

**CA/5/21**

Orig.: en

Munich, 26.02.2021

**SUBJECT:** Approval of amendment to the Rules of Procedure of the Boards of Appeal – new Article 15a

**SUBMITTED BY:** President of the Boards of Appeal

**ADDRESSEES:** Administrative Council (for decision)

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SUMMARY

The President of the Boards of Appeal proposes that the Administrative Council approves the amendment to the Rules of Procedure of the Boards of Appeal adopted by the Boards of Appeal Committee and set out in Part II of this document. The amendment involves inserting in the Rules of Procedure of the Boards of Appeal (RPBA 2020) new Article 15a, which clarifies that the Boards of Appeal may hold oral proceedings pursuant to Article 116 EPC by videoconference.

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## PART I

### **I. STRATEGIC/OPERATIONAL**

1. Operational.

### **II. RECOMMENDATION**

2. It is proposed that, pursuant to Article 23(4), second sentence, EPC, the Administrative Council approves the amendment to the Rules of Procedure of the Boards of Appeal adopted by the Boards of Appeal Committee (BOAC) and set out in Part II of this document.

### **III. MAJORITY NEEDED**

3. Simple.

### **IV. CONTEXT**

4. The Rules of Procedure of the Boards of Appeal were last revised in 2019 and the revised version (RPBA 2020) came into force on 1 January 2020 (see CA/3/19 and CA/D 5/19 Corr. 1). The present amendment involves adding one new Article to the RPBA 2020. Proposed new Article 15a RPBA clarifies that the Boards of Appeal may hold oral proceedings pursuant to Article 116 EPC by videoconference.
5. In 2020, Boards of Appeal conducted oral proceedings in two different formats, namely with the parties attending either in person or by videoconference. From May 2020 to January 2021, oral proceedings were held by videoconference in over 260 appeal cases. Initially, they were held by videoconference only if all parties to the proceedings agreed. This enabled the parties and the members of the Board to become accustomed to oral proceedings being conducted in the new format. Since 1 January 2021, the Boards of Appeal have extended their practice by holding oral proceedings by videoconference without requiring the parties' agreement to this format.
6. Some Boards of Appeal have furthermore conducted oral proceedings without all board members being present in the oral proceedings room, as board members have been able to participate by connecting remotely from another location, in particular from home.

7. Within the legal framework of the EPC (Article 116 EPC), proposed new Article 15a RPBA codifies this practice, sets out the procedure and further makes clear that a Board may decide to hold oral proceedings by videoconference if it considers it appropriate, either upon request by a party or of the Board's own motion. Of course, as in the past, the Boards of Appeal can equally continue to summon parties to oral proceedings with all parties and members of the Board in the particular appeal being physically present in the oral proceedings room.
8. In accordance with Rule 12b(3)(c) EPC, the Presidium advised the President of the Boards of Appeal on the proposal for the amendment to the RPBA 2020 on 30 October 2020 and 2 December 2020.
9. In accordance with Rule 12c(2) EPC, the President of the European Patent Office was given the opportunity to comment.
10. The user community was invited to comment on a first proposal for a new Article 15a RPBA in an online user consultation from 13 to 27 November 2020. A total of 162 replies were received, 18 from various user groups and associations and 144 from individual respondents (patent attorneys, companies, other interested persons). The proposal was additionally discussed at a meeting on 27 November 2020 which was chaired by the President of the Boards of Appeal and attended by representatives of epi and BusinessEurope, members of the Boards of Appeal Committee, representatives of the President of the European Patent Office, and members of the Presidium.
11. In the light of the input received, the President of the Boards of Appeal introduced modifications to the text (see BOAC/16/20). The Boards of Appeal Committee adopted the amendment to the Rules of Procedure of the Boards of Appeal in the form of proposed new Article 15a RPBA by written procedure on 11 December 2020 (see CA/80/20, point 14).

## V. ARGUMENTS

### A. **PROPOSED NEW ARTICLE 15a RPBA – ORAL PROCEEDINGS BY VIDEOCONFERENCE**

12. Article 116 EPC regulates oral proceedings before the European Patent Office. Neither this Article nor any other Article of the EPC or the RPBA 2020 stipulates that parties to the proceedings, their representatives, or members of the Board must be physically present in the oral proceedings room. Therefore, neither the EPC nor the RPBA 2020 exclude oral proceedings by videoconference. At the same time, it is self-evident that in all oral proceedings before the Boards of Appeal the rights and safeguards under the EPC and the RPBA 2020 must be respected.
13. The Board holds oral proceedings if it considers these to be expedient or if they are requested by any party to the proceedings (Article 116(1) EPC).
14. Where oral proceedings are to take place in a given case, then according to **proposed new Article 15a(1) RPBA** the Board in the particular appeal determines whether it is appropriate to hold them by videoconference. If the Board decides to hold oral proceedings by videoconference, they are conducted using technical means for the electronic transmission of audio and video signals in real time. Oral proceedings in this format constitute oral proceedings pursuant to Article 116 EPC.
15. The Board in a particular appeal can decide to hold oral proceedings by videoconference if a party so requests, or it can decide to do so of its own motion. In either case the decision is a discretionary one, in which the Board will be guided by the principles of fair proceedings, in particular the fair conduct of oral proceedings (Article 15(4) RPBA 2020), the parties' right to be heard (Article 113(1) EPC) and the public's right of access to oral proceedings (Article 116(4) EPC). When considering whether it is appropriate to hold oral proceedings by videoconference, the Board will take into account all relevant aspects, such as the suitability of the case to be heard in this way – notably in terms of its complexity and any need for interpretation, the parties' willingness or not to attend remotely and their arguments for or against remote attendance, any foreseeable travel restrictions, and the personal circumstances of the persons due to be involved in the oral proceedings.

16. **Proposed new Article 15a(2) RPBA** concerns oral proceedings scheduled to be held on the premises of the European Patent Office and allows for the use of videoconferencing means during those proceedings. Under proposed new Article 15a(2) RPBA, any party, representative or accompanying person may, upon request, be allowed to attend by videoconference, rather than in person.
17. Under **proposed new Article 15a(3) RPBA**, the Chair in the particular appeal can also allow, but may not order, any other member of the Board in the particular appeal to participate remotely by videoconferencing means, regardless of whether the oral proceedings are scheduled to be held on the premises of the European Patent Office or by videoconference. Under this provision, the Chair too may participate remotely.
18. The taking of evidence by videoconference in oral proceedings is not addressed by proposed new Article 15a RPBA. This has been regulated by way of amendment of Rules 117 and 118 EPC (see CA/79/20, CA/D 12/20).
19. The requirement under Article 116(4) EPC that oral proceedings are public must also be met when they are held by videoconference. It is for the Board in a particular appeal to ensure that access is provided to members of the public. In the case of oral proceedings by videoconference, it may be provided, for example, by also permitting interested members of the public to attend remotely or by streaming the oral proceedings to a dedicated room on the premises of the European Patent Office.
20. For the summons to oral proceedings by videoconference, Rule 115(1) EPC and Article 15(1) RPBA 2020 apply. Hence, at least two months' notice of the summons must be given and the Board endeavours to give at least four months' notice. These periods do not apply, however, in the event of a change of the format of oral proceedings, e.g. from in-person oral proceedings to oral proceedings by videoconference (see proposed new Article 15a(1) RPBA), or where a request by one or more attending persons to attend in-person oral proceedings by videoconferencing means is allowed (see proposed new Article 15a(2) RPBA). The parties will be informed of any such change by way of communication in good time before the date of the oral proceedings. If a party does not attend the oral proceedings, Rule 115(2) EPC and Article 15(3) RPBA 2020 apply.

**B. ENTRY INTO FORCE AND SUBSEQUENT REEVALUATION OF PROPOSED NEW ARTICLE 15a RPBA AND PUBLICATION OF A CONSOLIDATED VERSION OF THE RPBA**

21. Proposed new Article 15a RPBA enters into force on 1 April 2021 and applies to all oral proceedings scheduled to take place on or after that date (BOAC/16/20).
22. As noted in BOAC/16/20, the Boards of Appeal Committee intends 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.
23. A consolidated version of the RPBA 2020 as amended, having as its basis the version published in OJ EPO 2019, A63 and including proposed new Article 15a RPBA, should be published in the Official Journal of the EPO.

**VI. PROPOSED NEW PROVISION**

24. The new Article 15a should be inserted in the RPBA 2020 and read as follows:

**Article 15a**  
**Oral proceedings by videoconference**

(1) The Board may decide to hold oral proceedings pursuant to Article 116 EPC by videoconference if the Board considers it appropriate to do so, either upon request by a party or of its own motion.

(2) Where oral proceedings are scheduled to be held on the premises of the European Patent Office, a party, representative or accompanying person may, upon request, be allowed to attend by videoconference.

(3) The Chair in the particular appeal and, with the agreement of that Chair, any other member of the Board in the particular appeal may participate in the oral proceedings by videoconference.

**VII. LEGAL BASIS**

25. Article 23(4), second sentence, EPC.

**VIII. DOCUMENTS CITED**

26. CA/3/19, CA/D 5/19 Corr. 1., CA/79/20, CA/D 12/20, CA/80/20, BOAC/16/20.

**IX. RECOMMENDATION FOR PUBLICATION**

27. Yes.



## PART II

### Draft

DECISION OF THE ADMINISTRATIVE COUNCIL  
of [date of decision]  
approving an amendment to the Rules of Procedure  
of the Boards of Appeal

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THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,

Having regard to the European Patent Convention, and in particular Article 23,  
paragraph 4, thereof,

Having regard to the revised version of the Rules of Procedure of the Boards of Appeal  
which was approved by decision of the Administrative Council dated 26 June 2019 and  
came into force on 1 January 2020,

Having regard to the amendment to the Rules of Procedure of the Boards of Appeal  
adopted by the Boards of Appeal Committee on 11 December 2020 under Rule 12c,  
paragraph 2, of the Implementing Regulations to the European Patent Convention,

HAS DECIDED AS FOLLOWS:

#### Article 1

The amendment to the Rules of Procedure of the Boards of Appeal, as adopted by the  
Boards of Appeal Committee, is hereby approved:

A new Article 15a is inserted, which reads as follows:

**"Article 15a**  
**Oral proceedings by videoconference**

(1) The Board may decide to hold oral proceedings pursuant to Article 116 EPC by videoconference if the Board considers it appropriate to do so, either upon request by a party or of its own motion.

(2) Where oral proceedings are scheduled to be held on the premises of the European Patent Office, a party, representative or accompanying person may, upon request, be allowed to attend by videoconference.

(3) The Chair in the particular appeal and, with the agreement of that Chair, any other member of the Board in the particular appeal may participate in the oral proceedings by videoconference."

Article 2

This decision shall enter into force on 1 April 2021.

Article 3

Article 15a as approved by this decision shall apply to all oral proceedings scheduled to take place on or after 1 April 2021.

Done at Munich, [date of decision]

For the Administrative Council  
The Chairman

Josef KRATOCHVÍL