutter, Dr. sc. nat., Dipl. Phys. ETH
Daniel Vogel, Dipl. El.-Ing. ETH, MSc. C.S.
Prisca von Ballmoos, Dipl. Natw. ETH
André Werner, Dipl. Masch.-Ing. ETH
Marco Zardi, Dipl. Chem.-Ing. ETH

Non-permanent judges with legal training

Daniel M. Alder, Dr. iur.
Philippe Ducor, Dr. iur., Dr. med.
Christoph Gasser, Dr. iur.
Christian Hilti, Dr. iur.
Simon Holzer, Dr. iur.
Daniel Kraus, Prof. Dr. iur.
Thomas Legler, Dr. iur.
Rudolf Rentsch, lic. iur. HSG, Dipl. El.-Ing. ETH
Ralph Schlosser, Dr. iur.
Mark Schweizer, Dr. iur.
Christoph Willi, Dr. iur.

There have been no changes to the number of judges.

Caseload

By the end of 2015, there were 26 ordinary and no summary proceedings pending at the Federal Patent Court.

Compared with the previous year, the total number of incoming cases once again increased to 27 (23 in the previous year). The increase was attributed not so much to ordinary proceedings (18 compared to 19 in the previous year) as to summary proceedings (9 compared to 4 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 handled 17 ordinary proceedings (19 in the previous year), of which eight were settled (16 in the previous year), seven were terminated by judgment (1 in the previous year), two were declared groundless (1 in the previous year). The comparably low number of cases settled and correspondingly higher number of judgments resulted from the fact that the parties to the disputes in question wanted the matter to be terminated by means of a court ruling. Five of the judgments were appealed before the Federal Supreme Court (in 3 of these cases, the FSC upheld the FPC ruling, in 1 case it overturned the FPC ruling and 1 case is still pending). Despite the lower ratio of cases settled in the reporting year, this ratio stands at around 75% for the first five years of activity. The Federal Patent Court considers 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 alterna-

tive is for the parties to reach a settlement that both sides can agree to. Not only does this provide the parties with a solution, it saves a great deal of time and money compared to a case in which a judgment is rendered and may eventually be taken before the Federal Supreme Court. The Federal Patent Court therefore strives, in the interests of the parties, to reach mutually acceptable compromises in its handling of cases. During instructional 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.

Because 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 consistently high level. As far as we can tell, no other country has achieved comparable ratios. This is fairly remarkable considering that similar patent courts in Germany, France, the Netherlands and the United Kingdom rarely reach such an outcome. Over time, such outcomes achieved by the Federal Patent Court will 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 will be established.

A total of seven summary proceedings (9 in the previous year) were terminated during the reporting year, two of which were settled (2 in the previous year) and five terminated by judgment (7 in the previous year). None of the cases were referred to the Federal Supreme Court.

Non-permanent judges

The system of non-permanent judges with technical and legal expertise 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 and able to provide the parties with judgments that will be accepted and form the basis for compromise solutions.

Languages

During the reporting year, 17 of the ordinary proceedings submitted to the Federal Patent Court were handled in German, one case in French. In the summary proceedings, German was used in all nine cases. None of the cases were handled in Italian. In six ordinary proceedings and in one summary proceeding, litigants mutually agreed to invoke the legal right conferred upon them by the Federal Patent Court to use English in submissions and hearings instead of an official language of Switzerland. Clearly, the parties show a great interest to plead their cases in English. This can be explained by the fact that English is the working language used not just by foreign companies involved in court cases here but also by the R&D and patent divisions of a number of Swiss companies. Even in cases where English is used by the parties, the Federal Patent Court itself is legally obliged to carry out its activities in an official language of Switzerland. As could be expected, this turned out to be impractical. The Federal Patent Court attempted to introduce legislative amendments to remedy this situation but had to desist in the face of limited prospects of success. The issue is still a pressing one.

Administrative office

There are currently two office co-managers (equivalent to a combined workweek percentage of 130%) and two clerks (equivalent to a combined workweek percentage of 90%). No staff changes have been made with respect to the previous year, in terms of staff size, positions held and/or staff turnover

Premises

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 canton where the proceedings are to be held provides the hearing rooms. Corresponding cooperation has gone smoothly.

Finances

The profit and loss statement of the Federal Patent Court shows a total expenditure of CHF 1,638,689 and a total income of CHF 934,182 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 704,507. This figure is around 8% lower than in the previous reporting year. Income from court fees covered 57% of the expenditure of the Federal Patent Court. This was only possible because of one very large court case that had been transferred to the Federal Patent Court from a cantonal court. The court case in question generated CHF 250,000 in court fees due to the extremely high litigation value in dispute. Over the long term, however, the average cost coverage ratio is expected to remain at about 50%.

Cooperation

The Federal Patent Court greatly appreciated the support that it received in supervisory meetings with the Federal Supreme Court in Lucerne on 31 March and in St. Gallen on 13 October. Cooperation with the Federal Administrative Court also went smoothly. 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 was held on 23 February, enabling pending issues affecting all three federal courts to be discussed in an informal and relevant manner.

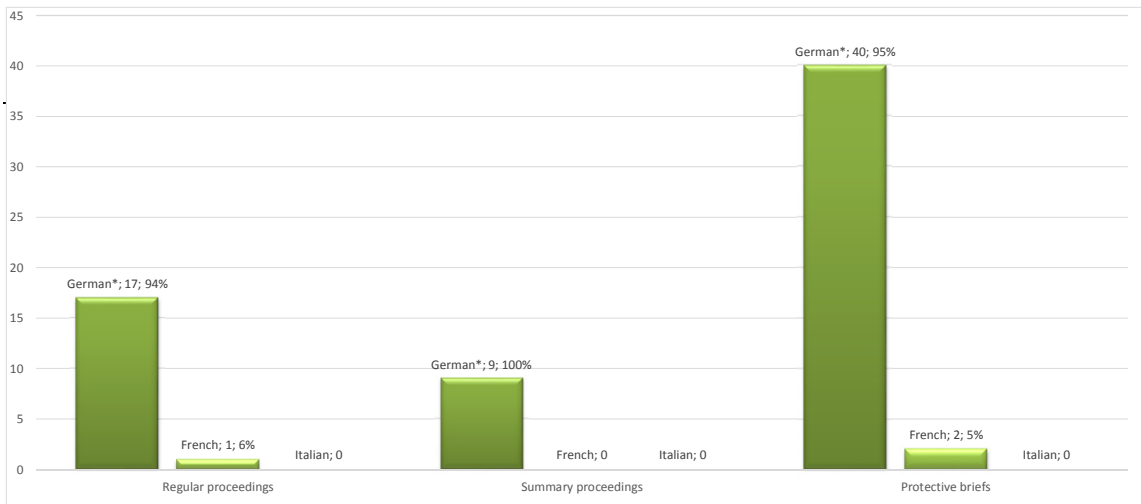
Statistics

Number and type of case

	Action taken				Outcome of proceedings			
	Cases still pending before 01.01.2016	Cases submitted to FPC in 2016	Cases settled	Cases still pending on 31.12.2016	Case settled by judgment	Case settled by compromise	Case declared inadmissible	Case declared groundless
Regular proceedings								
Infringement of patent without counter-claim of nullity of patent	11	7	7	11	4	3	0	0
Nullity of patent without counter-claim of infringement of patent	6	9	6	9	3	1	0	2
Infringement and nullity of patent	4	0	1	3	0	1	0	0
Right to a patent	4	0	2	2	0	2	0	0
Claim	1	2	1	2	0	1	0	0
Other	0	0	0	0	0	0	0	0
Total	26	18	17	27	7	8	0	2
Summary proceedings								
Injunction/safeguarding of interests	0	8	6	2	4	2	0	0
Description	0	1	1	0	1	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	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0
Total	0	9	7	2	5	2	0	0
Protective briefs								
	Transfer from 2015	Received in 2016	Period of protection expired	Relevant up to 2017				
Swiss patents (incl. supplementary protection certificates)	9	4	13	0				
European patents (incl. supplementary protection certificates)	24	38	42	20				
Total*	32	42	54	20				

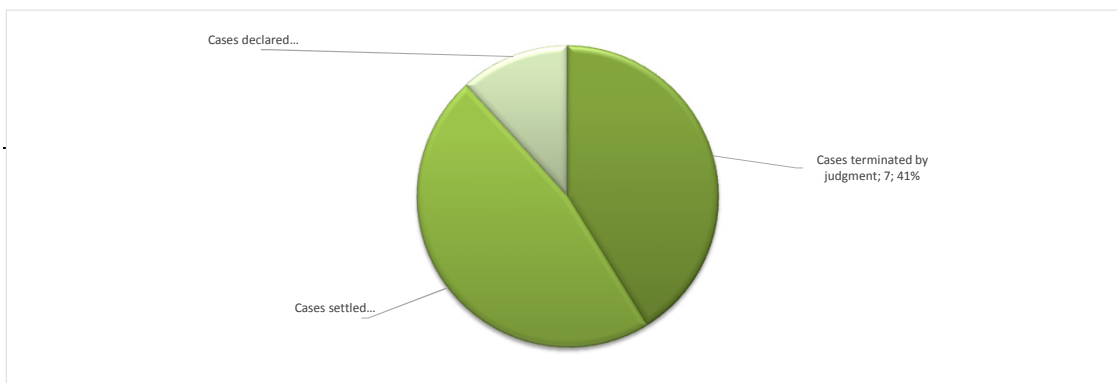
* in some cases, European and Swiss patents in same protective brief

Cases by language of proceedings in 2016

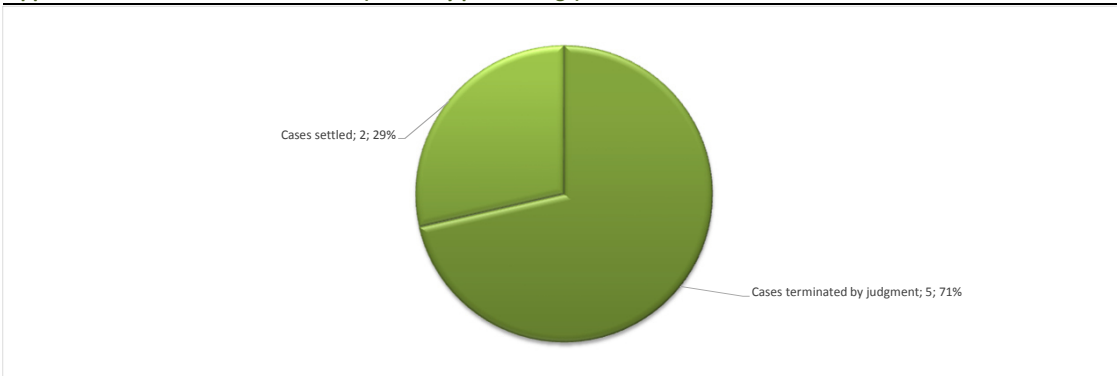


*including 8 cases where English was used during proceedings (6 regular proceedings, 1 summary proceeding, 1 protective brief)

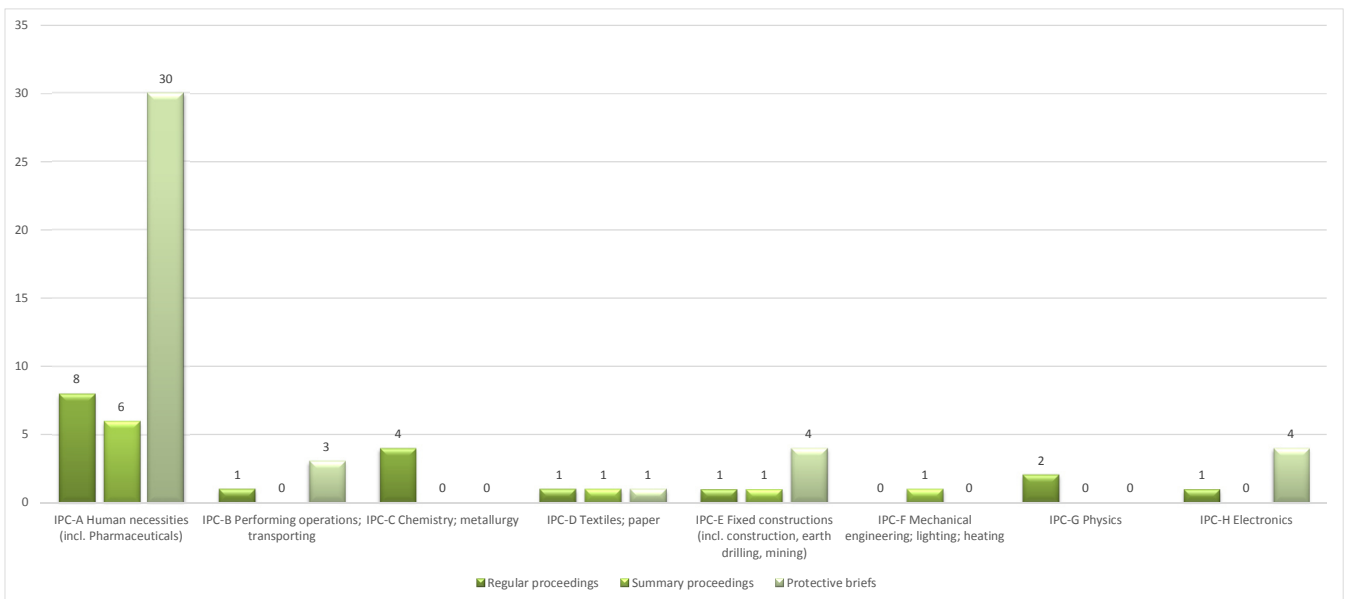
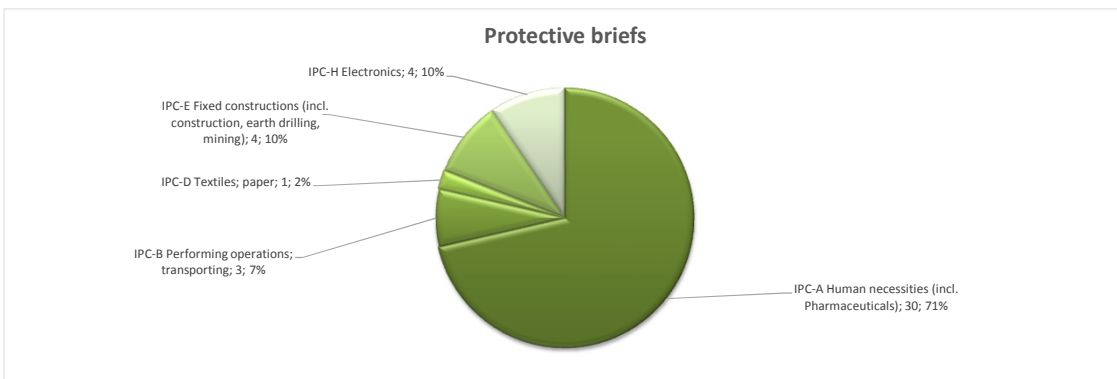
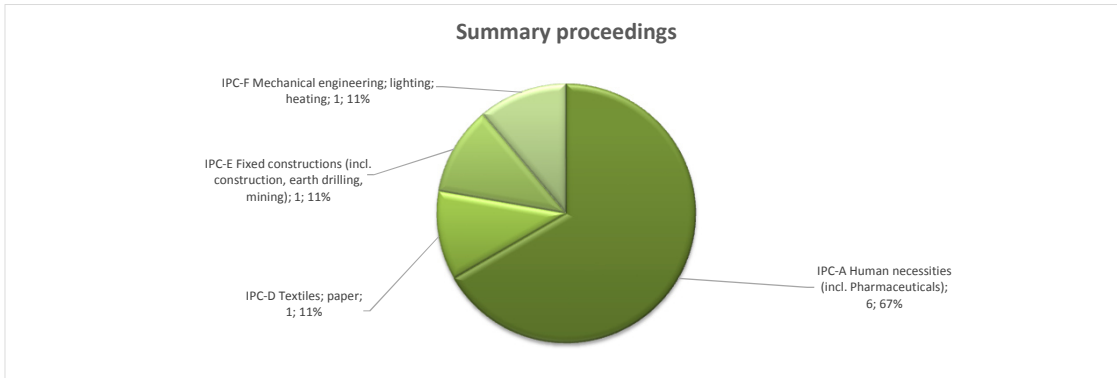
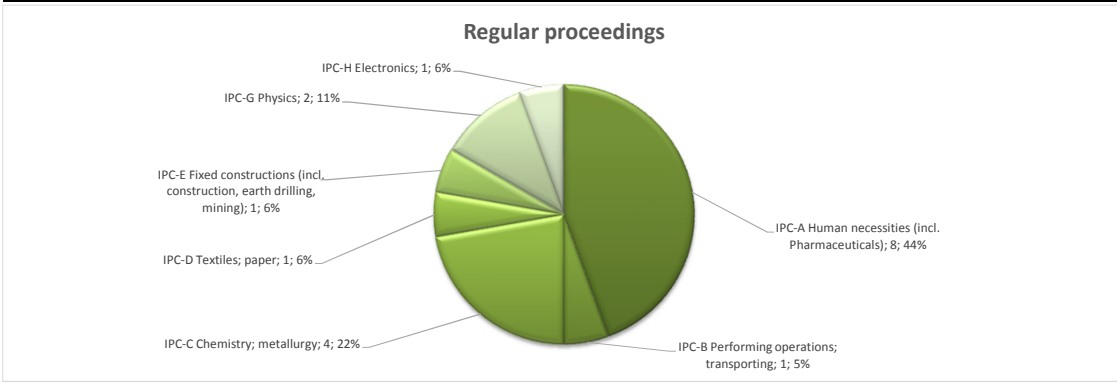
Approach used to settle cases in 2016 (regular proceedings)



Approach used to settle cases in 2016 (summary proceedings)



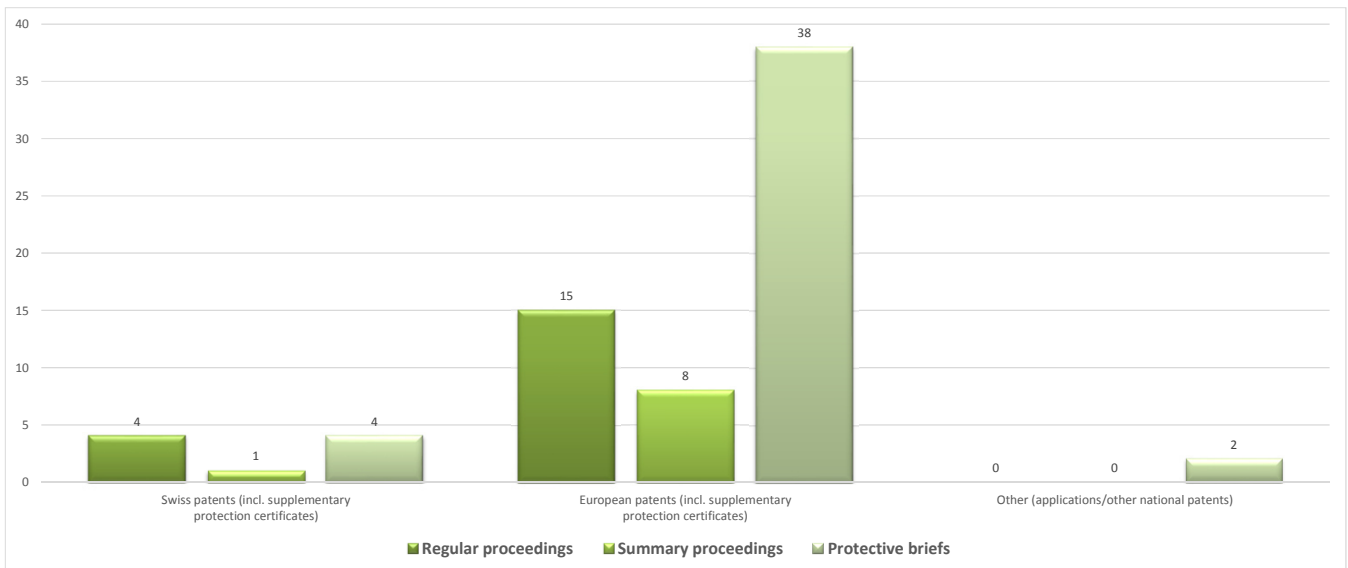
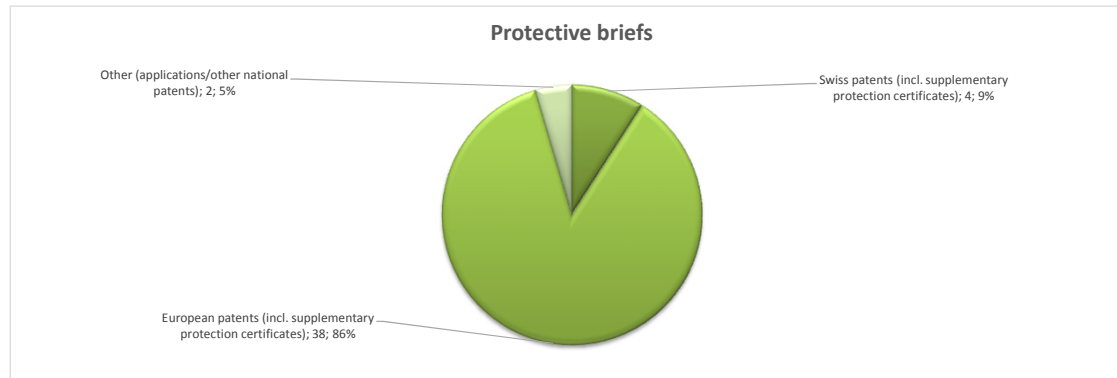
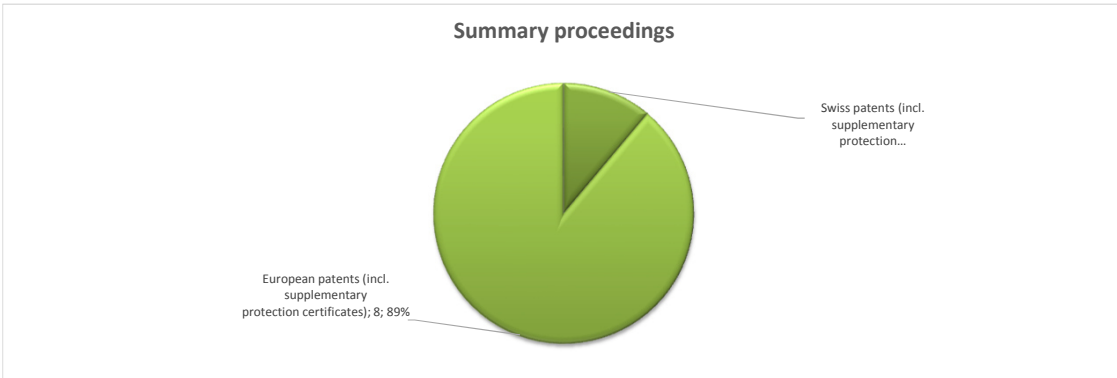
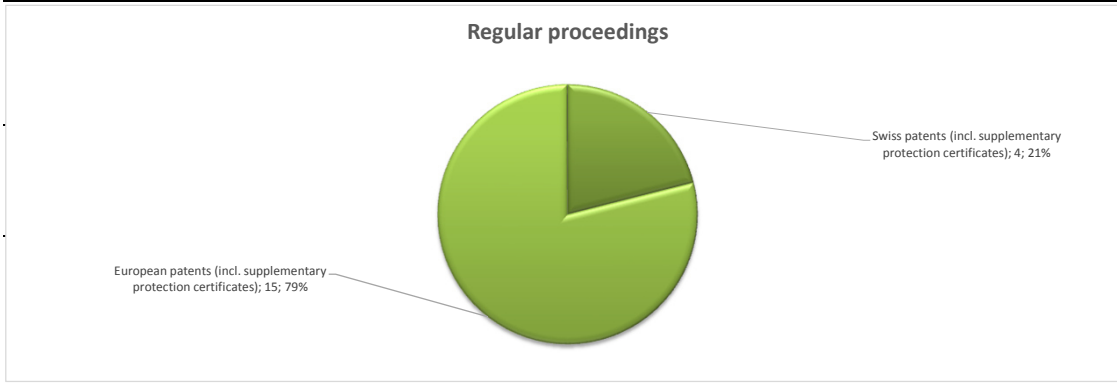
Cases by technical field



IPC = International Patent Classification

* some cases related to several technical fields simultaneously

Cases by intellectual property rights



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

Duration of cases

	Cases terminated						Cases still pending					
	1 to 3 months	4 to 6 months	7 to 12 months	1 to 2 years	over 2 years	Total cases terminated in 2016	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 2016
Regular proceedings												
Infringement of patent without counter-claim of nullity of patent	1	0	2	1	3	7	2	1	5	3	0	11
Nullity of patent without counter-claim of infringement of patent	1	1	3	0	1	6	2	0	5	2	0	9
Infringement and nullity of patent	0	0	0	0	1	1	0	0	1	1	1	3
Right to a patent	0	0	1	1	0	2	0	0	1	1	0	2
Claim	0	0	1	0	0	1	2	0	0	0	0	2
Other	0	0	0	0	0	0	0	0	0	0	0	0
Total	2	1	7	2	5	17	6	1	12	7	1	27
Summary proceedings												
Injunction/safeguarding of interests	4	0	2	0	0	6	1	1	0	0	0	2
Description	1	0	0	0	0	1	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	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0
Total	5	0	2	0	0	7	1	1	0	0	0	2

Average duration of cases

	Cases terminated			Cases still pending		
	Average duration (days)			Average duration (days)		
	in cantonal courts	in FPC	Total	in cantonal courts	in FPC	Total
Regular proceedings						
Infringement of patent without counter-claim of nullity of patent	0	553	553	0	254	254
Nullity of patent without counter-claim of infringement of patent	0	319	319	0	242	242
Infringement and nullity of patent	248	1736	1984	1335	810	2145
Right to a patent	0	483	483	0	370	370
Claim	0	341	341	0	62	62
Other	0	0	0	0	0	0
Average	0	518	533	0	306	353
Summary proceedings						
Injunction/safeguarding of interests	-	99	99	-	80	80
Description	-	21	21	-	0	0
Seizure	-	0	0	-	0	0
Evidence secured	-	0	0	-	0	0
Description and evidence secured	-	0	0	-	0	0
Other	-	0	0	-	0	0
Average	-	88	88	-	80	80

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
Regular proceedings									
Infringement of patent without counter-claim of nullity of patent	3	0	4	0	7	4		4	8
Nullity of patent without counter-claim of infringement of patent	3	3	0	0	6	4		1	5
Infringement and nullity of patent	1	0	0	0	1	2		1	3
Right to a patent	2	0	0	0	2	1		0	1
Claim	1	0	0	0	1	0		1	1
Other	0	0	0	0	0	0		0	0
Total	10	3	4	0	17	11		7	18
Summary proceedings									
Injunction/safeguarding of interests	4	2	0	0	6		1		1
Description	0	1	0	0	1		0		0
Seizure	0	0	0	0	0		0		0
Evidence secured	0	0	0	0	0		0		0
Description and evidence secured	0	0	0	0	0		0		0
Other	0	0	0	0	0		0		0
Total	4	3	0	0	7		1		1
Overall total	14	6	4	0	24	11	1	7	19

issued by

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