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European Patent Office
Beschwerdekammer/Boards of Appeal
85540 Haar

Your Reference:

Our Reference:
P51938-EPAP H

Date:
June 25, 2021

Case number:

G1/21

Appeal case number:

T1807/15 – 3.5.02

Patent Number:

EP04758381.0 / 1609239

Title:

**DOHERTY AMPLIFIER WITH OUTPUT HYBRID
COUPLER**

Applicant:

Andrew AG

Opponent:

Rohde & Schwarz GmbH & Co. KG

This is in response to the summons to attend oral proceedings dated June 1, 2021:

I. On the subject-matter of the Referral

The present case **G 1/21** is based on the interlocutory decision **T 1807/15** wherein the Technical 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?

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The question, referred to the Enlarged Board of Appeal shall be answered in the negative, i.e. the conduct of oral proceedings in the form of a videoconference is not 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.

As already stated in our submission dated April 27, 2021 concerns exist in particular regarding the conduct of oral proceedings by videoconference, without the consent of the parties. Such an approach is not compatible with the right to oral proceedings as enshrined in Article 116(1) EPC, as set forth in detail in the interlocutory decision T 1807/15. The referring Board provided in T 1807/15 a thorough analysis 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 support waiving the need for all parties to consent to holding oral proceedings by videoconference.

By letter from the Registry of the Enlarged Board of Appeal dated May 21, 2021, we received on May 26, 2021 comments of the President of the EPO dated April 27, 2021 (in the following "the President's comments") and *amicus curiae* briefs filed between April 8, 2021 and May 12, 2021. As it will be explained in more detail below, even considering the President's statement cannot dispel the above concerns.

Hence, the question referred to by the Technical Board of Appeal 3.5.02 shall be answered in the negative.

That is,

the conduct of oral proceedings in the form of a videoconference is not 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.

II. Article 116 EPC - oral proceedings

According to Article 116(1) EPC

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. However, the European Patent Office may reject a request for further oral proceedings before the same department where the parties and the subject of the proceedings are the same.

II.1 The interpretation of Article 116 EPC - Construing the term "oral proceedings"

It is established in the jurisprudence of the Enlarged Board of Appeal and the Boards of Appeal that the principles of interpretation provided for in Art. 31 and 32 Vienna Convention are to be applied when interpreting the EPC. (G 1/83; G 5/83; G 2/02 and G 3/02, OJ 2004, 483; G 2/08, OJ 2010, 456; G 3/14, OJ 2015, A102; G 1/16, OJ 2018, A70; J 10/98, OJ 2003, 184; T 128/82, OJ 1984, 164; T 1173/97, OJ 1999, 609)¹ (see also the Referring Board's decision T 1807/15²).

As summarized in Referring Board's decision T 1807/15³ according to Article 31(1) of the Vienna Convention, a treaty is to be interpreted 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. In this regard, Article 32 of the Vienna Convention stipulates recourse to supplementary means of interpretation, including the preparatory work ("*travaux préparatoires*") of the treaty, when the interpretation leads to a result which is manifestly absurd or unreasonable. The aim of any interpretation must be to determine the term's authentic meaning (see G 3/19, Reasons, point XIV.2).

II.1.1 Literal and systematic interpretation

As noted by the Referring Board in decision T 1807/15⁴, pursuant to the provisions of the Vienna Convention the term "oral proceedings" has to be interpreted in the context of Article 116 EPC and associated provisions of the EPC. Article 116 EPC itself defines the EPO departments before which oral proceedings take place. These departments' duties are generally defined in Articles 16 to 22 EPC and then fleshed out in further Articles of the EPC. Taking these Articles together, it follows that Article 116 EPC relates to administrative and judicial proceedings governed by the rule of law (see G 3/08, Reasons, point 7.2.1).

The Referring Board further noted that the EPC does not contain any explicit provision on the format of oral proceedings, yet this, in the Board's opinion, does not necessarily imply that the term "oral proceedings" in Article 116 EPC should be construed so broadly as to encompass videoconferences. To ascertain the authentic meaning of this term, it needs to be borne in mind that when the EPC was drawn up there were no suitable technical options for adequately replacing traditional oral proceedings. Therefore, in the absence of any technical alternatives, oral proceedings inevitably became to mean in-person proceedings, i.e. proceedings that were (generally) open to the public and which the parties attended in person in a courtroom before the responsible department to present oral arguments. As

¹ Case Law of the Boards of Appeal of the European Patent Office, Ninth Edition, July 2019 (in the following referred to as "case law") III.H.1.1

² T 1807/15, reasons, 5.2

³ T 1807/15, reasons, 5.3

⁴ T 1807/15, reasons, 5.4.1

such, the legislator of the EPC 1973 had absolutely no reason to further define the format of the oral proceedings, as this was specified by the very term "oral proceedings".

However, based on these circumstances, it follows that the fact, that the EPC does not contain any explicit provision on the format of oral proceedings, the term "oral proceedings" can only be understood by the legislator of the EPC 1973 as in-person proceedings or proceedings at the premises of the EPO.

The hypothetical opposite interpretation, that the absence of explicit provision on the format of the oral proceedings in Article 116 would allow a broad interpretation including any format (and therefore also oral proceedings by videoconference) is, as noted by the Referring Board, based solely on retrospective considerations.

The Referring Board further correctly noted, that the above interpretation is also supported by the wording of Rule 71(2) EPC 1973, which concerns a summoned party "appearing" before the EPO (*"If a party who has been duly summoned to oral proceedings before the European Patent Office does not appear as summoned, the proceedings may continue without him."*). Given the technology available at that time, "appearing" can indeed only be taken to mean physical presence in an actual room.

The argumentation in the president's comments⁵ that terms that the term "appear" could equally be used in relation to oral proceedings by videoconference are thus, solely based on retrospective considerations.

In the president's comments⁶ it is referred to subsequent practice in the application of the treaty which should be taken into account. It is further noted⁷ that there would be manifold relevant subsequent practice which support the conclusion that Article 116 EPC is not limited to oral proceedings held on the premises. It is in particular referred to the Diplomatic Conference and the Act revising the Convention on the Grant of European Patents concluded on 29 November 2000. In the president's comments it is argued that given the fact that oral proceedings were already held by videoconference when the Diplomatic Conference took place, it could be concluded that the Contracting States found this form of oral proceedings acceptable and compliant with Article 116 EPC and they thus, implicitly confirmed that its wording was broad enough to cover all the forms of oral proceedings other than those held on the premises.

However, this argumentation cannot be followed. As already pointed out in the Referring Board's decision⁸, there are no indications that the meaning of this term changed when the EPC was revised in 2000. The wording of Article 116 EPC 1973 remained the same, except for

⁵ President's comments, para. 47

⁶ President's comments, para. 48

⁷ President's comments, para. 49

⁸ T 1807/15, reasons, 5.5

some minor editorial amendments. If the legislators had wished to consider other technical options, a clarification to this effect would likely have been added to Article 116 EPC or to the Implementing Regulations. In this regard it has to be considered that the EPO first implemented the concept of holding oral proceedings in the form of a videoconference already in 1998, i.e. before the Diplomatic Conference for the revision of the EPC. Subsequently, interviews and oral proceedings before the examining division could be held as a videoconference at the applicant's request. For this request to be granted, however, the applicant had to submit a declaration waiving its right to traditional oral proceedings.

As the Referring Board concluded, this EPO Notice demonstrated the thinking at that time and at the time of the Diplomatic Conference in 2000, i.e. that videoconferences did not meet the statutory requirements for oral proceedings under Article 116 EPC and applicants thus had to waive their right to traditional oral proceedings held on EPO premises. The fact that the wording of Article 116 EPC has remained substantially the same despite the immediacy of the issue of using videoconferencing technology at the EPO can be considered a sign that the legislator responsible for the EPC 2000 still endorsed the idea of traditional oral proceedings.

In particular as further noted⁹ the EPO maintained the requirement to submit a declaration as mentioned above until 2006. Even after that date, the EPO upheld the principle that videoconferences still had to be requested and thus could only be held with the applicant's consent.

In the president's comments,¹⁰ as a further example of relevant subsequent practice, which supports the conclusion that Article 116 EPC is not limited to oral proceedings held on the premises, it is referred to the decision of the Administrative Council on 15 December 2020, to allow the taking of evidence by videoconference (in the president's comments it is noted that the delegations decided unanimously. The corresponding footnote 54 however mentions *"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 **video conference were a must during the pandemic**, thus adhering to the interpretation of Article 116 EPC advanced above (CA/PV 165, para. 143)."* (emphasize added). From the statement of the German delegation that *"video conference were a must during the pandemic"* it can however not be concluded, that this is a confirmation that oral proceedings by videoconference without the consent of the parties are in agreement with Article 116 EPC. In particular the pandemic situation has to be distinguished from a "normal" situation without pandemic. In this regard we refer to the legal opinion of A. Speer (Ass. jur.) / R. Schregle (Ass. jur.), Corporate and Intellectual Property Law TUM School of Management (Chair: Prof. Dr. jur. Christoph Ann,), of January 29, 2021¹¹. We

⁹ T 1807/15, reasons, 5.6

¹⁰ President's comments, para. 49

¹¹ Submitted by *amicus curiae* briefs of VPP, FEMIP, and Siemens

further refer to the *amicus curiae* briefs filed by VPP, FEMIP, and Siemens and their pleadings, which we fully adopt and to which we hereby refer. The corresponding *amicus curiae* brief of VPP is filed enclosed as (Encl.5).

As concluded in the above noted legal opinion, conducting oral proceedings as a videoconference is an infringement of the parties' right to be heard.¹² (*"Folglich ist die Durchführung der mündlichen Verhandlung als Videokonferenz ein Eingriff in das rechtliche Gehör der Parteien."*)

Such infringement may be justified. This would be the case if it could be based on a lawful legal basis and this is also applied proportionately in the individual case.¹³ (*"Dieser Eingriff kann gerechtfertigt sein. Das wäre der Fall, wenn er sich auf eine rechtmäßige Rechtsgrundlage stützen ließe und diese auch im Einzelfall verhältnismäßig angewendet wird."*)

Videoconferencing in pandemic times is a case where the right to be heard virtually stands in its own way. If the parties are heard by videoconference even without their consent, this interferes with their right to be heard. If the right to be heard is not infringed and instead the parties wait until they can be heard in person, no hearing at all will be possible for an unforeseeable period of time. Moreover, without the possibility of video conferencing, the system would run the risk of becoming inoperable due to a procedural backlog. The latter, in combination with the situation that the right to be heard virtually stands in its own way, is a strong reason to restrict the right to be heard. In times of pandemic, as we are currently experiencing, it is therefore permissible to adopt a rule according to which oral proceedings can be held as a video conference even without the consent of the parties.¹⁴ (*"Es handelt sich bei Videokonferenzen in Pandemiezeiten um einen Fall, in dem sich das Recht auf rechtliches Gehör quasi selbst im Weg steht. Wird auch ohne Willen der Parteien im Rahmen einer Videokonferenz verhandelt, greift das in ihr Recht auf rechtliches Gehör ein. Wird nicht in das rechtliche Gehör eingegriffen und stattdessen abgewartet bis persönlich verhandelt werden kann, ist auf unabsehbare Zeit überhaupt keine Verhandlung möglich. Zudem liefe das System ohne Möglichkeit der Videokonferenz Gefahr, durch einen Verfahrensstau funktionsunfähig zu werden. Letzteres in Kombination mit der Situation, dass sich das Recht auf rechtliches Gehör quasi selbst im Weg steht, ist ein gewichtiger Grund, um das rechtliche Gehör einzuschränken. In Pandemiezeiten, wie wir sie gerade erleben, ist es folglich durchaus zulässig eine Regelung zu treffen, der zufolge auch ohne Zustimmung der Parteien mündlich als Videokonferenz verhandelt werden kann."*)

Nevertheless, there exist two problems if Article 15a RPBA is to provide in the future that oral proceedings can always be conducted as a videoconference if the Board of Appeal deems

¹² Legal opinion A. Speer / R. Schregle, page 10, last paragraph

¹³ Legal opinion A. Speer / R. Schregle, page 11, first paragraph

¹⁴ Legal opinion A. Speer / R. Schregle, page 12, second paragraph

this to be expedient. Firstly, it is completely unclear what specific conditions must be met for the Board of Appeal to assume that it is expedient to hold the hearing as a video conference. It is thus not possible for the parties to predict in which cases their right to be heard is to be restricted. This raises significant concerns about the legality of the rule. Secondly, "expediency" is also a conceivably low hurdle for restricting such a substantial right as the right to be heard. The norm should rather clarify that the conduct of a videoconference against the will of the parties can only be ordered if there are particularly serious reasons in the individual case. This does not only apply to the proposed Article 15a RPBA, but to all norms that provide for an infringement of the right to be heard by conducting an oral hearing as a videoconference. Then, an infringement of the right to be heard would also be justified, provided that it is proportionate in the individual case.¹⁵ (*"Trotzdem bestehen gleich zwei Probleme, wenn Art. 15a VOBK künftig vorsehen soll, dass die mündliche Verhandlung immer dann als Videokonferenz durchgeführt werden kann, wenn die Beschwerdekammer das für zweckmäßig erachtet. Erstens ist völlig unklar, welche Voraussetzungen konkret vorliegen müssen, damit die Beschwerdekammer von einer Zweckmäßigkeit der Durchführung als Videokonferenz ausgeht.⁵² Für die Parteien ist so nicht vorhersehbar, in welchen Fällen ihr Recht auf rechtliches Gehör eingeschränkt werden soll. Das begründet erhebliche Bedenken an der Rechtmäßigkeit der Regelung. Zweitens ist „Zweckmäßigkeit“ auch eine denkbar niedrige Hürde, um ein solch gewichtiges Recht, wie das Recht auf rechtliches Gehör einzuschränken. Die Norm müsste viel eher klarstellen, dass die Durchführung einer Videokonferenz gegen den Willen der Parteien nur bei Vorliegen besonders gewichtiger Gründe im Einzelfall angeordnet werden kann. Das gilt nicht nur für den geplanten Art. 15a VOBK, sondern für alle Normen, die einen Eingriff in das rechtliche Gehör durch Durchführung einer mündlichen Verhandlung als Videokonferenz vorsehen. Dann wäre ein Eingriff in das rechtliche Gehör auch gerechtfertigt, sofern er im Einzelfall verhältnismäßig ist."*)

Hence, the German delegation's statement that *"video conference were a must during the pandemic"*, can only be understood as conforming that conducting oral proceedings as a videoconference, which is an infringement of the parties' right to be heard, is justified in pandemic times.

To come back to the argument in the President's comments, that the decision of the Administrative Council on 15 December 2020, to allow the taking of evidence by videoconference is an example of relevant subsequent practice, which supports the conclusion that Article 116 EPC is not limited to oral proceedings held on the premises, said argument cannot be accepted.

If an amendment of secondary law like the Rules of the EPC or even procedural regulations like the Rules of Procedure of the Boards of Appeal are used as justification of interpretation of Article 116 EPC, then this leads the pending proceedings *ad absurdum*. As we currently

¹⁵ Legal opinion A. Speer / R. Schregle, page 12, last to page 13, first paragraph

deal with the question whether oral proceedings by videoconference without the consent of the parties are in agreement with Article 116 EPC, such an agreement cannot be justified by implementing secondary law, which might itself – depending on the outcome of the present proceedings – be in contrast to the requirements of Art. 116 EPC.

The same applies to the further example of relevant subsequent practice mentioned in the president's comments¹⁶, namely the decision of the Administrative Council on 23 March 2021, to approve the amendment of the Rules of Procedure of the Boards of Appeal. This amendment introduced new Article 15a, confirming the practice to hold oral proceedings under Article 116 EPC before the Boards of Appeal by videoconference. The legal basis of introducing new Article 15a RPBA depends in particular on the outcome of the pending referral.

The President argues,¹⁷ referring to G2/12, that a decision to amend the Implementing Regulation may constitute subsequent agreement and practice in the application of the EPC for the purposes of treaty interpretation.

However, said general conclusion cannot be drawn from G 2/12 and further, the specific case G 2/12 is not applicable in the present proceedings.

In G2/12¹⁸ it was discussed that under Article 31(3) Vienna Convention any subsequent agreement between the parties regarding the interpretation of the treaty or its application, and 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. It was discussed whether Rule 26(5) EPC (formerly Rule 23b(5) EPC 1973) could be regarded as such subsequent agreement and practice. Rule 26(1) EPC explicitly calls for due consideration of the Biotech Directive.

Rule 26(5) EPC and Article 2(2) Biotech Directive both define a process for the production of plants as essentially biological if it consists entirely of natural phenomena such as crossing or selection. As held in G 2/07 and G 1/08, neither provision offers clear guidance with regard to the definition of "essentially biological processes for the production of plants" according to Article 53(b) EPC.

The exception to patentability according to Article 53(b) EPC is worded identically to Article 4(1)(b) Biotech Directive. Notwithstanding the differences in the legal sources of the Biotech Directive and of the EPC it might even be inferred from the similarities in the wording of both Article 4(1)(b) Biotech Directive and Article 53(b) EPC that the exclusion from patenting is to

¹⁶ President's comments, para. 49

¹⁷ President's comments, para. 43

¹⁸ G 2/12, OJ 2016, A27, reasons VII.4(1)

be understood restrictively. Article 4(2) Biotech Directive appears to confirm this idea. In the same way as Rule 27(b) EPC.

Thus, the Biotech Directive, to which Rule 26(1) EPC refers as a supplementary means for interpreting the EPC in relation to biotechnological inventions, does not provide a basis for extending the process exclusion under Article 4(1) Biotech Directive and Article 53(b) EPC to products of such processes.

This is a different situation from the one in the present case.

The Referring Board already noted in its decision¹⁹ that it is unaware of any subsequent agreements among all contracting states that could affect the interpretation of Article 116 EPC.

While the Administrative Council did introduce an amendment to Rules 117 and 118 EPC, which entered into force on 1 January 2021, these amendments merely concern the possibility of taking evidence via videoconference and do not provide any option to hold oral proceedings as a videoconference without the parties' consent. For the referring Board, the aim behind these changes is merely to enable access to advances in videoconferencing for the purpose of taking evidence.

Furthermore, in the Board's opinion, the new EPO practice as regards the conduct of oral proceedings cannot be deemed to reflect the practice of all contracting states in terms of the interpretation of the EPC.

When construing Article 116 EPC the President's comments²⁰ make a distinction between oral and written proceedings.

With regard to the ordinary meaning of the term "oral proceedings" it is pointed out²¹, that said term alludes to a formally regulated opportunity to exchange oral arguments. "Proceedings" would be defined as a serious of actions that happen in a planned and controlled way.

In this respect also the other authentic languages of the Convention should be considered in particular in the German text of the EPC, the term "written proceedings" corresponds to the term "schriftliches Verfahren", whereas the term "oral proceedings" corresponds to the term "mündliche Verhandlung" (see e.g. the corresponding English and German versions of Rule 3

¹⁹ T 1807/15, reasons, 5.10.1

²⁰ President's comments, para. 37

²¹ President's comments, para. 41

and Rule 4 EPC). Hence, the German text differentiates between “*Verfahren*” and “*Verhandlung*”.

The term “*Verfahren*” is defined as “*Folge von Rechtshandlungen, die der Erledigung einer Rechtssache dienen, (von Behörden bzw. Gerichten vorgenommene Untersuchung)*”²² (“Sequence of legal acts that serve to settle a case (investigation carried out by authorities or courts)”).

The term “*Verhandlung*” is defined as “*Auseinandersetzen der Sachlage in der Absicht, eine Einigung zwischen mehreren Personen herbeizuführen oder eine Entscheidung vorzubereiten.*”²³ (“Discussing the facts with the intention of reaching an agreement between several persons or preparing a decision.”)

Hence, from the German language text the interpretation of the term “written procedure” corresponds more to the English term “written proceedings”, a more formal serious of actions.

However, the German language term “*mündliche Verhandlung*” implies much more interaction between the parties during such proceedings in order to resolve the case.

In view of the literal interpretation Article 116 EPC stipulates the right of the parties to be heard at in-person oral proceedings, and holding oral proceedings in the form of a videoconference without the parties' consent has to be considered to be incompatible with Article 116 EPC.

According to Article 31(1) of the Vienna Convention, a treaty is to be interpreted 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. In this regard, Article 32 of the Vienna Convention stipulates recourse to supplementary means of interpretation, including the preparatory work (“*travaux préparatoires*”) of the treaty, when the interpretation leads to a result which is manifestly absurd or unreasonable. The aim of any interpretation must be to determine the term's authentic meaning (see G 3/19, Reasons, point XIV.2).

In view of the literal interpretation Article 116 EPC stipulates the right of the parties to be heard at in-person oral proceedings. And holding oral proceedings in the form of a videoconference without the parties' consent would be considered to be incompatible with Article 116 EPC

II.1.2 supplementary means of interpretation

²² Duden, Begriff “*Verfahren*” (<https://www.duden.de/rechtschreibung/Verfahren#bedeutungen>)

²³ Brockhaus, Begriff “*Verhandlung*”

(<https://brockhaus.de/ecs/permalink/5FCCD18A79C9DD8B885B47AE0FEDEF3.pdf>)

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 EPC in accordance with the primary means of interpretation neither leaves meaning ambiguous or obscure, nor does it lead to a manifestly absurd or unreasonable result. Insofar we agree with the President's comments²⁴

As already shown in the referring decision even relying on the *Travaux préparatoires*²⁵ and teleological interpretation²⁶ as a supplementary means of interpretation, do not support any other finding, and thus confirm the above conclusion that Article 116 EPC stipulates the right of the parties to be heard at in-person oral proceedings. Holding oral proceedings in the form of a videoconference without the parties' consent has to be considered to be incompatible with Article 116 EPC

II.1.3 Teleological interpretation

With regard to teleological interpretation the referring decision²⁷ mentioned G 1/97²⁸ wherein the Enlarged Board of Appeal stated that codified legal systems such as the EPC present limits to judges' development of the law through case law: "*In a codified legal system such as the EPC, the judge cannot simply decide, as the need arises, to substitute himself for the legislator, who remains the primary source of law. He may certainly find occasion to fill lacunae in the law, in particular where situations arise for which the legislator has omitted to provide. Thus, a line must be drawn between judicial interpretation and "judicial legislation".*" It should also be borne in mind that the interpretation relates to the parties' fundamental procedural rights, i.e. the right to be heard and the right to a fair trial. Restricting these key rights which are anchored in the Articles of the Convention would appear to require legislative measures.

Furthermore, until recently it was the practice of the EPO and the Boards of Appeal that oral proceedings took place exclusively at the premises. Only with the consent of the party, it was possible for first-instance oral proceedings, in examination proceedings, to be conducted by videoconference.

Hence, a party to proceedings before the EPO can legitimately expect that its well-established right to have oral proceedings in person will not be curtailed.

With regard to the societal developments in the Contracting States, which could justify adapting the interpretation of the term "oral proceedings", it has to be considered that the

²⁴ President's comments, para. 70

²⁵ T 1807/15, reasons, 5.8

²⁶ T 1807/15, reasons, 5.9

²⁷ T 1807/15, reasons 5.9.3

²⁸ G 1/97 (see reasons, point 3(b))

use and societal acceptance of videoconferencing technology might have increased during the coronavirus pandemic. However, changes in member states' authorities and judicial systems do not go as far as holding videoconferences against the will of the parties to the proceedings or without their consent, not even in the exceptional circumstances of the coronavirus pandemic. In this regard, we refer our further submission below under section III.

In the President's comments²⁹ it is referred to R 3/10 wherein 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."³⁰

The President further concludes³¹ that the purpose of the right to oral proceedings under Article 116 EPC can be summarized as giving parties a right to request an opportunity to present their case orally, 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.

As further argued³² said requirements are allegedly 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.

With regard to said argument, the President himself placed a condition on his conclusion, namely "*if each participant is shown in a similar distance to the camera*". However, neither Art.116 EPC nor any secondary legislation like Article 15a RPBA define any condition with regard to the technical requirements for oral proceedings held by videoconference nor any restriction with regard to distances to the camera.

²⁹ President's comments, para. 51

³⁰ R 3/10, reasons, 2.11

³¹ President's comments, para. 54

³² President's comments, para. 57

Having, experience with quite an amount of oral proceeding before the Boards of Appeal and Opposition Divisions of the EPO led by videoconference, this is not a mere theoretical issue, but rather there are numerous cases where said requirements are clearly not fulfilled. If e.g. several persons join oral proceedings by videoconference, sitting together in a large conference room, with one camera mounted in a corner of the room below the ceiling, then facial expressions, posture and body language are not at all visible.

With regard to 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), the President concluded³³, that they have no impact on the proper conduct of oral proceedings in view of its purpose. The above-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.

Here we must clearly disagree. One crucial point for oral proceedings within the meaning of Article 116 EPC was always the physical presence of the parties to the proceedings before the entire Board or Division in one room. This concept allowed both the parties and the Board to get an immediate personal impression of each other. In particular, the pleading party could get immediate feedback from the Board members' gestures and facial expressions and could realize whether its arguments have been understood. Depending on that feedback the party could react by elaborating further on its oral submissions.

This possibility is restricted in oral proceedings by videoconference in such a way, that the above-described purpose of oral proceedings³⁴ can no longer be fulfilled.

As the participants now sit in front of their computer, a party pleading during oral proceedings cannot even anymore recognize, whether the participant had sufficient time to open to relevant document and page, that is being quoted from.

Considering the above-cited purpose of oral proceedings "[...] *to allow the Board and the parties to discuss issues, including controversial and perhaps crucial issues.*" An essential part is to identify "crucial issues". One important factor to identify crucial issues and relevant arguments during pleading was always to observe the members / Examiners and to see at which argument they make notes or use non-verbal communication between each other.

³³ President's comments, para. 58

³⁴ "[...] *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.*" (R 3/10, reasons, 2.11)

As the members are now sitting in front of a computer, it is during pleading not anymore possible to get such important immediate feedback.

The possibility to get feedback from the board/division is even further limited by the possibility of Article 15a(3) RPBA, that the Chair in a 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. Similar regulations with regard to remote participation from different locations for members of the Examination³⁵ and Opposition³⁶ Divisions have been established.

This further impairs in particular the spontaneous consultation of the members among themselves.

In addition as noted in G 2/19³⁷ *"At the outset, a connection between the provision or violation of the right to be heard and the time and place of an oral proceedings may well be recognised. If a place or time is chosen that is completely out of the ordinary, this can appear to the parties seeking justice as a lack of willingness to deal with their matter and they can see themselves impaired in the exercise of their rights in a way that is to be disapproved of and legally significant" ("Im Ausgangspunkt mag durchaus ein Zusammenhang zwischen Gewährung bzw. Verletzung des rechtlichen Gehörs und dem räumlich-zeitlichen Rahmen für eine anberaumte mündliche Gerichtsverhandlung anzuerkennen sein. Wird dafür ein gänzlich aus dem üblichen Rahmen fallender Ort oder Zeitpunkt gewählt, kann dies den Rechtssuchenden als mangelnde Bereitschaft erscheinen, sich mit ihrem Anliegen zu befassen und sie können sich dadurch in zu missbilligender und rechtlich erheblicher Weise in der Wahrnehmung ihrer Rechte beeinträchtigt sehen").*

Oral proceedings, wherein the members of the Board or the Examiner sit at different locations and participate remotely, one might even ask, at which location the oral proceedings take place. Further in such proceedings, in which the members of the panel might be scattered across home offices or member states there is an increasing risk, that this might appear to the parties seeking justice as a lack of willingness to deal with their matter and they can see themselves impaired in the exercise of their rights in a way that is to be disapproved of and legally significant.

³⁵ Article 2 Decision of the President of the European Patent Office dated 1 April 2020 concerning oral proceedings by videoconference before examining divisions

³⁶ Article 3 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

³⁷ G 2/19, reasons IV.1.

II.1.4 *Dynamic interpretation*

Also a dynamic interpretation is not applicable in the present case

The referring decision³⁸ discussed whether new Article 15a RPBA could justify re-interpretating the term "oral proceedings" in Article 116 EPC and whether the legislative intention behind the new RPBA Article could justify a dynamic interpretation since it conflicts with the original aim of Article 116 EPC, i.e. establishing a right to present oral arguments at an in-person oral proceedings. In this respect, however, secondary legislation based on Rule 12c(2) EPC shall not lead to restrictions of fundamental procedural rights enshrined in the Convention. In this regard, Article 164(2) EPC has to be taken as a limitation of the legislative powers of the Administrative Council³⁹.

Furthermore, as outlined in the referring decision,⁴⁰ G 3/19 seems to be based on a different starting point, since the Administrative Council was empowered to bring the Convention in line with European Community legislation under Article 33(1)(b) EPC⁴¹. In the present case there is no such legislation. Thus, it appears doubtful whether secondary legislation might be a valid ground for a dynamic interpretation limiting substantial procedural rights anchored in the Convention.

In addition, it is noted that the interpretation in G 3/19 related to patentability requirements and not to a substantial procedural right.

II.2 Oral proceedings before first instance EPO Divisions and before the Boards of Appeal

As noted in the Referring Board's decision⁴² the term "oral proceedings" should be interpreted in the context of Article 116 EPC and associated provisions of the EPC. Article 116 EPC itself defines the EPO departments before which oral proceedings take place. These departments' duties are generally defined in Articles 16 to 22 EPC and then fleshed out in further Articles of the EPC. Taking these Articles together, it follows that Article 116 EPC relates to administrative and judicial proceedings governed by the rule of law.

As outline above, the conduct of oral proceedings in the form of a videoconference is not 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.

³⁸ T 1807/15, reasons 5.11.4

³⁹ G 2/07, reasons, 2.2

⁴⁰ T 1807/15, reasons 5.11.5

⁴¹ G 3/19, reasons XXV.3.2

⁴² T 1807/15, reasons 5.4.1

This is true for first instance administrative procedures but even more so for second instance appeal procedures.

Whereas e.g. first instance opposition procedure is a purely administrative procedure, the appeal procedure must be regarded as a procedure proper to an administrative court, in which an exception from general procedural principles, such as the principle of party disposition, has to be supported by much weightier grounds than in administrative procedure⁴³.

Appeal proceedings are wholly separate and independent from the proceedings at first instance. Their function is to give a judicial decision upon the correctness of a separate earlier decision taken by a department (T 34/90, OJ 1992, 454; G 9/91, OJ 1993, 408; G 10/91, OJ 1993, 420; T 534/89, OJ 1994, 464; T 506/91). In T 501/92 (OJ 1996, 261) the board deduced from this principle that any procedural request or statement made by a party during proceedings in the first instance was not applicable in any subsequent appeal proceedings, and had to be repeated during the latter if it was to remain procedurally effective.

The fact that the boards of appeal are courts was established in G 1/86 (OJ 1987, 447, point 14 of the Reasons). In decision G 1/99 (OJ 2001, 381) the Enlarged Board held that the appeal procedure is to be considered as a judicial procedure (see G 9/91, OJ 1993, 408, point 18 of the Reasons) proper to an administrative court (see G 8/91, OJ 1993, 346, point 7 of the Reasons; likewise G 7/91, OJ 1993, 356). In G 9/92 and G 4/93 (both OJ 1994, 875) it was decided that the extent of appeal proceedings is determined by the appeal.

These characteristics of the appeals procedure not only serve as criteria when assessing whether a provision may be applied analogously in individual cases; they also have general legal consequences in many respects. It follows from the characteristics set out by the Enlarged Board that the general principles of court procedure, such as the entitlement of parties to direct the course of the proceedings themselves ("principle of party disposition"), also apply to appeals (see G 2/91, OJ 1992, 206; G 8/91, G 8/93, OJ 1994, 887; G 9/92 and G 4/93), that a review of the decision taken by the department of first instance can, in principle, only be based on the reasons already submitted before that department (G 9/91, G 10/91), and that the proceedings are determined by the petition initiating them (*ne ultra petita*) (see G 9/92 and G 4/93).

It is established jurisprudence that the boards of appeal and the Enlarged Board of Appeal respectively act as judicial bodies, which were established by law, and apply general principles of procedural law (see G 3/08, OJ 2011, 10 and G 2/08, OJ 2010, 456).

⁴³ G 8/91 Reasons 7

In T 1676/08 the board went on to say that one of these principles is laid down in Art. 6(1) ECHR, relying on principles of law common to the member states of the European Patent Organisation and applying to all EPO departments of the said organisation, which requires *inter alia* in "... the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Hence, in appeal proceedings the principle of party disposition shall also be considered when summon to oral proceedings. Even if one would follow the President's Comments⁴⁴ that 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 EPC, However, this is not to case of judicial appeal procedures before the Boards of Appeal.

Hence, if necessary, Art 116 EPC has to be interpreted differently with regard to administrative first instance procedure and judicial appeal procedure.

Such a different interpretation is supported by the different legal principles underlying the appeal proceedings.

Further such a different interpretation is also supported by the *Travaux préparatoires*.

As noted in the Referring Board's decision⁴⁵ originally, there was a distinction between a "hearing" and "oral proceedings". A hearing was meant to take place before the examining division, i.e. on the administrative level, and the term "oral proceedings" was used for the appeal procedure, i.e. for the judicial level (cf. comments of K. Haertel dated 2 August 1961, "Bemerkungen zu dem ersten Arbeitsentwurf eines Abkommens über ein europäisches Patentrecht, Artikel 61 bis 90", Zu Artikel 75 a; EFTA 4/67, points 83, 102 and 111). Later on, the terminology changed temporarily. There was a separate Article foreseen dedicated to "hearings" before the Boards of Appeal, which was based on the Rules of Procedure of the Court of Justice of the European Communities (cf. BR/59 e/70; BR/60 e/70) using the same expression. However, that term was later on replaced by "the more general expression "oral proceedings"" throughout the First Preliminary Draft Convention (cf. BR/84 e/71, point 34). This expression was meant to be "more general" as it was then used for administrative and judicial proceedings.

Hence, already in the *travaux préparatoires* it was differentiated between administrative and judicial proceedings.

⁴⁴ President's comments, para. 29

⁴⁵ T 1807/15, reasons 5.8.3

III. Regulations in member states

As noted in the Referring Decision⁴⁶ the use and societal acceptance of videoconferencing technology have evidently significantly increased during the coronavirus pandemic. However, the member states' authorities and judicial systems do not go as far as holding videoconferences against the will of the parties to the proceedings or without their consent, not even in the exceptional circumstances of the coronavirus pandemic.

In this regard, German civil law procedures, wherein the use of video technology is governed in section 128a of the German Code of Civil Procedure (Zivilprozessordnung), stipulates that courts can order proceedings to be held in the form of a videoconference. However, the court itself must sit in a courtroom, and the parties (or their representatives) are entitled to appear in the courtroom⁴⁷. Therefore, if a party objects to oral proceedings being held using videoconferencing technology, the court cannot force the party to use that format.

Oral proceedings by videoconference without the consent of the party would be against German constitution (see Legal opinion of Prof. Dr. Dr. h. c. Ull Siegfried Broß)⁴⁸, which is filed enclosed as (Encl.6).

We further refer to the *amicus curiae* brief filed by Meissner Bolte and their pleading, comprising an overview of regulations in member, which we fully adopt and to which we hereby refer. The corresponding *amicus curiae* brief is filed enclosed as (Encl.7).

In addition, we would like to refer to two relevant decisions.

In Switzerland in one case a court (Züricher Handelsgericht) has actually performed videoconference proceedings - against the will of one party - because it believed this would be in line with the Swiss code of Civil procedure (ZPO), requiring "oral" proceedings. In concrete terms, it was stated that the legislator had "no objections of a fundamental nature" (original German: "keine Einwände grundsätzlicher Art") to videoconferencing. The higher court (Schweizer Bundesgericht) recently decided⁴⁹ to the contrary, that the lower court had no legal basis to order a video conference against the will of the parties. Therefore, it could also not rely on the extraordinary situation resulting from the coronavirus pandemic.

⁴⁶ T 1807/15, reasons 5.9.3

⁴⁷ see Mantz/Spoenle, Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung, MDR 2020, 637 et seq.; with further references

⁴⁸ Submitted with *amicus curiae* brief of Maiwald /Hoffmann Eitle /Cohausz & Florack /Dr U. Kinkeldey /Boehmert & Boehmert /Vossius /Grünecker

⁴⁹ Urteil 4A_180/2020 vom 7. 8. 20 – BGE

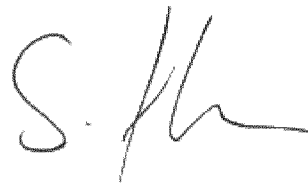
(https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F06-07-2020-4A_180-2020&lang=de&zoom=&type=show_document)

Further there is a recent decision from the constitutional court in France⁵⁰ which decided that oral proceedings by videoconference against without consent of the party are against the constitution.

Respectfully



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Enclosure(s):

Encl.5 *amicus curiae* brief filed by VPP

Encl.6 Legal opinion of Prof. Dr. Dr. h. c. Ull Siegfried Broß

Encl.7 *amicus curiae* filed by Meissner Bolte

⁵⁰ Décision n° 2021-911/919 QPC du 4 juin 2021 (https://www.conseil-constitutionnel.fr/decision/2021/2021911_919QPC.htm)