

**Third Party Observation for application Number  
EP20040758381**

Successful submission of observation took place on 10/05/2021  
20:50

**Title: HIGH EFFICIENCY AMPLIFIER AND METHOD OF DESIGNING SAME**

**Publication Number: EP1609239**

**Applicant: ANDREW CORP[CH]**

**Date of publication: 28.12.2005**

**Date of filing: 26.03.2004**

**These observations have been filed by:**

Anonymous

1. Facts and evidence

**1.1. Reference is made to the following documents**

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**1.2. Observations concerning the public availability of the non-patent literature**

NPL1

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**2.1. Prior use (1)**

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**Where was it made available?**

**How and to whom was it made available?**

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4. Novelty (Article 54 EPC)

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#### **6.1. Unallowable amendments (Articles 76 and 123 EPC)**

#### **6.2. Sufficiency of disclosure (Article 83 EPC)**

#### **6.3. Clarity (Article 84 EPC)**

#### **6.4. Further observations**

In the submission of the opponent/appellant of April 27, 2021, the Chairman of the Enlarged Board of Appeal (EBoA), Mr. C. Josefsson, and two further members of the EBoA were objected to as being suspected of partiality. Concerns related to the impartiality of the EBoA have also been raised in various amicus curiae briefs and third party submissions.

In this context, we would like to mention that there is an appeal case (T0761/17) wherein the Board of Appeal acted on the basis of the understanding that the decision in referral case G1/21 will allow the conducting of oral proceedings as a videoconference without the consent of all the parties. From the point of view of the public, this creates the impression that the question of referral case G1/21 is already decided, confirming the suspicion of partiality.

In appeal case T0761/17, oral proceedings were scheduled for March 22, 2021. On February 2, 2021, the Board informed the parties that the oral proceedings will be held as a videoconference.

In a submission of March 4, 2021, one of the parties (opponent I) informed the Board that they do not agree to the conducting of the oral proceedings as a videoconference, and requested to stay the proceedings until the EBoA has decided on the referral in the case of T1807/15 (now G1/21).

The oral proceedings were then rescheduled to July 21, 2021. The communication from the Board of March 11, 2021 wherein the parties were informed of the rescheduling did not indicate the location of the oral proceedings. However, on April 27, 2021, the Board issued a further communication stating that the oral proceedings on July 21, 2021 will be held as a videoconference.

From the submission of opponent I of March 4, 2021, it is clear that there is at least one party of the proceedings of case T0761/17 that does not agree to the conducting of the oral proceedings as a videoconference. Thus, the communication of April 27, 2021 is based on the understanding of the Board that, by July 21, 2021, the EBoA will have decided that the consent of all parties to the videoconference is not necessary.

April 27, 2021 is almost three months before the date of the oral proceedings of July 21, 2021. It is not apparent why the Board could not have awaited the further development of referral case G1/21 before deciding on the location of the oral proceedings.

The behavior of the Board in appeal case T0761/17 is relevant for assessing if there is a suspicion of partiality of members of the EBoA in referral case G1/21.

For an objection under Art. 24(3) EPC, it is sufficient if the circumstances of the case allow a reasonably objective and informed person to conclude that he or she might have good reasons to suspect partiality, see decision G2/08, r.4. The Boards of Appeal and the EBoA are part of the same unit of the EPO, the Chairman of the EBoA being also the President of the Boards of Appeal (R. 12a EPC) who is consulted on re-appointment of members of the Boards of Appeal (R. 12d EPC). Therefore, an objective and informed person has good reasons to believe that the EBoA will not assess the referral case in an unbiased and impartial manner, if Boards of Appeal communicate in advance to the public (that can access all the above-mentioned documents by file inspection) that there is only one possible decision of the EBoA that can seriously be expected.

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10:04

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**6.4. Further observations**

Under Art.10, the President of the EPO only has the power :

- (a) to take necessary steps to ensure the functioning of the EPO, which purely addresses the operation of the EPO itself, not of any parties to the proceedings, as well as
- (b) to prescribe which acts are to be performed at the EPO in Munich and its branch at The Hague respectively.

Thus, the President of the EPO does NOT HAVE THE POWER to prescribe:

- 1) that some acts may be performed by EPO employees elsewhere than at the EPO premises in Munich and The Hague; nor
- 2) where and how acts are to be performed by parties and third parties; nor
- 3) that some acts may be performed at other locations than at the EPO in Munich or The Hague.

So, in particular does the President of the EPO does NOT HAVE THE POWER to prescribe:

- 1) that oral proceedings may be performed by EPO employees elsewhere than at the EPO premises in Munich and The Hague; i.e., not at another physical location if they are in-person, nor by videoconferencing from another location than from an EPO Office in Munich or The Hague; nor
- 2) where and how oral proceedings are to be performed by parties and third parties (apart from the usual appearance in-person on oral proceedings at the EPO in Munich or The Hague), i.e., not that they have to be conducted by videoconferencing, nor that a non-appearance would allow the EPO to proceed without them; nor
- 3) that some acts HAVE TO be performed at another location than at the EPO in Munich or The Hague, i.e., that videoconferencing must be conducted by parties from a location outside the EPO.

So, the Decision of the President to decide that oral proceedings may be performed by videoconferencing without the consent of the parties goes beyond the President's power.

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**6.3. Clarity (Article 84 EPC)**

**6.4. Further observations**

We submit the following third party observations in response to the referral to the Enlarged Board of Appeal in case G 1/21.

The referral is based on the following question, referred to the Enlarged Board of Appeal by Technical Board of Appeal 3.5.02:

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 parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference?

The question has been so interpreted that the question specifically does not ask the Enlarged Board to rule on compatibility of oral proceedings in the form of a videoconference with the right to oral proceedings as enshrined in Article 116(1) EPC, where all parties to the proceedings have given their consent.

These observations do not support the emerging trend that appears to be seeking a way to have oral proceedings in the form of a videoconference declared illegal. It is our interpretation of the decision of the referring board that the legality and legitimacy of oral proceeding by video conference need not be considered by the Enlarged Board.

The referral is a question of consent of a party (or parties), or the right of parties (or a party) to stall proceedings by withholding consent.

The EPC however provides no framework for consent in such a context. Indeed the word consent appears in the EPC only in the context of privileged information (Art. 128 EPC). The EPC does not provide a mechanism for parties to proceedings to set the pace of proceedings.

Summons:

Parties are called to oral proceedings by means of a summons, in accordance with Rule 115 (1) EPC:

The parties shall be summoned to oral proceedings under Article 116, drawing their attention to paragraph 2 of this Rule. At least two months' notice of the summons shall be given, unless the parties agree to a shorter period.

A summons is a court order. It is not an invitation; nor is it a suggestion as to when proceedings may or could take place.

Deviations from summons are hitherto by means of a request to the summoning division. It is at the discretion of the responsible Division of the Office to grant or deny requests. This is common practice and is not at odds with the right to oral proceedings as enshrined in Article 116 EPC.

Appearance:

The referring board has duly considered the meaning of "appear" with regard to Rule 115 (2) EPC:

If a party duly summoned to oral proceedings before the European Patent Office does not appear as summoned, the proceedings may continue without that party.

The established working use of R. 115 (2) EPC needs to take precedence over this analysis in light of those who are searching for a way to declare ViCo illegal.

As such, R. 115 (2) EPC sets down that those who do not comply with a summons face the prospect of having proceedings continue without them.

This does not infringe on the party's right to oral proceedings in the sense of Art. 116 EPC or indeed the right to be heard, Art. 113 EPC.

Looking at the scenario of the referred question more closely, and in particular at "consent" in the context of ViCo oral proceedings. Consent is seen as a yes/no option, meaning that there are two scenarios:

- All parties consent to ViCo: oral proceedings proceed; this scenario is beyond the scope of the referral. The referring board appears to be satisfied that the right to oral proceedings has been satisfied;
- At least one of the parties does not consent: Rule 115 (2) EPC applies, and proceedings may continue without [the non-consenting party/parties.]

Rule 115 (2) EPC alone answers the referred question. Non-compliance with the summons to oral proceedings before the European Patent Office, including not consenting to the means of conduct of oral proceedings, results in a continuation of the proceedings without the party. The right to oral proceedings as enshrined in Article 116 EPC has been attended to by the EPO; compatibility is therefore implicit.

The board clearly must answer the referred question, insofar as it is admissible, with yes. Failure to do so would imply that the application of Rule 115 (2) EPC would be contrary to Article 116 EPC and consequently Article 113 EPC.

As a side note: the Office ought to fix the means of oral proceedings in the summons when it is dispatched, such that the correct application of Rule 115(2) EPC is possible. A summons that does not convey the type of oral proceedings makes it difficult for parties to comply with the requirement "as summoned" of Rule 115 (2).

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Observations on the G1/21

In considering the referral, the Enlarged Board must decide what is fairest, not just the parties, but also for the public. Much focus in the referral has been placed on the party who does not consent to oral proceedings being held by video conference. However, the effect of delaying justice on the other parties, and the public, must also be considered. Patents are a time-limited right, and the delaying of a final decision on the validity of a patent affects many more than just the party not wanting to attend oral proceedings by video conference. A delay in a final determination by a Board means potentially that invalid rights remain uncertain for much longer than they should or that valid rights cannot be enforced with confidence until a final determination by a Board.

The Boards of Appeal are a judicial body and therefore should have the right to determine the most appropriate way of administering justice, including holding oral proceedings. Article 116 EPC does not exclude oral proceedings being held by video conference. Accordingly, the Boards should have a right to determine in any given situation what is the fairest way to hold oral proceedings for all parties and the public, including if this means by video conference. It should not be determined on the basis of one party simply not wanting oral proceedings to be held by video conference (and without giving any reasons).

Fairness also requires consistency, and simply because one party does not agree to video conference, does not mean that oral proceedings should automatically be postponed until a time when all parties can meet in person. Consistency by the Boards should mean that it is for the Boards to decide, on the basis of any given situation, whether the right to be heard would be present for all parties. If a party does not wish oral proceedings to be held by video conference because they believe it would not give them the right to be heard, they should submit reasons. Those reasons should be weighed up by a Board against the approaches taken across all Boards to see if it would be fair and consistent with other Boards to hold oral proceedings by video conference or if there should be a delay until the parties can meet in person. The Boards of Appeal (and perhaps the Enlarged Board in its answer) should ideally set out, at least in guidelines, the situations that video conference would not allow a right to be heard.

In conclusion, the answer to the referring question must be yes. It is for a Board to decide how oral proceedings should be conducted and what would be fairest for all concerned, including the parties and the public, weighing up the effect of a delay on all parties and the public against the reasons put forward by a party for not considering that video conference gives them a right to be heard. Whether or not oral proceedings are to be held by video conference should not be determined solely on the basis of whether one party consents to video conference.

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#### **6.4. Further observations**

Relatively to the question referred to the Enlarged Board of Appeal (EBA) in G1/21 : "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?"

The meaning of Article 116(1) should be firstly considered. The first sentence of this article reads "Oral proceedings shall take place either at the instance of the European Patent Office if it considers this to be expedient or at the request of any party to the proceedings."

This wording is identical to the wording of the same article of CBE73.

At the time where the CBE73 applied, the first reference to a possible meeting as a video conference with one of the bodies of the EPO seems to have appeared in OJ EPO 1997, 572 for the case oral proceedings (OP) being held before Examining Division (ED).

It should be admitted that at in 1997, the technology was sufficient to hold OP as a video conference.

However it should not be admitted that such proposed OP before ED were equivalent to OP being held in traditional form, i.e. with a physical attendance at the EPO premises. Indeed the availability of the OP as a videoconference by OJ EPO 1997, 572 was subject to a waiver declaration according to which the "right to oral proceedings being held in the traditional form at the EPO premises" was irrevocably renounced.

It was then clearly admitted by the EPO that the right to OP encompasses the right to OP with physical attendance.

This required waiver was still in place when the EPC was revised in 2000 (with its entry into force only in 2007).

This revision did not change a comma of the Article 116(1), so that it must be admitted that the right deduced from Art116(1) EPC 73 (among which the right to physically attend to a requested OP) remains the same under Art116(1) EPC2000.

Contrary to a position held by a board of appeal (T2320/16 pt1.5.9), it could not be deduced from the silence of the Art116(1) about the form of the OP that the intention of the legislator of 2000 (revising the EPC) was to not exclude the possibility of OP in video conference. In 2000, the possibility to hold OP in video conference was subject to a waiver of the parties as for an OP with physical attendance. Accordingly, irrespective of the fact that OP in video conference was clearly possible in 2000, the Legislator in 2000 was also of the knowledge that art 116(1) EPC73 was implicitly inducing the physical attendance for OP so that the choice not to amend this article together with the revision is a clear pointer that this right of OP with physical attendance remained unaltered by the revision.

To be complete it should be mentioned that the abandonment of the waiver in 2006 (OJ EPO 2006, 585) is irrelevant to construe the intention of the Legislator revising the EPC in 2000, even if the entry into force of the revision of 2000 was postponed to 2007.

In other words, in 2000 at the time where the OP by video conference was clearly possible, the basic rule was that the OP should be held physically unless for the party to waive his right to physical attendance by accepting a videoconference. If the Legislator wanted to reduce this right to OP of the parties to a possible OP by video, the Legislator should have amended the article 116(1) with the revision to limit this right to OP to an OP possibly by videoconference only.

Therefore it could be deduced from the Article 116(1) EPC that an OP held by videoconference is not compatible with the right to oral proceedings unless to have the parties waived their right to OP with physical attendance.

As a side notes relative to T2320/16,

I. Re. pt. 1.5.2 : the board distinguishes OP from telephone conference (TC) in that a prerequisite of OP is that the parties can see the member of the Board and vice versa. But this prerequisite is not mention in Art 116(1) and TC are not referred to in the EPC. Accordingly, arguendo, following the reasoning of the board in T2320/16 should result in a possible right to OP being fulfilled by an OP held by TC, these proceedings being "oral". The absurd result obtained proves that the absence of exclusion of oral proceedings by videoconference (as well as the absence of exclusion of OP by TC) could not be deduced as resulting as a right to

OP fulfilled by an OP held by videoconference.

II. Re. pt. 1.5.10 : the board states “Furthermore, the board doubts whether procedural law in the contracting states is sufficiently developed and harmonised with regard to the status of oral proceedings by videoconference to the extent that the latter could be considered as one of the "principles of procedural law generally recognised in the contracting states" . This statement refers to the procedural law of the contracting states nowadays 2020/2021. If the current procedural law of the contracting states it not yet sufficiently developed regarding the status of OP by videoconference, it is a further pointer that in 2000 at the time of the revision, the intent of the Legislator revision the EPC was not to consider that the right to OP of art116(1), left unamended, was fulfilled by OP by videoconference without positive indication thereof in the wording of the article

by ReadyOpponentOne <https://www.readyopponent.one/>

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G 3/14, Reasons point 72

#### **6.4. Further observations**

"Access to justice": a "practical need" is not a justification to deviate from the Convention

T 2320/16, reason 1.7: " In the communication of the registry dated 15 January 2021, sent on behalf of the board, it was stated that in the midst of a worldwide pandemic, it was incumbent on the board to MAINTAIN ACCESS TO JUSTICE FOR ALL PARTIES CONCERNED. This applied in particular in view of the delay that would be incurred, were proceedings to be postponed." (emphasis added)

Communication from the Boards "Oral proceedings before the Boards of Appeal by videoconference" of 24 March 2021 (<https://www.epo.org/law-practice/case-law-appeals/communications/2021/20210324a.html>): "To ensure timely access to justice under these circumstances, the Boards of Appeal introduced the possibility of conducting oral proceedings by videoconference in May 2020."

A mere reference to "Access to justice" not a proper legal justification. It may be "practical need", but whether it is justified depends on the framework of the EPC, properly interpreted and not interpreted beyond its scope because it fits the Office, the Boards, the parties and/or any other stakeholders. The whole aim of Art. 113 and Art. 116 is to provide access to justice while providing all parties with the right to be heard in an appropriate way. Deviation from the Convention with the argument of "access" to justice is a serious breach.

Reference is made to, e.g., the CLARITY referral G 3/14, Reasons point 72: "The Enlarged Board cannot agree with the submission that it can be concluded from the travaux préparatoires relating to the EPC 2000 that WHILE A VIOLATION OF ARTICLE 84 EPC WAS DELIBERATELY NOT ADDED AS A GROUND FOR OPPOSITION OR REVOCATION, A "PRACTICAL NEED WAS SEEN BY THE USERS" FOR SUCH A GROUND. While some users may have seen a need (initially as represented by epi) this was not generally accepted. Nor can the Enlarged Board agree that the travaux préparatoires confirm that a patent as amended during opposition proceedings is to be examined as to its conformity with all the provisions of the EPC and that Article 84 EPC can be a reason for revocation of a patent in amended form, if by this it is meant that on amendment all the parts of a patent ARE TO BE EXAMINED FOR COMPLIANCE WITH THE EPC, including Article 84 EPC." (emphasis added)

In other words: deviating from the EPC cannot be justified by a "practical need".

As in Bayer's submission, I refer to "the thorough analysis of the referring Board in T1807/15 as to the different approaches for the construction of the term "oral proceedings" in Article 116 EPC, i.e. Case Law of the Boards of Appeal, literal and systematic interpretation, Travaux préparatoires, teleological interpretation, subsequent agreements and dynamic interpretation, NONE OF WHICH CLEARLY SUPPORT WAIVING THE NEED FOR ALL PARTIES TO CONSENT TO HOLDING ORAL PROCEEDINGS BY VIDEOCONFERENCE. At most, the issue is – so the referring Board – open to debate, and it is DOUBTFUL WHETHER SECONDARY LEGISLATION such as Article 15a of the Rules of Procedure of the Boards of Appeal, which was recently approved by the Administrative Council, CAN LEAD TO THE RESTRICTION OF PROCEDURAL RIGHTS ENSHRINED BY THE EPC." (emphasis added)

# **VIRTUAL ORAL PROCEEDINGS - ARE THEY LEGAL UNDER ARTICLE 116 EPC?**

## **I. Introduction**

The President of the EPO decided on November 10, 2020, that Oral Proceedings before Opposition Divisions are to be held by video conference, until September 15, 2021. According to this decision, agreement of the parties is not necessary (Decision of the president of the European Patent Office dated 10 November 2020, Articles 1 and 2). The Boards of Appeal at the EPO intend to go one step further, namely to restrict the possibility for Oral Proceedings according to Article 116 EPC permanently (if "exceptional circumstances" can be confirmed). Reference is made to the proposed text of Article 15(a) EPC of the Rules of Procedure of the Boards of Appeal, according to the user consultation, as online on December 2, 2020. The present article will not focus on whether such "virtual Oral Proceedings" are in general reasonable or, in a broader sense, legitimate during an extreme pandemic situation with severe travel restrictions (which should not be confused with any "exceptional circumstances") as a specific and limited deviation of the law, but rather whether such "virtual Oral Proceedings" are legal under the EPC. This article will also not focus upon whether virtual proceedings should be possible if the party (or the representative) agrees. In essence, this article relates to how Article 116 EPC must be interpreted and not about how it should be worded.

## **II. Article 116 EPC**

### **1. Background – intended amendment in the Rules of Procedures of the Boards of Appeal (RPBA)**

Article 15(a) of the proposed text for an amended RPBA reads as follows:

#### Article 15(a)

#### Oral Proceedings by video conference

*(1) The Board may decide to hold Oral Proceedings pursuant to Article 116 EPC by video conference 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 in person, the Chair may allow a party, representative or accompanying person to attend by video conference. In exceptional circumstances, the Chair may decide that a party, representative or accompanying person shall attend by video conference.*

*(3) The Chair may allow any member of the Board in the particular appeal to participate by video conference.*

Hence, according to Article 15(a) (2) sentence 2, RPBA (draft), a party does not have the right to (personal) Oral Proceedings under "exceptional circumstances" (e.g. in the case that the oral proceedings are exceptionally well suited to be held by video conference). The question now is whether this is in line with Article 116 EPC.

## **2. The official reasoning for the intended new Art 15a RPBA (draft)**

It is somewhat of a surprise that the only reasoning for this amendment (according to the "explanatory remarks" of the annex to the proposed text of Article 15(a) of the draft RPBA) is the following:

*5. 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 video conference.*

The "argument" therefore seems to be: Article 116 EPC does not literally mention the words "physically present" nor does the EPC explicitly exclude Oral Proceedings being held by video conference.

In our opinion, this is not how a correct interpretation of the law and legal texts works. To clarify this, maybe some examples will assist. Article 116 EPC also does not stipulate that the parties, their representatives, or members of Board must be visible. Article 116 EPC, nor in fact any other provision of the EPC, does not exclude Oral Proceedings being held by telephone call. It does not exclude Oral Proceedings by exchange of videos, nor does it literally exclude Oral Proceedings through the exchange of simple voice messages.



Whilst these examples do not necessarily show that the reasoning of the intended Article 15(a) ROPB is fundamentally flawed, these examples do at least show that this reasoning should never be taken to be sufficient.

What seems necessary, therefore, is a deeper look into the wording of Article 116 EPC and its context.

### **3. Art. 116 EPC**

According to Article 116(1) EPC, first sentence, first alternative, Oral Proceedings must take place if any party requests so. In each of paragraphs (1), (2) (3) and (4) of Article 116 EPC, the word "before" (German: "vor"; French: "devant") is used to further describe the Oral Proceedings ("before the same department"; "before the Receiving Section", "before the Examining Divisions and the Legal Division"; "Department before which").

The question which must be answered is, therefore, what does "before" mean in this context?

According to the Cambridge Dictionary, "before" is defined as follows:

"If a legal case comes before a law court or a judge, it is dealt with by them and when **someone** comes before a court or judge, they are **present** while the case is dealt with" (emphasis added)

According to the Collins Dictionary, it is described as follows:

"To go before a judge, tribunal or court of law means to be **present** there as part of an official or a legal process"

To be present means, of course, that someone or something is in a particular place, it is "there". The word "present" is, therefore, in sharp contrast to the word "virtual". If something/someone is "virtual" it is understood to mean that this something or this someone is not present at a place. Hence, the term "physically present" is simply a (misleading) pleonasm.

It is also very interesting to see that the BOAC's reasoning seems also to follow extremely closely the wording of the EPC (everything is allowed which is not literally excluded) whilst at the same time sees no problem in understanding appearance before a Court as not requiring ("physical") presence.

Personally, we do not believe that using the term "virtual presence" is fundamentally incorrect: everyone would immediately understand what is meant. The question, however, is if one can simply say "virtual presence" is an example of "presence". Similarly, if one says that something is sent by mail, this would not (at least not naturally) cover sending it by "e-mail" (even though e-mail is a virtual, "electronic" mail).

It can readily be understood, however, that virtual presence is a form of non-presence.

That ("physical") presence is meant in Art. 116 EPC is further supported by the language of the implementing regulations of the EPC, in particular Rule 115 EPC. According to Rule 115 EPC, the parties shall be summoned to Oral Proceedings under Article 116 EPC (in German: zur mündlichen Verhandlung nach Artikel 116 werden die Beteiligten ... geladen"; in French: La citation des parties à une procédure orale...").

According to the authors' understanding, "Summons" (or "Ladung"/"citation ") means that the Court (Office) invites the parties to come to their place (so that the parties will be there). Again, this provision requires presence (or at least the option to be present) of the parties (or their representatives).

In essence, the EPC stipulates that a party has a right to oral proceedings before the Division/Board which means the party has "a right to appear in person before the Division/Board in order to discuss the case" (cf. T 677/08, reasons, 4.3 and T 1012/03, reasons, 37 and 38).

#### **4. Principles of procedural law of the Contracting Members of the EPC – Art. 125 EPC**

Further, Article 125 EPC requires that the European Patent Office must take into account the principles of procedural law generally recognized in the contracting

states. This means that Article 125 EPC requires the EPO to consider, for example, the procedural law in Germany.

Sections 128 and 128a of the German Civil Procedure code read as follows:

### **Section 128**

#### ***Principle of oral argument; proceedings conducted in writing***

*(1) The parties shall submit their arguments regarding the legal dispute to the court of decision orally.*

*(2) The court may give a decision without hearing oral argument [German: mündliche Verhandlung] provided that the parties have consented thereto; such consent may be revoked only in the event of a material change to the litigation circumstances. The court shall determine, at its earliest convenience, the deadline for written pleadings to be submitted, and shall determine the date of the hearing on which the decision is to be pronounced. A decision given without a hearing for oral argument is inadmissible should more than three (3) months have lapsed since the parties granted their consent.*

*(3) Should nothing but the costs remain to be ruled on, the decision may be given without a hearing for oral argument being held.*

*(4) Unless determined otherwise, decisions of the court that are not judgments may be given without a hearing for oral argument being held.*

### **Section 128a**

#### ***Hearing for oral argument using image and sound transmission***

*(1) The court may permit the parties, their attorneys-in-fact, and advisers, upon their filing a corresponding application or ex officio, to stay at another location in the course of a hearing for oral argument, and to take actions in the proceedings from there. In this event, the images and sound of the hearing shall be broadcast in real time to this location and to the courtroom.*

*(2) The court may permit a witness, an expert, or a party to the dispute, upon a corresponding application having been filed, to stay at another location in the course of an examination. The images and sound of the examination shall be broadcast in real time to this location and to the courtroom. Should permission have been granted, pursuant to subsection (1), first sentence, for parties, attorneys-in-fact and advisers to stay at a different location, the images and sound of the examination shall be broadcast also to that location.*

*(3) The broadcast images and sound will not be recorded. Decisions given pursuant to subsection (1), first sentence, and subsection (2), first sentence, are incontestable.*

The fact that Section 128a of the code of civil procedure exists makes it very clear that, for the German lawmaker at the very least, virtual Oral Proceedings (or Oral Proceedings by video conference) are not Oral Proceedings. This is also supported by the reasoning for Section 128a German Court Code of Civil Procedure. In this reasoning, the German legislator explained (Deutscher Bundestag Drucksache 14/6036, p. 116):

*Insoweit wird **der Grundsatz** des § 128 Abs. 1 ZPO, nach dem die Parteien über den Rechtsstreit **vor** dem erkennenden Gericht **mündlich verhandeln**, im Interesse der Prozessökonomie **durchbrochen**. (Emphasis added)*

In English:

*In this respect, the **principle** of § 128 (1) ZPO, according to which the parties **hear the dispute orally before** the recognizing court, **is broken** in the interest of procedural economy. (Emphasis added)*

This shows that Oral Proceedings held by video conference are considered by the German legislator as something different from Oral Proceedings. A video conference Oral Proceedings "breaks" ("durchbricht") the fundamental principle of Oral Proceedings.

## **5. G 2/19 – potential infringement of the right to be heard and legitimate expectations**

In their Decision: G 2/19 the Enlarged Board of Appeal indicated that any unusual place or time for Oral Proceedings, could be seen as infringement of the right to be heard. It is to be noted that "Oral Proceedings by video conference", in particular before the Boards of Appeal (but also before the Opposition Division) are not only unusual but without any precedent (until very recently). Indeed (cf. G 2/19, reasons, C.IV.1.), the intended change appears to show a certain lack of willingness on the part of the EPO/Boards of Appeal to deal with a case.

Also, very clearly, the Enlarged Board of Appeal explains in G 2/19 (cf. reasons, C.VI.2.) that the principle of the protection of legitimate expectation (German: "Grundsatz des Vertrauensschutzes"), must be considered. In particular, the Enlarged Board of Appeal explains that the user of EPO services, must be able to rely on the fact that the departments of the EPO do not carry out their actions in any third place. At the very least, this seems to clearly forbid that members of the Division/Board handling the case are absent from the actual location of the Oral Proceedings. This means, at least paragraph (3) of intended Article 15(a) EPC RPBA does not seem to be admissible.

### **III. Conclusion**

The authors contend that depriving parties and representatives of their right to personal appearance before the EPO infringes Article 116 EPC. The wording of Article 116 EPC clearly requires the ("physical") presence of the parties or their representatives. General principles in the member states (by way of example only, Germany) do not understand "Oral Proceedings by video conference" to be Oral Proceedings. Since any provision in the RPBA or any decision of the President of the EPO must (of course) be in line with the EPC itself, the abovementioned decision of the President appears to be illegal as would the intended Rule 15a of the ROPB.

# **Third Party Observation for application Number EP20040758381**

Successful submission of observation took place on 19/04/2021  
11:59

**Title: HIGH EFFICIENCY AMPLIFIER AND METHOD OF DESIGNING SAME**

**Publication Number: EP1609239**

**Applicant: ANDREW CORP[CH]**

**Date of publication: 28.12.2005**

**Date of filing: 26.03.2004**

**These observations have been filed by:**

Anonymous

1. Facts and evidence

**1.1. Reference is made to the following documents**

PL1

**1.2. Observations concerning the public availability of the non-patent literature**

NPL1

Virtual oral proceedings - Are they legal under article 116 EPC? 12-02-2021(Tilman Pfrang, Andrew J Parker)

Uploaded documents:

1. NPL1\_e8a412e9-e6ed-4450-b3e9-50983e1f921b.pdf

2. Prior Use

**2.1. Prior use (1)**

**When did the prior use occur?**

**What was made available?**

**Where was it made available?**

**How and to whom was it made available?**

3. Common General Knowledge

4. Novelty (Article 54 EPC)

**4.1. Novelty (1)**

5. Inventive step (Article 56 EPC)

**5.1. Inventive step (1)**

**Features known from the prior art:**

**Novel features not known from the prior art:**

**The technical effect caused or technical problems solved by the novel features:**

**Reasons why it would be obvious to the skilled persons to combine the features as set in the independent claim:**

6. Any further Observations, e.g. Articles 52(2), 53, 57, 76, 83, 84, 123(2) EPC, validity of the priority date

**6.1. Unallowable amendments (Articles 76 and 123 EPC)**

**6.2. Sufficiency of disclosure (Article 83 EPC)**

**6.3. Clarity (Article 84 EPC)**

**6.4. Further observations**

I ran into this article. Worth considering by the Enlarged Board of Appeal.

The authors conclude:

"The authors contend that depriving parties and representatives of their right to personal appearance before the EPO infringes Article 116 EPC. The wording of Article 116 EPC clearly requires the ("physical") presence of the parties or their representatives. General principles in the member states (by way of example only, Germany) do not understand "Oral Proceedings by video conference" to be Oral Proceedings. Since any provision in the RPBA or any decision of the President of the EPO must (of course) be in line with the EPC itself, the abovementioned decision of the President appears to be illegal as would the intended Rule 15a of the ROPB."

**Third Party Observation for application Number  
EP20040758381**

Successful submission of observation took place on 13/04/2021  
20:07

**Title: HIGH EFFICIENCY AMPLIFIER AND METHOD OF DESIGNING SAME**

**Publication Number: EP1609239**

**Applicant: ANDREW CORP[CH]**

**Date of publication: 28.12.2005**

**Date of filing: 26.03.2004**

**These observations have been filed by:**

Anonymous

1. Facts and evidence

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**6.1. Unallowable amendments (Articles 76 and 123 EPC)**

**6.2. Sufficiency of disclosure (Article 83 EPC)**

**6.3. Clarity (Article 84 EPC)**

**6.4. Further observations**

Mr. Ingo Beckedorf (DE) is currently foreseen as a member of the panel of the Enlarged Board of Appeal in this matter. He shall recuse, for at least the following reasons:

Mr. Beckedorf is Chairman of the Board of Appeal 3.2.07. Case T 0328/16 is currently pending before this Board. The parties had initially been summoned to oral proceedings for April 29, 2020

(<https://register.epo.org/application?documentId=E36XZJRE2633DSU&number=EP09169216&lng=en&npl=false>), with later postponements to May 8, 2020 in Haar

(<https://register.epo.org/application?documentId=E4AW52BE9428DSU&number=EP09169216&lng=en&npl=false>) and then to February 2, 2021, without any change of the format

(<https://register.epo.org/application?documentId=E4OS75AS6832DSU&number=EP09169216&lng=en&npl=false>).

The venue has been changed with a notification dated January 25, 2021 to a videoconference

(<https://register.epo.org/application?documentId=E5R2C53I7592DSU&number=EP09169216&lng=en&npl=false>). From the file wrapper, it appears that the parties had been provided with this notification by Email already on January 20, 2021. With letter of January 22, 2021, a party did explicitly not agree to a videoconference because the possibility for a party to present the case is limited, compared to a face-to-face oral proceedings

(<https://register.epo.org/application?documentId=E5SDICGQ6777DSU&number=EP09169216&lng=en&npl=false>). Notably, this party mentioned that the other party did agree to a postponement, to allow for in-person oral proceedings at a later point of time.

With notification of January 27, 2021

(<https://register.epo.org/application?documentId=E5SD8XA46958DSU&number=EP09169216&lng=en&npl=false>), the Board informed the parties that both the date and the format are maintained. This notification holds: "Dementsprechend können die Kammern die Beteiligten zu einer mündlichen Verhandlung per Videokonferenz laden oder eine mündliche Verhandlung, die in den Räumlichkeiten des Europäischen Patentamts vor diesem Datum stattfinden soll, in eine mündliche Verhandlung per Videokonferenz umwandeln, und zwar auch ohne das Einverständnis der Beteiligten zu dem jeweiligen Format."

Accordingly, a party had to accept oral proceedings by videoconference in this case, even though it had explicitly disagreed with this format. Mr Beckedorf's Board held that this course of action is in conformance with Art. 116 EPC.

Putting oneself in the shoes of an objective observer, one just cannot but say that there is an appearance of bias of Mr. Beckedorf: It is only about three months ago that his Board, with him taking part as Chairman, has already dealt with and procedurally decided the very same issue that the Enlarged Board of Appeal is now dealing with.

I urge the Enlarged Board to re-compose the panel in a way that excludes the appearance of bias.

**Third Party Observation for application Number  
EP20040758381**

Successful submission of observation took place on 09/04/2021  
16:02

**Title: HIGH EFFICIENCY AMPLIFIER AND METHOD OF DESIGNING SAME**

**Publication Number: EP1609239**

**Applicant: ANDREW CORP[CH]**

**Date of publication: 28.12.2005**

**Date of filing: 26.03.2004**

**These observations have been filed by:**

Anonymous

1. Facts and evidence

**1.1. Reference is made to the following documents**

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**1.2. Observations concerning the public availability of the non-patent literature**

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**5.1. Inventive step (1)**

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**Novel features not known from the prior art:**

**The technical effect caused or technical problems solved by the novel features:**

**Reasons why it would be obvious to the skilled persons to combine the features as set in the independent claim:**

6. Any further Observations, e.g. Articles 52(2), 53, 57, 76, 83, 84, 123(2) EPC, validity of the priority date

**6.1. Unallowable amendments (Articles 76 and 123 EPC)**

**6.2. Sufficiency of disclosure (Article 83 EPC)**

**6.3. Clarity (Article 84 EPC)**

**6.4. Further observations**

With respect to the question whether Art. 116 EPC supports a video conference as oral proceedings if not all parties consent, attention is drawn to Art. 134(6) EPC. Art 134(6) EPC stipulates that "[f]or the purpose of acting as a professional representative, any person whose name appears on the list of professional representatives shall be entitled to establish a place of business in any Contracting State in which proceedings established by this Convention may be conducted, having regard to the Protocol on Centralisation annexed to this Convention."

If Art. 116 EPC were to support video conferences without consent of all parties, it follows that "proceedings established by this Convention" may not only be carried out in Germany and the Netherlands, but potentially in all Contracting States. Consequently, all representatives would have the right to establish a place of business in any Contracting State. However, this possibility was not foreseen in the EPC as is clear from the relevant section of the Travaux Préparatoires EPC 1973.

As such, it seems that Art. 116 EPC can not be interpreted to allow video conferences in case not all parties agree.

**Third Party Observation for application Number  
EP20040758381**

Successful submission of observation took place on 30/03/2021  
10:21

**Title: HIGH EFFICIENCY AMPLIFIER AND METHOD OF DESIGNING SAME**

**Publication Number: EP1609239**

**Applicant: ANDREW CORP[CH]**

**Date of publication: 28.12.2005**

**Date of filing: 26.03.2004**

**These observations have been filed by:**

Anonymous

1. Facts and evidence

**1.1. Reference is made to the following documents**

PL1

**1.2. Observations concerning the public availability of the non-patent literature**

NPL1

2. Prior Use

**2.1. Prior use (1)**

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**What was made available?**

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**How and to whom was it made available?**

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4. Novelty (Article 54 EPC)

**4.1. Novelty (1)**

5. Inventive step (Article 56 EPC)

**5.1. Inventive step (1)**

**Features known from the prior art:**

**Novel features not known from the prior art:**

**The technical effect caused or technical problems solved by the novel features:**

**Reasons why it would be obvious to the skilled persons to combine the features as set in the independent claim:**

6. Any further Observations, e.g. Articles 52(2), 53, 57, 76, 83, 84, 123(2) EPC, validity of the priority date

**6.1. Unallowable amendments (Articles 76 and 123 EPC)**

**6.2. Sufficiency of disclosure (Article 83 EPC)**

**6.3. Clarity (Article 84 EPC)**

**6.4. Further observations**

Without wanting to repeat the other third party observations which have been made concerning the forthcoming oral proceedings via videoconference, we agree with the objections that have been made, notably that members of the Enlarged Board who were involved in the drafting and proposing of new A.15a RPBA may not be involved in the matter G1/21, to preserve the impression of impartiality.

Additionally the holding of videoconference "oral proceedings" in G1/21 already leads the informed observer to believe that the referral has already been decided:

If the Enlarged Board decides that videoconference oral proceedings are not proper under the EPC then the oral proceedings at which this is decided are themselves not proper, meaning that the decision nullifies itself. This is not a logical outcome which the Board can possibly reach.

The only logical outcome is the alternative - that videoconference oral proceedings are allowable. Thus the holding of oral proceedings via videoconference in G1/21 already prejudices the outcome. The oral proceedings should be held in person, when this is possible.

Secondly the summons to oral proceedings under Rule 115(1) dated 17 March 2021 is deemed received by the parties on Monday 29 March 2021 (since 27 March 2021 falls on a Saturday). Rule 126(2) EPC. This is one day less than 2 months before oral proceedings (scheduled for 28 May 2021). This contravenes Rule 115(1) EPC which requires two months notice of oral proceedings, unless the parties agree to less, which they have apparently not. J0014/91 does not apply here in view of the circumstances of the present case, which is to decide a matter of far-reaching importance to the future of the EPORG. As is clear from the referring decision, the case is also far from straightforward (J0014/91, R.2.5).

The high potential for partiality and prejudice in this matter as well as the breach of Rule 115(1) EPC, apparent from the current state of the file, could well lead to constitutional complaints in the member states of the EPC.

The fundamental question of "videoconference without consent" could also well lead to a constitutional complaint if it is decided that such action is lawful. For example in Germany it is accepted that "virtual" oral proceedings are not equivalent to oral proceedings. This is particularly the case for a patent proprietor who has her patent finally revoked at videoconference oral proceedings without consent before the Boards, and has no further recourse to a higher authority.

**Third Party Observation for application Number  
EP20040758381**

Successful submission of observation took place on 27/03/2021  
15:58

**Title: HIGH EFFICIENCY AMPLIFIER AND METHOD OF DESIGNING SAME**

**Publication Number: EP1609239**

**Applicant: ANDREW CORP[CH]**

**Date of publication: 28.12.2005**

**Date of filing: 26.03.2004**

**These observations have been filed by:**

Anonymous

1. Facts and evidence

**1.1. Reference is made to the following documents**

PL1

**1.2. Observations concerning the public availability of the non-patent literature**

NPL1

2. Prior Use

**2.1. Prior use (1)**

**When did the prior use occur?**

**What was made available?**

**Where was it made available?**

**How and to whom was it made available?**

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4. Novelty (Article 54 EPC)

**4.1. Novelty (1)**

5. Inventive step (Article 56 EPC)

**5.1. Inventive step (1)**

**Features known from the prior art:**

**Novel features not known from the prior art:**

**The technical effect caused or technical problems solved by the novel features:**

**Reasons why it would be obvious to the skilled persons to combine the features as set in the independent claim:**

6. Any further Observations, e.g. Articles 52(2), 53, 57, 76, 83, 84, 123(2) EPC, validity of the priority date

**6.1. Unallowable amendments (Articles 76 and 123 EPC)**

**6.2. Sufficiency of disclosure (Article 83 EPC)**

**6.3. Clarity (Article 84 EPC)**

**6.4. Further observations**

At least three member of the current panel of the Enlarged Board of Appeal, incl the Chairman, must not take part in proceedings G 1/21 because of the appearance of bias.

According to BOAC/16/20

(<[http://documents.epo.org/projects/babylon/eponet.nsf/0/ABB07FC3026814D7C125863F004CF531/\\$File/boac-16-20\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/ABB07FC3026814D7C125863F004CF531/$File/boac-16-20_en.pdf)>), the President of the Boards of Appeal, Mr Carl Josefsson, proposed the adoption of Art 15a RPBA, as indicated on the title page as follows: “The President of the Boards of Appeal proposes that the Boards of Appeal Committee adopts the amendment to the Rules of Procedure of the Boards of Appeal set out in Part II of this document.”

The Presidium advised the President on the proposal (paragraph 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.” Mr Gunnar Eliasson and Ms Andrea Ritzka were member of the Presidium at the time;  
<[http://documents.epo.org/projects/babylon/eponet.nsf/0/C8760950A6BBF8D4C12585D600487583/\\$File/Presidium%202020%2001.09%20-%20PDF.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/C8760950A6BBF8D4C12585D600487583/$File/Presidium%202020%2001.09%20-%20PDF.pdf)>.

BOAC/16/20 goes on to explain what Art 15a RPBA is foreseen to support (paragraph 5, last sentence): “It is envisaged that in the near future the Boards of Appeal will extend their practice by holding oral proceedings by videoconference without requiring the parties’ agreement to this format.”

At least the aforementioned three member of the Enlarged of Appeal will be perceived as biased in view of their prior involvement in the preparation of Art 15a RPBA with the explanatory note that the Boards will hold oral proceedings by videoconference without the parties’ consent. This is exactly what the referral G 1/21 is all about. They should recuse in accordance with Art. 24 EPC and Art. 4 RPEBA.

Nothing is publicly known about the involvement of Mr Ingo Bechedorf or Mr Wim van der Eijk in the preparation of Art. 15a RPBA. If they were involved, they should also recuse.

**Third Party Observation for application Number  
EP20040758381**

Successful submission of observation took place on 21/03/2021  
20:42

**Title: HIGH EFFICIENCY AMPLIFIER AND METHOD OF DESIGNING SAME**

**Publication Number: EP1609239**

**Applicant: ANDREW CORP[CH]**

**Date of publication: 28.12.2005**

**Date of filing: 26.03.2004**

**These observations have been filed by:**

Anonymous

1. Facts and evidence

**1.1. Reference is made to the following documents**

PL1

**1.2. Observations concerning the public availability of the non-patent literature**

NPL1

2. Prior Use

**2.1. Prior use (1)**

**When did the prior use occur?**

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3. Common General Knowledge

4. Novelty (Article 54 EPC)

**4.1. Novelty (1)**

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**The technical effect caused or technical problems solved by the novel features:**

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#### **6.2. Sufficiency of disclosure (Article 83 EPC)**

#### **6.3. Clarity (Article 84 EPC)**

#### **6.4. Further observations**

Objection under Article 24 of the European Patent Convention.

All members of the Enlarged Board of Appeal in case G 1/21, and in particular the chairman, should be excluded from the proceedings since they are suspected of partiality:

##### 1) Exclusion of the Chairman

According to the communication of the Enlarged Board of Appeal dated 17 March 2021 informing on the composition of the Board, the chairman in the case will be the President of the Boards of Appeal, Mr C. Josefsson.

This violates Article 24(1), first alternative EPC stipulating that members of the Boards of Appeal or of the Enlarged Board of Appeal may not take part in a case in which they have any personal interest (...).

In the present case G 1/21 the following question has to be answered by 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?"

The answer to this question inter alia relates to Article 15a of the Rules of Procedure of the Boards of Appeal (see also point 2.1 of the referring decision T 1807/15) which is aimed at being introduced into these Rules as of 1st April 2021.

The chairman in the present proceedings before the Enlarged Board, Mr C. Josefsson, in his function as the President of the Boards of Appeal, issued a document dated 10 December 2020 (see [http://documents.epo.org/projects/babylon/eponet.nsf/0/ABB07FC3026814D7C125863F004CF531/\\$File/boac-16-20\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/ABB07FC3026814D7C125863F004CF531/$File/boac-16-20_en.pdf)) in which he stated (see also point 2.1 of the referring decision T 1807/15 with reference to a web page that seems not accessible anymore):

"The President of the Boards of Appeal proposes that the Boards of Appeal Committee adopts the amendment to the Rules of Procedure of the Boards of Appeal 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."

The proposed new Article 15a 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."

Thus, Mr. C. Josefsson has proposed a new Article to the Rules of Procedure of the Boards of Appeal in his function as the President of the Boards of Appeal and is now, in his function as the chairman of the Enlarged Board of Appeal, to decide on the lawfulness of exactly this Article, i.e. the Article he himself proposed to be introduced.

This is not compatible with basic principles of impartiality as set out in Article 24(1) EPC because Mr C. Josefsson would have a personal interest in that his "own" new Article is not overturned by the Enlarged Board of Appeal in order to avoid the disgrace of having proposed a new Article that is unlawful.

In addition to this objection under Article 24(1), 1st alternative, there is also an objection under Article 24(1), 3rd alternative, when applied by means of analogy. This alternative stipulates that members of the Boards of Appeal or of the Enlarged Board of Appeal may not take part in a case if they participated in the decision under appeal. Obviously, Mr C. Josefsson has not taken part in the decision under appeal. Still, the idea behind the third alternative is that no member of the Enlarged Board of Appeal should take a

decision on issues related to a previous relevant activity in the same matter. As said above, Mr C. Josefsson was involved in the same matter since he proposed new Article 15a of the Rules of Procedure of the Boards of Appeal.

It is therefore considered in compliance with Article 24(1) EPC that Mr C. Josefsson is removed from the board of case G 1/21.

2) Exclusion of other members involved in the drafting of Article 15a of the Rules of Procedure of the Boards of Appeal.

It is not known whether other members of the Enlarged Board of Appeal in the composition for case G 1/21 were involved in the drafting of Article 15a. Those who were, should act in line with the requirements of Article 24(2) EPC.

3) Exclusion of all members of the Enlarged Board of Appeal in the present composition

The Enlarged Board of Appeal has to decide on whether or not videoconferencing is in line with the requirements of the EPC. To this end the Enlarged Board of Appeal has summoned the parties to a hearing by means of a videoconference.

This is an indication that the Enlarged Board of Appeal has already decided that videoconferences are an acceptable form of oral proceedings although it did not yet hear the case. Further, this is an indication that the Enlarged Board of Appeal as a whole is not impartial on this point since it is assumed that the summons to videoconference were issued with the consent of all members of the Board in the present composition.