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To the
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Referral G 1/21 - communication of the Enlarged Board of Appeal under
Article 9 of its Rules of Procedure

Dear Mr Chairman,

Thank you very much for your communication of 17 March 2021 informing me of the decision of the Enlarged Board of Appeal to invite the President of the European Patent Office to give written comments on the points of law referred to by decision T 1807/15.

Please find attached my comments.

I would also like to inform you that for the oral proceedings scheduled to take place by videoconference on 28 May 2021, I will be represented by M. Ficsor (PD Legal Affairs) as well as H. Pihlajamaa and T. Imscher (Director and Lawyer Patent Law respectively) who will speak on my behalf.

I look forward to the decision regarding referral G 1/21 with great interest.

Yours sincerely,

António Campinos

G 1/21 – Comments by the President of the EPO

Munich, 27 April 2020

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Summary of submissions

Following the invitation from the Enlarged Board of Appeal, the President of the European Patent Office (EPO) would like to take the opportunity to comment on the points of law at issue in referral G 1/21. The question referred has been raised in appeal proceedings. At the same time, the referral raises general questions about the parties' right to oral proceedings under the EPC, the legality of oral proceedings conducted in the form of a videoconference (VICO) as well as the function of party consent. The referral has been explicitly extended by the referring Board to administrative proceedings before the European Patent Office.

The conduct of oral proceedings by VICO has become an indispensable measure to bring examination and opposition proceedings to a close thus ensuring legal certainty of the European patent grant and opposition process and guaranteeing access to judicial review before the Boards of Appeal. Users and the public are relying on the legal soundness of these proceedings. In view of this, a decision of the Enlarged Board of Appeal on the substance of the referred question is of importance in order to ensure legal certainty and the uniform application of the EPC.

In this regard, it is submitted that – irrespective of party consent – the compliance of oral proceedings by VICO with the EPC is beyond doubt, having regard to Article 116(1) EPC, the existing case law of the Boards of Appeal and the Enlarged Board of Appeal, and Article 6(1) of the European Convention on Human Rights (fair trial) as a principle of law common to all EPC Contracting States.

A. Background

1. With its decision T 1807/15 of 12 March 2021, Board of Appeal 3.5.02 referred the following question to the Enlarged Board of Appeal:

“Is the conduct of oral proceedings in the form of a videoconference compatible with the right to oral proceedings as enshrined in Article 116(1) EPC if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference?”

2. The referral relates to European patent No. 1609239 against which an opposition was filed. Following oral proceedings (held on the premises of the EPO) the opposition division decided that, account being taken of amendments made by the patent proprietor, the European patent and the invention to which it relates meet the requirements of the European Patent Convention (EPC).
3. The opponent’s appeal against the opposition division’s decision was referred to Board of Appeal 3.5.02 and attributed reference number T 1807/15. The Board appointed oral proceedings for 8 February 2021 to be held on the premises¹ of the Boards of Appeal. Following a letter from the proprietor indicating its inability to attend the oral proceedings in view of the COVID-19 pandemic, oral proceedings were converted into videoconference. The parties attended the oral proceedings but had submitted earlier that the case was not suitable for oral proceedings by VICO.
4. Oral proceedings by videoconference before the Board, attended by both parties, took place on 8 February 2021. At the end of the oral proceedings, the Board announced that it will refer a question to the Enlarged Board of Appeal, which it subsequently did.²
5. The referral is pending before the Enlarged Board of Appeal under case number G 1/21 (“Oral proceedings by videoconference”).
6. With communication of 17 March 2021, the Enlarged Board of Appeal has invited the President of the EPO to comment in writing on the points of law referred to it in case G 1/21. By a communication published on the Boards of Appeal website on 24 March 2021 interested third parties were given the opportunity to file written statements, too.³ The Enlarged Board of Appeal has further announced that oral proceedings will take place on 28 May 2021 by videoconference (Zoom).

¹ The referring Board occasionally uses the term oral proceedings “held in person” when referring to oral proceedings held in oral proceedings rooms on the premises of the EPO. These comments will refer to oral proceedings held “on the premises of the EPO” or simply “on the premises”.

² See point 2 above.

³ EPO - Oral proceedings in case G 1/21.

B. Considerations relating to the admissibility of the referral

7. Under Article 112(1)(a) EPC, a Board of Appeal shall, during proceedings on a case either of its own motion or following a request from a party to the appeal, refer any question to the Enlarged Board of Appeal if it considers that a decision is required in order to ensure uniform application of the law or if the question concerns a point of law of fundamental importance.
8. In accordance with established case law of the Enlarged Board of Appeal, this requires in particular that the referred question is relevant for the underlying case and that it concerns a point of law of fundamental importance or a lack of uniform application of the law by the boards.⁴

I. Relevance of the referred question for the underlying case

9. The referred question must not have a merely theoretical or hypothetical significance for the original proceedings but must be relevant for deciding the case in question.⁵

a. Relevance for oral proceedings in case T 1807/15

10. As regards appeal case T 1807/15, the patent proprietor (respondent) stated that the case was not suitable for videoconference because of multiple parties making submissions in different languages and the need for simultaneous translations.⁶ The opponent (appellant) stated to share the proprietor's view that a videoconference was not suitable in the case at hand.⁷ Both parties provided the Board with the contact and connection details for the videoconference and participated in the videoconference oral proceedings of 8 February 2021. The minutes of these oral proceedings do not mention an objection against the conduct of the oral proceedings by videoconference. The opponent filed an auxiliary request, which was withdrawn on 8 March 2021, to refer a question related to videoconference oral proceedings in view of Article 116 EPC to the Enlarged Board of Appeal.
11. It would appear that the parties neither explicitly objected nor explicitly consented to conducting the oral proceedings of 8 February 2021 by videoconference. Whether taking a procedural step (such as participation in oral proceedings by videoconference) without raising an explicit objection can be interpreted as implied consent depends on the specific legal and factual circumstances at issue.⁸ The referring Board has

⁴ Case Law of the Boards of Appeal of the EPO, 9th ed. 2019, V. B. 2.3; recently Opinion G 3/19, OJ EPO 2020, A119, reasons, point IV, G 1/19, OJ publication forthcoming, reasons, point D. I. et seq.

⁵ *Idem* V. B. 2.3.3 with reference to inter alia decisions G 3/98, G 2/99 and G 2/04; see recently G 1/19, OJ publication forthcoming, reasons, point D. II. b.

⁶ Submission dated 8 January 2021 – see T 1807/15, summary of facts and submissions, point V.

⁷ Submission dated 20 January 2021 – see T 1807/15, summary of facts and submissions, point VII.

⁸ See, for example, T 2102/08, reasons, point 4.7; T 831/17, reasons, point 4.3; Rule 106 EPC and the case law pertaining thereto. See also the decision of the European Court of Human Rights in re Håkansson and Sturesson v. Sweden of 21 February 1990, No. 11855/85, cited by the referring Board in which the lack of an explicit objection was interpreted as unequivocal implied waiver (to a public hearing).

interpreted the circumstances as establishing the absence of the parties' consent to the conduct of the oral proceedings by videoconference.⁹

12. Oral proceedings in case T 1807/15 took place by videoconference on 8 February 2021. The parties were mainly heard on the issue of a referral to the Enlarged Board of Appeal.¹⁰ At the same time, in the oral proceedings of 8 February 2021 the Board did not hear the parties and decide on the appeal in substance.
13. For this purpose the Board intends to summon the parties to oral proceedings once more after the Enlarged Board of Appeal has handed down its decision on the referral.¹¹ As acknowledged by the referring Board, it has the discretion to hold such future oral proceedings on the premises of the Boards of Appeal, and therefore the question if the parties would consent to the conduct by videoconference is merely hypothetical. In addition, it is hypothetical since the conduct of further oral proceedings may also become obsolete for procedural reasons, for example if a request for oral proceedings or an appeal is withdrawn.
14. In decision T 831/17 the Board referred a question related to the possibility under Article 116 EPC to hold oral proceedings at the Boards of Appeal in Haar to the Enlarged Board of Appeal, although the Board could have conducted the oral proceedings at the EPO's headquarters in Munich. In its decision G 2/19 the Enlarged Board of Appeal held this question to be admissible, finding it to be "*more than merely conceivable in a purely theoretical sense*" and potentially arising in an "*indeterminably large number of similar cases*".¹²
15. In decisions G 3/98 and G 2/99, the Enlarged Board of Appeal had doubts whether the answer to the referred question would have an impact on the decision in the underlying proceedings, but deemed the referral nevertheless admissible, for reasons of procedural efficiency.¹³ Based on the same considerations, the question referred in the present case should be acknowledged as relevant for the purposes of Article 112(1)(a) EPC.

b. Relevance for oral proceedings by videoconference before examining and opposition divisions

16. The question as formulated by the referring Board is not limited to oral proceedings conducted by videoconference before the Boards of Appeal. Rather, in the referring Board's view the "*issue of whether holding a videoconference without the parties' consent is consistent with Article 116 EPC is generally applicable to first-instance proceedings too*".¹⁴
17. Oral proceedings before the opposition division which gave rise to the decision under appeal in case T 1807/15 were held on the premises of the EPO.

⁹ See T 1807/15, summary of facts and submissions, point VII, and reasons, point 2.3.

¹⁰ See the Minutes dated 12 February 2021.

¹¹ T 1807/15, reasons, point 2.3.

¹² G 2/19, OJ EPO 2020, A87, reasons, point A. III. 5.

¹³ G 3/98, OJ EPO 2001, 62, reasons, point 1.2.4; G 2/99, OJ EPO 2001, 83, reasons, point 1.2.4.

¹⁴ T 1807/15, reasons, point 3.6.

18. As acknowledged in decision G 2/19, “Article 116(1), first sentence, EPC applies to a wide range of procedures which sometimes differ considerably not only in terms of their structure, design and purpose but also in terms of their parties”.¹⁵ This “variety in the scope of application”¹⁶ must be taken into account in interpreting that provision. Principles and exceptions applicable regarding oral proceedings in judicial procedures before the Boards of Appeal generally, but not necessarily, apply in identical terms as far as administrative proceedings before examining and opposition divisions are concerned.
19. In decision G 2/07 the Enlarged Board of Appeal considered a referral admissible irrespective of the question whether for deciding the underlying case an answer was actually required on all aspects which the referred question intended to embrace.¹⁷ On the same line of reasoning the question referred in the present case should be considered relevant also as far as it relates to administrative proceedings in particular in examination and opposition¹⁸.

II. Point of law of fundamental importance

20. To be admissible, the referred question must further concern a point of law of fundamental importance, as opposed to a question of fact or a question which can be answered by reference to the EPC without doubt.

a. Question of law

21. Only questions of law, not questions of fact may be referred to the Enlarged Board of Appeal under Article 112(1) EPC.¹⁹ Boards of Appeal have refused to refer questions to the Enlarged Board of Appeal where the answer depended on an assessment of the specific circumstances in each individual case and could not be answered in a general manner.²⁰
22. The parties in T 1807/15 stated that they did not consider the case to be suitable for oral proceedings by videoconference, the proprietor referring specifically to multiple parties making submissions in different languages and the need for simultaneous translations. It would appear that whether a case is suitable for videoconference oral proceedings depends on the specific circumstances of that individual case. This was established practice with regard to oral proceedings by videoconference in examination.²¹ The explanatory notes (or *travaux préparatoires*) for new Article 15a of the Rules of Procedure of the Boards of Appeal, which entered into force on 1 April

¹⁵ G 2/19, OJ EPO 2020, A87, reasons, point B. I. 2.

¹⁶ *Idem*.

¹⁷ G 2/07, OJ EPO 2012, 130, reasons, point 1.

¹⁸ Eventually, the decision will also have relevance for oral proceedings before the receiving section and the legal division.

¹⁹ Case Law of the Boards of Appeal, 9th ed. 2019, V. B. 2.3.4. See recently G 1/19, OJ EPO publication forthcoming, reasons, point D. II. a.

²⁰ See, for example, T 1242/04, reasons, point 10.3.

²¹ See, for example, Guidelines for Examination in the EPO, November 2019, E-III, 11.1.1.

2021, also refers to the “suitability of the case” to be heard by videoconference as one of several aspects to be taken into account by a Board when considering whether to hold oral proceedings by videoconference.²²

23. In this regard the explanatory notes for new Article 15a of the Rules of Procedure of the Boards of Appeal further mention “*the parties’ willingness or not to attend remotely*” as one aspect to be taken into account.²³ The legislator for the Rules of Procedure of the Boards of Appeal, i.e. the Boards of Appeal Committee and the Administrative Council, thus considered the question of consent to be one factual aspect to be taken into account by a Board when deciding whether to conduct oral proceedings on appeal by videoconference. At the same time, it should be acknowledged that the referring Board considers the question raised to be of a legal nature.

b. Question which cannot be answered without doubt

24. The case law of the Boards of Appeal consistently provides that when deciding whether to refer a question to the Enlarged Board of Appeal, a Board should consider whether it can itself answer the question by reference to the EPC in such a way as to leave no doubt as to the correctness of the answer.²⁴ This approach was confirmed in decision G 1/12 in which the Enlarged Board of Appeal held that the ground “point of law of fundamental importance” for referring a question requires that a Board considers that the question cannot be answered directly and unambiguously by reference to the EPC.²⁵
25. In decision G 2/19 the Enlarged Board of Appeal clarified that Article 116(1) EPC had to be interpreted with due regard to a party’s possibility to effectively exercise its right to be heard in oral proceedings. Organisational aspects, such as the venue of oral proceedings, which could not be considered to infringe a party’s right to be heard were not the subject of Article 116(1) EPC.²⁶ Already on this basis it may be considered beyond doubt that Article 116(1) EPC does not prescribe a specific form of oral proceedings and exclude other forms such as a videoconference which cannot be perceived to affect a party’s right to present its case orally.²⁷
26. In decision T 2320/16 of 4 February 2021 a Board of Appeal found, based on a reading of the EPC in accordance with the principles of interpretation enshrined in the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter “VCLT”),²⁸ that oral proceedings by videoconference are consistent with Article 116 EPC irrespective of the parties’ consent thereto.
27. A similar conclusion was reached in other decisions of the Boards of Appeal which by reference to the EPC considered oral proceedings held by videoconference to fulfil the

²² CA/5/21, para. 15.

²³ *Idem*.

²⁴ See, for example, J 5/81, OJ EPO 1982, 155, as well as Case Law of the Boards of Appeal of the EPO, 9th ed. 2019, V. B. 2.3.7.

²⁵ G 1/12, OJ EPO 2014, A114, reasons, point 10.

²⁶ G 2/19, OJ EPO 2020, A87, reasons, point C. IV. 2.

²⁷ See in more detail below at C. I. b, para. 39 et seq.

²⁸ United Nations Treaty Series, vol. 1155, p. 331.

requirements for holding oral proceedings within the meaning of Article 116 EPC and hence not to be excluded by that provision.²⁹

28. In the interpretation of the right to be heard and the right to oral proceedings, the Boards of Appeal regularly take into account Article 6 of the European Convention on Human Rights (ECHR) and the pertinent case law of the European Court of Human Rights. The fair trial principle has been recognised as a binding standard for proceedings before the Boards of Appeal and as a principle of law common to all EPC Contracting States.³⁰ The European Court of Human Rights has consistently held that videoconference oral proceedings are not, as such, incompatible with the fair trial principle enshrined in Article 6(1) ECHR.³¹ Since all EPC Contracting States are signatories of the European Convention on Human Rights, this clearly implies that they could not have intended Article 116 EPC to provide for anything other than what the fair trial principle guarantees in relation to oral proceedings.
29. As far as oral proceedings by videoconference before examining and opposition divisions are concerned, the administrative character of such proceedings must additionally be taken into account in the interpretation of Article 116(1) EPC.³² Furthermore, Decisions of the President of the EPO adopted on the basis of Article 10(2)(a) EPC in order to ensure the functioning of the EPO unambiguously provide for the possibility to conduct oral proceedings in the form of a videoconference irrespective of the parties' consent thereto. In decision T 1012/03, the Board clarified that Article 10(2)(a) EPC empowers the President of the EPO to adopt measures which affect the procedural rights of parties by, for example, determining the venue of oral proceedings.³³

III. Need for legal certainty

30. In the past the Enlarged Board of Appeal has consistently accepted referrals as admissible if the referred question was relevant in a substantial number of similar cases, or if a decision of the Enlarged Board of Appeal was required in order to ensure the uniform application of the law.³⁴
31. In line with the referring Board's considerations, there can be no doubt that the referred question is relevant for a significant number of cases, namely each oral proceedings by videoconference in examination, opposition³⁵ or appeal in which a party does not

²⁹ T 1378/16, reasons, point 1; T 2068/14, reasons, point 1.2.2; T 195/14, reasons, point 1; T 932/16, reasons, point 1.1.

³⁰ Case Law of the Boards of Appeal of the EPO, 9th ed. 2019, III H. 3.

³¹ European Court of Human Rights, Yevdokimov and others v. Russia (2016), 2723605 et al., para. 43, with further references. With regard to criminal proceedings see European Court of Human Rights, Grand Chamber, Sakhonovskiy v. Russia, no. 21272/03, judgment of 2 November 2010, para. 98; European Court of Human Rights, Marcello Viola v. Italy, no. 45106/04, judgment of 5 October 2006, para. 72 et seq. For further details see below C. I. b. (3), para. 64.

³² See supra, para. 25 with reference to decision G 2/19.

³³ T 1012/03, reasons, point 49.

³⁴ Case Law of the Boards of Appeal of the EPO, 9th ed. 2019, V. B. 2.3.7; G 1/12, OJ EPO 2014, A114; G 3/19, OJ EPO 2020, A119; G 1/19, OJ EPO publication forthcoming, reasons, point D. II. d.

³⁵ In addition, oral proceedings before the legal division and, if applicable, the receiving section can be concerned.

consent to this format. Several hundreds of oral proceedings by videoconference take place each week in examination and opposition alone. In 2020, when oral proceedings by videoconference were still subject to party consent in opposition under a pilot project launched in May 2020 (see paragraphs 79 and 83 below), only around 300 opposition oral proceedings could be conducted by videoconference, whereas in 2021 more than 1000 such videoconference oral proceedings already took place by the end of March alone. Particularly in view of the developments triggered by the coronavirus pandemic, videoconference oral proceedings have become an indispensable measure for parties and the Office to bring examination and opposition proceedings to a close, ensure legal certainty for the stakeholders of the European patent system and provide access to judicial review before the Boards of Appeal. Not only the users of the European patent system but also the public at large are relying on the compliance of this measure with the applicable legal framework.

32. T 2320/16 has found oral proceedings by videoconference to be consistent with Article 116 EPC. Several other decisions of the Boards of Appeal have reached a similar conclusion, even though not specifically addressing the issue of party consent raised in case T 1807/15. The referring Board's decision may be read as tending towards a different conclusion. Against this background, a decision of the Enlarged Board of Appeal preventing the generation of case law deviating from T 2320/16 is required to ensure the uniform application of Article 116(1) EPC regarding oral proceedings held by videoconference.

IV. Summary of admissibility considerations

33. Any doubts with regard to the actual relevance of the broadly formulated question for the specific appeal at issue should be left aside when deciding on the admissibility of the referral, in line with the Enlarged Board's earlier findings regarding the admissibility of referrals in, for example, cases G 3/98, G 2/99, G 2/07 and G 2/19.
34. Particularly for videoconference oral proceedings in examination and opposition an answer to the referred question can be derived directly and unambiguously by reference to the EPC, as was done in decision T 2320/16.
35. At the same time, a decision of the Enlarged Board of Appeal on the referred point of law is of importance for legal certainty and in the interest of the users of the European patent system, the general public and the EPO. In view of this, the referral should be considered as admissible and be decided on the merits, taking into account the substantive considerations set out hereunder.

C. Considerations relating to the question referred

36. The question referred is seeking to clarify whether, in view of Article 116(1) EPC, oral proceedings may be conducted by videoconference without all parties' consent. The answer to that question depends essentially on the interpretation of the term "oral proceedings". An interpretation in accordance with general principles of treaty interpretation as codified in the Vienna Convention on the Law of Treaties shows that Article 116 EPC does not determine the form of oral proceedings. The provision cannot be interpreted to exclude oral proceedings held by videoconference (I.). Since the decision regarding the form of conducting oral proceedings lies with the competent department, the consent of a party is of no relevance in that regard (II.).

I. Construing Article 116 EPC

a. Oral proceedings under the EPC

37. Proceedings under the EPC are in principle conducted in writing.³⁶ Oral proceedings take place either at the instance of the European Patent Office or at the request of any party to the proceedings. In practice, oral proceedings are often requested by the parties under the condition that the case would not be decided in their favour in the written procedure.³⁷
38. Oral proceedings are intended to complement the written proceedings and to ensure that the proceedings can be completed in an expedient manner.³⁸ At the same time, oral proceedings provide for a different means to render effective the right to be heard pursuant to Article 113(1) EPC, and are in that sense complementary to the written proceedings.³⁹ If requested, oral proceedings in examination and opposition have to be appointed without any room for discretion. The right to oral proceedings is absolute and not subject to any conditions.⁴⁰

b. Interpretation in accordance with general principles of treaty interpretation

39. According to the referring Board, videoconferences could be deemed to fulfil the purpose of oral proceedings.⁴¹ Still, it considers that such a teleological interpretation possible under Article 31(1) VCLT does not necessarily mean that the term "oral

³⁶ Schäfers/Unland, in: Benkard, Europäisches Patentübereinkommen, 3rd ed. 2019, Art. 113, para. 10.

³⁷ As the referring Board points out (at pt. 3.2 and 3.3) this is in contrast to systems as for example in Germany where the procedure is by default oral and the content of the written procedure has to be discussed in oral proceedings ("Mündlichkeitsprinzip"). Under German law, this understanding of oral proceedings is complemented by the principle of immediacy ("Unmittelbarkeitsgrundsatz") which requires the discussion of the subject matter of the proceedings (any content of the written proceedings) before the deciding body (see Rauscher, in: Münchener Kommentar zur Zivilprozessordnung 6th ed. 2020, Einleitung, paras. 399, 418 et seq.). The principle of immediacy therefore does not apply in the same way under the EPC as it does under German law.

³⁸ Schäfers/Unland, in: Benkard, Europäisches Patentübereinkommen, 3rd ed. 2019, Art. 116, paras. 1, 3.

³⁹ Schäfers/Unland, in: Benkard, Europäisches Patentübereinkommen, 3rd ed. 2019, Art. 116, para. 4.

⁴⁰ See only T 552/06, reasons, point 2.2, cf. also T 1829/10, reasons, point 2.7 et passim.

⁴¹ T 1807/15, reasons, point 5.9.1.

proceedings” in Article 116 EPC should be construed so broadly as to encompass videoconference.⁴² In the referring Board’s opinion it needs to be borne in mind that when the EPC was drawn up there were no suitable technical options for adequately replacing oral proceedings on the premises.⁴³ Therefore, oral proceedings inevitably came to mean proceedings on the premises of the EPO with all parties and the competent department being present at the same venue. In the referring Board’s view, this understanding has not changed since, and there is no need for further interpretation because the term “oral proceedings” is unambiguous. This interpretation of the term “oral proceedings” in Article 116 EPC relates to the historic context at the time the EPC was drafted.

40. When looking into the general principles of interpretation of international treaties as codified in the Vienna Convention on the Law of Treaties and applied by the Enlarged Board of Appeal (e.g. in G 3/19), a treaty provision is to be interpreted in accordance with the ordinary meaning of the terms (1) to be given to them in their context (2) and in the light of its object and purpose (3). In view of the interpretation, recourse to supplementary means of interpretation including, most notably, the historical preparatory work (*travaux préparatoires*) of the treaty, is of limited value (4). Such interpretation leads to the conclusion that Article 116 EPC does not determine the form of oral proceedings; accordingly, oral proceedings may be held by videoconference (5).

(1) Ordinary meaning

41. The term “Oral proceedings” alludes to a formally regulated opportunity to exchange oral arguments. “Proceedings” is defined as a series of actions that happen in a planned and controlled way.⁴⁴ The expression, hence, does not include informal discussions. This follows from the use of the term “proceedings”. It is also apparent from the context of the provision, e.g. from Articles 18(2) and 19(2) EPC. Both provisions clarify that oral proceedings shall be before the division itself, not only before one of its members entrusted with the examination.
42. The wording does not signify or even suggest any restrictions in that the oral exchange must occur face-to face. The adjective “oral” is explained to signify “spoken and not written”.⁴⁵ The same would apply for the terms in the other authentic languages of the Convention (“mündliche”, “orale”).
43. Other than that, there is no clarification as to the nature of “oral proceedings” (with the exception of the public or non-public character). Thus, starting from its ordinary meaning, it clearly follows from Article 116 EPC that oral proceedings can be held in any suitable form – on the premises or by videoconference. The same conclusion is reached in decisions T 2068/14 and T 2320/16.⁴⁶ In fact, even the referring Board

⁴² T 1807/15, reasons, point 5.1.2.

⁴³ T 1807/15, reasons, point 5.4.1.

⁴⁴ Cambridge Dictionary, term “proceedings” (<https://dictionary.cambridge.org/dictionary/english/proceedings>).

⁴⁵ Cambridge Dictionary, term “oral” (<https://dictionary.cambridge.org/dictionary/english/oral>).

⁴⁶ T 2068/14, reasons, point 1.2.3; T 2320/16, reasons, point 1.5.2.

acknowledges that the EPC does not contain any explicit provision on the form of oral proceedings.⁴⁷

44. The wording of Article 116(1) EPC is, hence, rather clear in that it would extend to oral proceedings in any suitable form; in particular, there is nothing in the ordinary meaning of the term “oral proceedings” that would suggest that a formalised exchange of oral arguments and views by videoconference would not be covered by the expression.

(2) Context

45. In Article 116 (1), (2) and (3) EPC, the term “oral proceedings” is used together with the preposition “before”. In judicial language, the term “before” signifies a relationship to the deciding body. In certain uses, the term “before” implies a local relationship, but in others it does not.⁴⁸ As highlighted by the Board in T 2320/16:

“The term ‘before’ in a judicial context is to be understood as ‘under the consideration of, or being judged or decided by’.”,

pointing to many examples in the EPC where the same term is employed without denoting any physical presence, most notably Article 14(2), Article 60(3), Article 70(1), Article 114(1) EPC, Article 115 EPC, Article 123(1) and Article 134 EPC (at pt. 1.5.4). Hence, the use of the term “before” does not suggest that Article 116 EPC would necessarily imply that oral proceedings are to take place only on the premises.

46. Equally, and as acknowledged in the referring decision, the wording of Articles 18(2) and 19(2) EPC does not require that oral proceedings are to be conducted on the premises of the EPO. As far as relevant here, these provisions only require that all members of the respective division participate in any oral proceedings. When this can be ensured – as is the case in a videoconference – the provisions do not require that oral proceedings are to be held on the premises.
47. The referring Board also points to Rule 71(2) EPC 1973, an argument that seems to relate to the context of the provision as well. Still, terms such as “appear” or “appear as summoned” are equally open and could equally be used in relation to “oral proceedings by videoconference”, where a party may “appear on screen” “appear via online/digital tools” or “appear (on screen) as summoned”.
48. In addition to the context of a provision, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is to be taken into account (cf. the principle codified in Article 31(3) b) VCLT).
49. Relevant subsequent practice is manifold and supports the conclusion that Article 116 EPC is not limited to oral proceedings held on the premises. As explained by the Enlarged Board of Appeal in G 2/12,⁴⁹ a decision to amend the Implementing

⁴⁷ T 1807/15, reasons, point 5.4.1.

⁴⁸ See, for example, the various entries in the Cambridge Dictionary, term “before” (<https://dictionary.cambridge.org/dictionary/english/before>).

⁴⁹ G 2/12, OJ 2016, A27, reasons, point VII.4(1).

Regulation may constitute subsequent agreement and practice in the application of the EPC for the purposes of treaty interpretation.

- a. On 29 November 2000 the Contracting States, represented in a Diplomatic Conference, concluded the Act revising the Convention on the Grant of European Patents.⁵⁰ At that time oral proceedings before examining divisions could already be held by videoconference upon request and with agreement of the division.⁵¹ The Diplomatic Conference could have amended Article 116 EPC and made express reference to the possibility of holding oral proceedings by videoconference, had it seen a need for that in view of a narrow understanding of Article 116 EPC. There was, however, no proposal to that extent.⁵²

Given that oral proceedings were already held by videoconference when the Diplomatic Conference took place, concerns about the compatibility with Article 116 EPC could have been raised by the Contracting States. Yet, there is no record about any objections to this practice.⁵³ The only conclusion that can be drawn from this is that the Contracting States found this form of oral proceedings acceptable and compliant with Article 116 EPC. They thus implicitly confirmed that its wording was broad enough to cover also forms of oral proceedings other than those held on the premises, most notably those by videoconference.

- b. On 15 December 2020 the Contracting States to the EPC, through their delegations in the Administrative Council, decided unanimously⁵⁴ to allow the taking of evidence by videoconference.⁵⁵ While the wording of amended Rules 117 and 118 EPC only relates to the taking of evidence by videoconference, not to oral proceedings being held by videoconference, the explanatory documents on the basis of which the Contracting States' delegations took their decision explicitly reflected the fact that oral proceedings according to Article 116 EPC are held by videoconference before examining and opposition divisions and before the boards of appeal.⁵⁶ Amended Rule 118 EPC further shows that the term "appear" was not considered to cover exclusively the taking of evidence on the premises. Otherwise, there would not have been any need to include the words "on its premises" in

⁵⁰ Act revising the Convention on the grant of European patents (European Patent Convention) of 5 October 1973, last revised at 17 December 1991, Special Edition No. 4 OJ EPO 2001, 3.

⁵¹ See Information concerning interviews and oral proceedings to be held as a video conference, OJ EPO 1997 572.

⁵² While the provisions of part VII, chapter I, of the EPC have been subject to numerous amendments, no proposal as regards Article 116 had been tabled for the Diplomatic Conference – see Basic Proposal, M/2/00. Accordingly, there had been no discussion during the Diplomatic Conference on this provision – see Conference of the Contracting States to revise the 1973 European Patent Convention (Munich, 20 to 29 November 2000) - Conference Proceedings, M/24/00.

⁵³ *Idem*.

⁵⁴ The German delegation formally noted that it wished to abstain (CA/PV 165, para. 151). According to the minutes of the meeting the statement was linked to a specific proposal concerning the wording; the delegation confirmed that videoconference were a must during the pandemic, thus adhering to the interpretation of Article 116 EPC advanced above (CA/PV 165, para. 143).

⁵⁵ Decision of the Administrative Council of 15 December 2020 amending Rules 117 and 118 of the Implementing Regulations to the European Patent Convention, CA/D 12/20, OJ EPO 2020, A132.

⁵⁶ See CA/79/20, para. 4 et seq.

Rule 118(2)(c) EPC, and the text of what is now Rule 118(2)(d) EPC would not have remained unamended.

- c. On 23 March 2021, the Contracting States, through their delegations in the Administrative Council, decided unanimously to approve the amendment of the Rules of Procedure of the Boards of Appeal.⁵⁷ This amendment introduced a new Article 15a, confirming the practice to hold oral proceedings under Article 116 EPC before the Boards of Appeal by videoconference. As set out in document BOAC/16/20, para. 20, this amendment was meant to clarify the existing practice of the Boards of Appeal since May 2020, so that the Boards of Appeal could have adapted their practice before the date of entry into force.

50. There is, thus, subsequent practice of the Contracting States through their delegations in the Administrative Council, endorsing the interpretation that oral proceedings under Article 116 EPC can be conducted in various forms, including by videoconference.

(3) Interpretation in the light of the provision's object and purpose

Object and purpose of the right to oral proceedings

51. Any treaty interpretation must take into consideration the object and purpose of the provision. In R 3/10,⁵⁸ the Enlarged Board of Appeal described the purpose of oral proceedings as being

“... to allow each party to make an oral presentation of its arguments, to allow the Board to ask each party questions, to allow the parties to respond to such questions and to allow the Board and the parties to discuss issues, including controversial and perhaps crucial issues. The value of oral proceedings is that matters may as a result be clarified and the Board may ultimately be satisfied that a party's position is the right one, although it was not so satisfied by the written submissions alone.”⁵⁹

52. Oral proceedings also present an opportunity to avoid several rounds of written exchanges and allow reaching a decision faster than in a purely written procedure.⁶⁰
53. The records of the preparatory work to the EPC, furthermore, mention that oral proceedings would also have to allow that both the chairperson and the other members of the competent department would need to be able to participate in the discussion with the parties.⁶¹

⁵⁷ Decision of the Administrative Council of 23 March 2021 approving an amendment to the Rules of Procedure of the Boards of Appeal, CA/D 3/21 (OJ EPO 2021, A19). The delegations of Ireland, Austria, Latvia, Slovenia, Malta and San Marino abstained.

⁵⁸ Referred to in R 12/12, reasons, point 7; R 1/19, reasons, point 2.3.1.

⁵⁹ R 3/10, reasons, point 2.11.

⁶⁰ Bühler, in Singer/Stauder/Luginbühl (eds.), *Europäisches Patentübereinkommen*, 8th ed. 2019, Artikel 116, para. 2. For the specific situation in examination, see van Empel, *The Granting of European Patents*, Leyden 1975, para. 448 (p. 208 et seq.).

⁶¹ See document BR/60 e/70, para. 19.

54. The purpose of the right to oral proceedings under Article 116 EPC can be summarised as giving parties a right to request an opportunity to present their case orally (instead of in writing), to have an interactive exchange of arguments between the competent department in its entirety and the other parties, if any, in real time and, as a consequence, the possibility to immediately respond to inquiries and to act according to any procedural development.

Construing Article 116 in the light of its object and purpose

55. Considering object and purpose identified above, Article 116 EPC cannot imply a limitation as to the form in which oral proceedings are held. It only requires that the essential elements and features of oral proceedings are maintained. These include in particular:

- parties must be able to present their case orally,
- all participants must be able to see and hear each other, to allow an interactive oral discussion in real time,
- all participants must be able to immediately respond to questions and react to statements and procedural developments.

56. The Enlarged Board of Appeal Board has already identified as the core of Article 116(1) EPC that parties have the possibility to exercise their right to be heard.⁶² Organisational aspects are not considered to be relevant for assessing compliance with the right to be heard other than in extreme cases characterised, e.g., by the choice of an entirely unusual place or date of the oral proceedings.⁶³ The Board in T 2068/14 concluded that

“... a videoconference ... contains the essence of oral proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously. Thus each party’s case can be presented to the board in real time, and the board can put questions to the parties/representatives”.⁶⁴

57. It unambiguously follows that the requirements identified above are fulfilled in the case of oral proceedings held by videoconference at the EPO. Modern videoconferencing systems as deployed by the EPO allow any party to present their case orally while seeing all members of the competent department (and any other party). They permit an interactive discussion, in real time, with the opportunity to immediately react or adapt the subsequent procedural strategy. Specifically, the tools always allow all participants to be kept in view. Facial expressions, posture and body language might even be clearer and better visible than in proceedings conducted with physical presence, if each participant is shown in a similar distance to the camera.

58. Possible restrictions in transmitting some of the non-verbal expressions (e.g. as regards the posture of the entire body, the movements of hands or similar) have no impact on the proper conduct of oral proceedings in view of its purpose. The above-

⁶² G 2/19, OJ EPO 2020, A87, reasons, point C.IV.1.

⁶³ G 2/19, OJ EPO 2020, A87, reasons, point C.IV.1.

⁶⁴ T 2068/14, reasons, point 1.2.3.

listed essential points, in particular an interactive exchange of arguments in real time, are by no means affected if these proceedings are held by videoconference.⁶⁵

59. For the sake of completeness, it may be mentioned that the same applies regarding the additional requirement that, in certain cases, oral proceedings are to be public. The videoconferencing tools in use for public oral proceedings allow participation of several participants – exceeding what could be accommodated in the oral proceedings’ rooms on EPO premises. Procedural provisions allow the attendance for any member of the public to the oral proceedings.⁶⁶ Oral proceedings by videoconference contribute to an increase in transparency, providing easier, better and wider access to oral proceedings and, consequently, to the patent grant procedure in general.

The need to conclude proceedings in an expedient manner

60. When looking at object and purpose of oral proceedings under Article 116 EPC, particular importance is attached to the possibility of concluding proceedings in an expedient manner.⁶⁷ Oral proceedings are intended to help ensure legal certainty (for the parties and the general public) and access to justice. This can be achieved when oral proceedings are held by videoconference. In fact, it can be achieved more efficiently, with less delays due to the non-availability of oral proceedings rooms, with less environmental impact (as it avoids related travels), lower costs for the parties, and enhanced access for the public, thus contributing to more transparency in line with modern standards in a democratic society.
61. Insofar, the Enlarged Board held in G 1/19 that criteria and requirements not set by the legislator should be open to further development as technology evolves.⁶⁸ Over the last years, and in particular since the outbreak of the COVID-19 pandemic, there have been remarkable advances in tools and technology. In parallel, communication habits have changed, both in the professional context and in everyday life: video connections have become a widely used means of communication everywhere. In the light thereof, any interpretation taking into account the object and purpose of Article 116 EPC cannot but lead to the conclusion that the term “oral proceedings” is to be interpreted to include also those held by videoconference. The practice of other patent offices as well as international and national courts equally show that hearings and oral proceedings can regularly be conducted by videoconference.⁶⁹

⁶⁵ Similarly T 2320/16, reasons, point 1.5.3. From experience in opposition and appeal it emerges that, during oral proceedings held by videoconference, the members and the parties could see and talk to each other, and good communication between all participants was possible, see Opposition oral proceedings by videoconference in the context of COVID-19, Progress report November 2020, especially section 4.4; see also Annual report of the Boards of Appeal 2020, p. 22.

⁶⁶ See, in particular, Article 5 of the Decision of the President of the European Patent Office dated 10 November 2020 concerning the modification and extension of the pilot project for oral proceedings by videoconference before opposition divisions (OJ EPO 2020, A121) and point 25 of the Notice from the EPO dated 10 November 2020 concerning oral proceedings before examining and opposition divisions, and consultations, by videoconference (OJ EPO 2020, A122).

⁶⁷ See para. 38 above.

⁶⁸ G 1/19, OJ EPO publication forthcoming, reasons, point 65.

⁶⁹ Hearings and oral proceedings are held by videoconference, for example, at the US Patent and Trademark Office, at the Japan Patent Office, at the Chinese Patent Office (CNIPA) and at the UK Intellectual Property Office. Equally, courts in the United Kingdom, Ireland, Norway, Turkey, the Netherlands, Austria and Switzerland may now conduct hearings by videoconference even without the consent of a party. The same applies to hearings before the European Court of Human Rights, the International Criminal Court and the

62. In view thereof, the earlier Office practice mentioned by the referring Board⁷⁰ is of no relevance. From 1998 to 2006, applicants interested in oral proceedings by videoconference had to submit a declaration renouncing their right to oral proceedings in the traditional form. Such declaration was meant to serve as an acknowledgement that oral proceedings, once held by videoconference, could not be repeated in the traditional way. Hence, it merely reflected Article 116(1) EPC, second sentence and clarified in different terms that oral proceedings by videoconference are equivalent to oral proceedings on the premises. (As from 2006, the practice of requiring such declaration was discontinued, with the relevant notice expressly stating that both forms of oral proceedings were equivalent.⁷¹) The declaration did not contain, or even imply, a waiver of the right to oral proceedings. It differentiated between the two forms of oral proceedings but clarified that both fulfil the requirements of Article 116 EPC.
63. Oral proceedings held by videoconference perform the same function in substantially the same way as oral proceedings held on the premises.

Oral proceedings by videoconference in view of Article 6(1) ECHR

64. As ensuring that the proceedings are held fairly also belongs to the object and purpose of oral proceedings, the right to oral proceedings under Article 116 EPC is to be interpreted in line with the requirements of the right to fair proceedings pursuant to Article 6(1) European Convention on Human Rights (ECHR). The Enlarged Board of Appeal has repeatedly held that the requirements of Article 6 ECHR must be respected in proceedings under the EPC.⁷² Given that the provision is binding on all Contracting States to the EPC, Article 6 ECHR is to be taken into consideration when interpreting the EPC as a relevant rule of international law applicable in the relations between the parties (see the principle of treaty interpretation codified in Article 31(3)(c) VCLT).
65. The European Court of Human Rights has consistently held that resorting to oral proceedings by videoconference in court proceedings concerning civil rights (as opposed to criminal proceedings) would not, as such, be incompatible with the notion of a fair and public hearing pursuant to Article 6(1) ECHR, provided the parties are

“able to follow the proceedings, to see the persons present and hear what is being said, but also to be seen and heard by the other parties, the judge and witnesses, without technical impediment”.⁷³

This corresponds to what has been identified to be the purpose and function of oral proceedings at the EPO as identified above.⁷⁴

International Court of Justice and is also provided for in the 2021 version of the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce.

⁷⁰ T 1807/15, reasons, point 5.5.

⁷¹ Updated information concerning interviews and oral proceedings to be held as a video-conference, OJ EPO 2006, 585, point 1.

⁷² See e.g. decisions G 1/05, OJ 2007, 362, reasons, point 22; G 2/08, OJ 2010, 456, reasons, point 3.3.

⁷³ European Court of Human Rights, Yevdokimov and others v Russia (2016), 27236/05 et al., para. 43, et passim.

⁷⁴ See para. 51 et seq. above.

66. In videoconference oral proceedings before examining and opposition divisions, the chairperson requests confirmation from the parties that there had not been any technical issues and that all persons could be seen and heard throughout the proceedings. The relevant decisions of the President further provide the assurance that summons to new oral proceedings would be issued in any case in which the parties rights under Articles 113 and 116 EPC could have been compromised.⁷⁵
67. The videoconferencing tools in use for oral proceeding by the EPO and the practice and procedural provisions adopted mean that the standards of Article 6(1) ECHR are met. Accordingly, Article 116 EPC is to be interpreted that oral proceedings can be conducted in various forms, including by videoconference.
68. Hence, when looking at the object and purpose of the right to oral proceedings under Article 116 EPC, it is clear that the provision is not to be interpreted in a limiting manner. Rather, it is open as to the form in which oral proceedings may take place, on condition that oral arguments and an interactive exchange of views in real time are ensured. Videoconferencing tools and practices in use at the EPO fully meet these requirements. Therefore, oral proceedings can be conducted in the form of videoconference in full compliance with Article 116 EPC.

(4) Supplementary means of interpretation

69. In line with the principles set out in Article 32 VCLT, recourse may also be had to supplementary means of interpretation. This would include the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the interpretation in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, or to determine the meaning when that interpretation leaves the meaning ambiguous or leads to a result which is manifestly absurd or unreasonable.⁷⁶
70. In the present case concerning the interpretation of the term “oral proceedings”, it is questionable whether the requirements for having recourse to the supplementary means of interpretation are met. It is submitted that construing Article 116 EPC in accordance with the primary means of interpretation neither leaves its meaning ambiguous or obscure, nor does it lead to a manifestly absurd or unreasonable result.
71. Even if one were to rely on the *travaux préparatoires* as a supplementary means of interpretation, the available records do not support any other finding, and thus confirm the above conclusion that oral proceedings in terms of Article 116 EPC can be conducted in various forms, including by videoconference.⁷⁷ The referring Board correctly points out that the *travaux préparatoires* do not contain any statement

⁷⁵ Article 7 of the Decision of the President of the European Patent Office dated 10 November 2020 concerning the modification and extension of the pilot project for oral proceedings by videoconference before opposition divisions (OJ EPO 2020, A121); Article 4 of the Decision of the President of the European Patent Office dated 17 December 2020 concerning oral proceedings by videoconference before examining divisions (OJ EPO 2020, A134).

⁷⁶ See Dörr, in: Dörr / Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2nd ed. 2018, Article 32, paras. 30 et seq., 34 et seq.

⁷⁷ The same conclusion was reached in T 2320/16, reasons, point 1.5.8.

addressing explicitly the form in which oral proceedings should be conducted.⁷⁸ In particular, there is no passage that could lend any support to the conclusion that the term “oral proceedings” in Article 116 EPC should be qualified in a certain way. Thus, even if the *travaux préparatoires* were to be regarded as relevant, they seem to confirm rather than call into doubt the conclusion based on the primary means of interpretation. Therefore, no necessity exists for applying further supplementary means of interpretation.

(5) Conclusion

72. The interpretation of Article 116 EPC on the basis of its ordinary meaning in light of the context and its object and purpose, taking also into account the subsequent practice of the Contracting States, confirms that the provision does not restrict the forms in which oral proceedings may be held.
73. Given that all the substantive requirements under Article 116 EPC are met when oral proceedings are held by videoconference before the EPO, the conduct of oral proceedings in this form is in compliance with Article 116 EPC.

II. The role of “consent” under Article 116 EPC

74. The question referred to the Enlarged Board of Appeal focuses on oral proceedings where at least one party has not consented to the videoconference form. The referring Board is reasoning that since parties can waive their right to oral proceedings, oral proceedings in the form of a videoconference are necessarily compliant with Article 116 EPC if all parties agree to that format.⁷⁹ The reasoning is based on an *argumentum a maiore ad minus*: If a party can waive its right to oral proceedings, it may waive a possible right to oral proceedings on the premises and consent to oral proceedings by videoconference.
75. It is submitted that consent of a party is not a requirement that would follow directly from Article 116 EPC or otherwise be implied in the videoconference format (a.). The decision as to the form in which oral proceedings are to be held remains with the competent department (b.). Oral proceedings by videoconference are equivalent to those held on the premises and do not, by any means, imply a restriction or limitation of the rights of the parties (c.). The assumption that videoconference oral proceedings may only be justified by the parties’ consent, like a waiver of the right to oral proceedings on the premises, is thus to be rejected (d.)

a. The need for consent does not follow from Article 116 EPC

76. As set out above, Article 116 EPC does not restrict the forms of oral proceedings and allows for various forms of conducting such proceedings. Oral proceedings under this provision may, hence, be held by videoconference. Consequently, Article 116 EPC

⁷⁸ T 1807/15, reasons, point 5.8.2.

⁷⁹ T 1807/15, reasons, at 3.4.

cannot provide a legal basis for any additional requirement in the form of a procedural statement as regards the choice of this form.⁸⁰ Parties do not need to consent to oral proceedings being held on the premises, hence, consent may equally not be required in the case of a videoconference.

77. Oral proceedings are to be appointed upon request or *ex officio* if the competent department considers this to be expedient. Hence, if a party is of the opinion that it can better argue its case orally, it can submit such a request. In such case, oral proceedings are appointed without room for discretion on the side of the competent department (safe for certain proceedings before the Receiving Section pursuant to Article 116(2) EPC, and requests for further oral proceedings). The right to oral proceedings is absolute.⁸¹
78. The relevant procedural statement of a party foreseen in Article 116 EPC is the request for oral proceedings. Other than that, under Article 116 EPC, the conduct of the oral proceedings and its form is not dependent on any further procedural statement from any party under Article 116 EPC.
79. Given that the right to oral proceedings under Article 116 EPC is absolute, oral proceedings do not depend on any other party's consent. Consent of another party cannot be made a prerequisite for the holding of oral proceedings. Any other conclusion would mean that, by withholding consent to a particular form of oral proceedings, a party could effectively preclude the holding of oral proceedings. Indeed, during the first phase of the pilot project for oral proceedings by videoconference before opposition divisions, which required the agreement of all parties,⁸² oral proceedings before opposition divisions could be held by videoconference in a limited number of cases only.⁸³

b. The form of oral proceedings is determined by the competent department

80. Beyond the request for oral proceedings, any consent could, at most, relate to the form of oral proceedings (the "how"). However, under the EPC, the decision as to the form in which the oral proceedings are held is reserved to the competent department. The form of the conduct of oral proceedings is not for the party or parties to determine. Case law has confirmed the discretionary character of the decision as to the form or

⁸⁰ The fact that Article 116 EPC does not require the parties' consent to a specific form of oral proceedings does not preclude the President of the EPO from determining, by virtue of his managerial and organisational powers pursuant to Article 10(2)(a) EPC, and within the framework of Article 116 EPC, additional conditions for holding oral proceedings in a new form. When the pilot project for oral proceedings by videoconference before opposition divisions was launched in May 2020 (see para. 83 below), allowing for the first time *inter partes* proceedings at the EPO to be held by videoconference, it was considered beneficial for successful testing and for the smooth and efficient conduct of the oral proceedings to make participation in the pilot voluntary. The decision of 14 April 2020 underlying the pilot project (OJ EPO 2020, A41) makes it clear that the pilot project was launched on the understanding that oral proceedings may be held by videoconference in accordance with Article 116 EPC.

⁸¹ See only T 552/06, reasons, point 2.2, cf. also T 1829/10, reasons, point 2.7 et passim.

⁸² Decision of the President of the European Patent Office dated 14 April 2020 concerning the pilot project for oral proceedings by videoconference before opposition divisions (OJ EPO 2020, A41), Article 2(1).

⁸³ Opposition oral proceedings by videoconference in the context of COVID-19, Progress report November 2020, p. 10 et seq.

oral proceedings both as regards oral proceedings in examination⁸⁴ and those held in appeal proceedings.⁸⁵

81. As set out above, decision G 2/19 clarified that organisational aspects or oral proceedings like venue and time are, in principle, not elements that could raise an issue under Article 116(1) EPC, other than in “entirely unusual” situations or cases;⁸⁶ the same must apply to the form. From the above, it also follows that the videoconferencing tools, practice, and procedure at the EPO fulfil the requirements of Article 116 EPC and cannot, by any means, be considered to constitute such “entirely unusual cases”.
82. The regulation of organisational aspects of oral proceedings before examining and opposition divisions or the legal division concern the functioning of the European Patent Office. Accordingly, any relevant measures and necessary steps would be for the President of the Office to address – on the basis and in accordance with his functions and powers under Article 10(2)(a) EPC.
83. In examination, until 31 March 2020, oral proceeding would have been held by videoconference only if the division had consented to a request.⁸⁷ Since 1 April 2020, oral proceedings in examination are held by videoconference, unless there are serious reasons against doing so.⁸⁸ The decision on whether there are serious reasons precluding oral proceedings by videoconference lies with the examining division. In opposition, oral proceedings were initially only held with the consent of all parties under the pilot project launched in May 2020, but, again, the final decision rested with the opposition division.⁸⁹ Since 1 January 2021, oral proceedings in opposition are being conducted by videoconference as part of the modified and extended pilot project, unless there are serious reasons against doing so.⁹⁰ Here again, the final decision lies with the opposition division.
84. Article 15a RBPA which entered into force on 1 April 2021⁹¹ confirms the generally applicable understanding that the determination of the form of the oral proceedings is a discretionary decision of the board in the particular appeal.
85. Therefore, even though Article 116 EPC does not stipulate the form of the oral proceedings, it clearly does not put it at the disposition of the parties. The parties can

⁸⁴ T 677/08, reasons, point 4.3.

⁸⁵ T 2068/14, reasons, point 1.2.2.

⁸⁶ See para. 26 above with further references.

⁸⁷ Updated information from the European Patent Office dated 15 November 2018 concerning interviews and oral proceedings to be held as a video-conference, OJ EPO 2018, A96.

⁸⁸ Decision of the President of the EPO dated 17 December 2020 concerning oral proceedings by videoconference before examining divisions (OJ EPO 2020, A134), superseding the Decision of the President of the EPO dated 1 April 2020 concerning oral proceedings by videoconference before examining divisions (OJ EPO 2020, A39).

⁸⁹ Decision of the President of the European Patent Office dated 14 April 2020 concerning the pilot project for oral proceedings by videoconference before opposition divisions (OJ EPO 2020, A41), Article 2(1).

⁹⁰ Decision of the President of the EPO dated 10 November 2020 concerning the modification and extension of the pilot project for oral proceedings by videoconference before opposition divisions (OJ EPO 2020, A121). According to Article 1 of this decision, the pilot project is currently foreseen to run until 15 September 2021.

⁹¹ Decision of the Administrative Council of 23 March 2021 approving an amendment to the Rules of Procedure of the Boards of Appeal, CA/D 3/21 (OJ EPO 2021, A19).

only decide whether they request oral proceedings, and whether they attend oral proceedings to which they were summoned.

c. Videoconference oral proceedings do not imply a restriction of procedural rights

86. The referral argues that parties who can waive their right to oral proceedings can, *a fortiori*, consent to the form of the oral proceedings.⁹² The reasoning is apparently based on the understanding that oral proceedings by videoconference do not, or at least not fully, qualify as oral proceedings in the sense of Article 116 EPC.
87. This understanding is incompatible with Article 116 EPC as shown above: this Article does not specify the form of oral proceedings. It allows for various forms of conducting such proceedings and, thus, permits oral proceedings by videoconference.
88. In view thereof, it cannot be maintained that oral proceedings held by videoconference would lead to procedural deficiencies or would constitute a restriction of the parties' procedural rights. Oral proceedings held by videoconference meet the same standards as those held on the premises and are, for the purposes of Article 116 EPC, thus, equivalent.
89. The decision as to the form remains with the competent department in line with any applicable rules (such as, in relation to oral proceedings in examination and opposition, the relevant decisions).

d. Consent to videoconference cannot be equated to a waiver

90. A waiver to oral proceedings can, therefore, only concern the question of whether oral proceedings are held, not how. It is correct that a party can waive its right to oral proceedings (i.e. the "whether"), including by not attending oral proceedings, as recognised, inter alia, in Rule 115(2) EPC. But the "how" (i.e. the form) is a different category.
91. Interpreting consent as equal to a waiver would lead to a different form of proceedings, eventually being held with the consent of the parties. Neither Article 116 nor any other provision of the EPC suggests that there could be anything else than oral proceedings (in addition to the written proceedings) that would still be subject to Article 116(1) EPC. Thus, interpreting consent as equal to a waiver would not be compatible with the EPC. A different format fulfilling the requirements of Article 116 EPC is not foreseen, and cannot be established, even with the consent of a party. Especially, Article 116(1) EPC contains no right to an informal interview or telephone conversation.⁹³
92. The argument of the referring Board could lead to a situation where a party having requested oral proceedings, but having consented to conduct them by videoconference, would be able to successfully request further oral proceedings, even

⁹² T 1807/15, reasons, point 3.4.

⁹³ T 552/06, reasons, point 2.2.

if the parties and subject remained the same, because Article 116(1) EPC, second sentence, could not be applied. This would be contrary to the object and purpose of Article 116 EPC and seriously endanger procedural and legal certainty.

e. Conclusion

93. Article 116 EPC does not stipulate the form of the oral proceedings, it only determines the minimum requirements, which can be fulfilled by videoconference oral proceedings held in accordance with the EPO's practice. The decision as to the form in which oral proceedings are held, lies with the competent department, not with the parties. Accordingly, the question of whether oral proceedings can be held by videoconference cannot depend on the consent, a waiver or similar procedural declaration of the parties.

III. Summary of the arguments as to question referred

94. For these reasons, it is submitted:

- a. Article 116 EPC does not specify the form in which oral proceedings may be held, as long as the essential elements and features of oral proceedings are maintained.
- b. Oral proceedings held by videoconference in accordance with the EPO's practice meet the requirements of Article 116 EPC. They are, hence, compatible with the right to oral proceedings as enshrined in Article 116(1) EPC.
- c. The decision as to the form in which oral proceedings are held lies with the competent department. Accordingly, the question of whether oral proceedings can be conducted in the form of a videoconference cannot depend on the consent, waiver or similar procedural declaration of a party.

Annex

Relevant decisions, notices and other announcements concerning oral proceedings by videoconference

- Decision of the Administrative Council of 23 March 2021 approving an amendment to the Rules of Procedure of the Boards of Appeal, CA/D 3/21⁹⁴
- Decision of the Administrative Council of 15 December 2020 amending Rules 117 and 118 of the Implementing Regulations to the European Patent Convention, CA/D 12/20⁹⁵
- Decision of the President of the EPO dated 17 December 2020 concerning oral proceedings by videoconference before examining divisions⁹⁶, superseding the Decision of the President of the EPO dated 1 April 2020 concerning oral proceedings by videoconference before examining divisions⁹⁷
- Decision of the President of the EPO dated 10 November 2020 concerning the modification and extension of the pilot project for oral proceedings by videoconference before opposition divisions⁹⁸
- Notice from the European Patent Office dated 10 November 2020 concerning oral proceedings before examining and opposition divisions and consultations, by videoconference⁹⁹
- Notice from the European Patent Office dated 17 December 2020 concerning the taking of evidence by videoconference by examining and opposition divisions¹⁰⁰
- Decision of the President of the European Patent Office dated 13 May 2020 concerning the filing of documents during telephone consultations and during interviews and oral proceedings held by videoconference¹⁰¹
- Website publication: Information on Opposition hearings by VICO – changes in 2021¹⁰²

⁹⁴ [OJ EPO 2021, A19.](#)

⁹⁵ [OJ EPO 2020, A132.](#)

⁹⁶ [OJ EPO 2020, A134.](#)

⁹⁷ [OJ EPO 2020, A39.](#)

⁹⁸ [OJ EPO 2020, A121.](#)

⁹⁹ [OJ EPO 2020, A122.](#)

¹⁰⁰ [OJ EPO 2020, A135.](#)

¹⁰¹ [OJ EPO 2020, A71.](#)

¹⁰² Published on the [EPO website](https://www.epo.org/news-events/news/2020/20201110.html): <https://www.epo.org/news-events/news/2020/20201110.html>

- Website publication: Information about access to oral proceedings by videoconference before opposition divisions¹⁰³

- Website publication: Information about oral proceedings before the Boards of Appeal – continuation of the measures adopted due to the coronavirus (COVID-19) pandemic and revised practice on oral proceedings by VICO, dated 15 December 2020¹⁰⁴

- Website publication: Information about oral proceedings before the Boards of Appeal – reassessment of the measures adopted due to the coronavirus (COVID-19) pandemic, dated 19 October 2020¹⁰⁵

¹⁰³ Published on the EPO website: <https://www.epo.org/applying/online-services/proceedings/public-access.html>

¹⁰⁴ Published on the EPO website: <https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201215.html>

¹⁰⁵ Published on the EPO website: <https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201019.html>