

12<sup>th</sup> April 2021

**PRELIMINARY *AMICUS CURIAE* BRIEF OF epi IN CASE G 1/21  
PURSUANT TO ARTICLE 10(1) RPEBA IN VIEW OF ARTICLE 4(1) RPEBA**

**1. Introduction**

1.1 This preliminary *amicus curiae* brief is filed by the Institute of Professional Representatives before the EPO established under Article 134a EPC. The Institute is referred to herein as “**epi**”. **epi** represents over 12,000 European patent attorneys from the 38 member states. Most of **epi**'s members are in private practice or industrial practice and represent their clients or companies before the EPO, in particular in oral proceedings before Examining Divisions, Opposition Divisions and Boards of Appeal.

1.2. The matter of oral proceedings before the EPO has been considered in depth by **epi**, as is evidenced by the documents referred to below. In particular, at its virtual Council meeting held on 14<sup>th</sup> November 2020, **epi**'s Council adopted by a large majority the following Resolution:

*Council considers that, after the Covid-19 pandemic is over, oral proceedings should as a rule be held face-to-face but any party should be free to attend oral proceedings by videoconference, even if the other parties are attending in person.*

This shows that **epi** has an interest in the subject-matter of **G 1/21**. This interest is shared by many other parties. One only has to take a look at the sheer number and the content of the submissions<sup>1</sup> filed by the interested circles during a user consultation launched by the Boards of Appeal Committee (“the BOAC”) on the introduction of new Article 15a of the Rules of Procedure of the Boards of Appeal (“the RPBA”) to understand how great was the interest in oral proceedings amongst users of the European patent system.

1.3. **epi** considers that there are two separate issues which need to be addressed regarding **G 1/21**. The first is the issue of the composition of the panel of the Enlarged Board of Appeal (hereinafter “the Enlarged Board”) dealing with the reference. The second is the subject-matter of the reference. This preliminary *amicus curiae* brief addresses only the first issue. **epi** will be filing a

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<sup>1</sup> The Boards of Appeal only published a brief summary of the consultation here: [http://documents.epo.org/projects/babylon/eponet.nsf/0/26FC88F4EBB475FEC125861F002F09E7/\\$FILE/RPBA%2015a%20ViCo\\_User%20consult\\_summary.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/26FC88F4EBB475FEC125861F002F09E7/$FILE/RPBA%2015a%20ViCo_User%20consult_summary.pdf). However, the Boards did not provide access to the submissions, several of which can be read in their entirety here: <https://www.patentlitigation.ch/referral-to-the-enlarged-board-of-appeal-re-video-conferencing-all-you-need-to-know-for-now/>

second *amicus curiae* brief addressing the second issue. **epi** decided to file separate briefs in order to avoid any risk of inadmissibility –however remote– of its comments regarding the composition of the Panel and to avoid any appearance of abuse of proceedings by filing the first brief well ahead of the due date for briefs (as explained below).

## 2. The Composition of the Panel of the Enlarged Board

2.1 **epi** considers that the question under consideration in **G 1/21**, concerning oral proceedings under Article 116 EPC, is very important. **epi** also notes that a number of questions have been raised about the operation of the EPO and the Boards of Appeal, not least in complaints to the German Constitutional Court. It is therefore, in **epi**'s view, essential for the European patent system to show that the Enlarged Board not only **is** but also **appears** to be a proper judicial body. It is therefore necessary that there should be no **suspicion** of partiality for any member of the panel of the Enlarged Board dealing with the reference ("the Panel")<sup>2</sup>. It is made clear in Article 4(1) of the Rules of Procedure of the Enlarged Board of Appeal ("the RPEBA") that:

"If the [Enlarged] Board has knowledge of a possible reason for exclusion or objection [to a member of a panel of the Enlarged Board] ... , then the procedure of Article 24, paragraph 4, EPC shall be applied."

Article 24(4) EPC refers to Articles 24(2) and (3) EPC. In Article 24(3) EPC, it is made clear that, if a member is **suspected** of partiality, this is a possible reason for exclusion. The Enlarged Board is invited to apply the procedure of Article 24(4) EPC and decide whether certain members of the Panel should be excluded on the ground of **suspected** partiality.

2.2 In this respect, it is pointed out the President of the Boards of Appeal ("the BoA President") and some other members of the Panel were involved in the drafting of new Article 15a RPBA and it is this involvement which gives rise to a **suspicion** of partiality, as explained below.

## 3. Information for the Enlarged Board

3.1 As explained in greater detail below, on 10th December, 2020, the BoA President recommended the adoption of a proposed new Article 15a RPBA to the Boards of Appeal Committee ("the BOAC"); furthermore, the BoA President indicated on that occasion that the

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<sup>2</sup> As the proverb says, Caesar's wife must be above suspicion, which means that those in positions of authority should avoid even the implication of impropriety.

Boards were entitled to summon parties to oral proceedings by videoconference prior to the entry into force of the proposed Article 15a RPBA. The BoA President arranged for a communication to that effect to be published on the public web site of the Boards of Appeal on 15th December, 2020, well before the approval of proposed Article 15a RPBA by decision CA/D/3/21 taken on 23rd March, 2021 by the Administrative Council.

3.2 By taking these public actions, overtly supporting the introduction of proposed Article 15a RPBA and indicating that provision could be used before its entry into force, the BoA President made available to the public a view as to the very issue that forms the object of the referral, namely whether holding oral proceedings by videoconference in appeal proceedings without the consent of the parties is in conformity with Article 116 EPC.

3.3 As explained in greater detail below, the communications from the BoA President objectively show an **appearance** of bias in favour of considering oral proceedings by videoconference without the consent of the parties to be compatible with Article 116 EPC, to the effect that a reasonably objective and informed person would conclude, on the basis of said communications, that he might have good reason to **suspect** the partiality of the BoA President.

3.4 Based on these facts, the communications of the BoA President show that the objective test that the Enlarged Board must apply when deciding on whether there is **suspected** partiality under Article 24(3) EPC is met.

3.5 It can be assumed that new Article 15a RPBA was not produced by a single person. The BoA President is advised by the Presidium of the Boards of Appeal. The fact that new Article 15a RPBA was presented for consultation and then presented to the BOAC and the Administrative Council for approval are evidence that the majority of the Presidium **appeared** to be in favour of the proposal. The Panel for **G 1/21** includes members of the Presidium. It therefore **appears** that the members of the Presidium on the Panel also have a bias in favour of considering oral proceedings by videoconference without the consent of the parties to be compatible with Article 116 EPC, to the effect that a reasonably objective and informed person would conclude that he has good reason to **suspect** the partiality of such members.

3.6 There are, in general, four situations under which a member of the Enlarged Board of Appeal might be prevented from participating in proceedings under Article 112(1) EPC. In this case, the relevant situation is pursuant to Article 4(1) RPEBA (cf. **G 2/08**, point 2.1 of the reasons;

**R 19/12**, point 5 of the reasons; **R 2/14**, point 4 of the reasons), whereby a third party brings the Enlarged Board's attention to facts which provide the "knowledge of a possible reason for exclusion" on the ground of **suspected** partiality pursuant to Article 24(3) EPC. Such facts relevant under Article 4(1) RPEBA may be brought to the attention of the Enlarged Board by anyone, i.e. also by third parties (see the Case Law of the Boards of Appeal, 9<sup>th</sup> edition 2019, III, J.2.4), provided they do not amount to an abuse of procedure. The decision as to how to proceed on the basis of the "knowledge" and to apply the procedure under Article 24(4) EPC is left to the discretion of the Enlarged Board (cf. **G 2/08**, point 2.3 of the reasons).

3.7 The present *amicus curiae* brief relates to **suspected** partiality pursuant to Article 24(3) EPC and raises points regarding the BoA President and the other members of the Presidium who are members of the Panel.

3.8 According to established case law, under Article 24(3) and (4) EPC, the Enlarged Board can apply one of two tests in order to assess the **suspected** partiality of a member of the Enlarged Board. The first is a subjective test, requiring evidence of actual partiality of the member concerned. The second is an objective test to determine if the circumstances of a case would allow a reasonably objective and informed person to conclude that he has good reason to **suspect** the partiality of the member concerned (cf. **G 2/08**, point 4 of the reasons).

3.9 The two tests are not cumulative: **suspicion** of partiality can be justified on the basis of only the objective test, i.e. by determining whether the objective test is fulfilled, having due regard to the presumption that members of the Board act in good faith and are deemed impartial (cf. **G 2/08**, point 4.2 of the reasons). Furthermore, **suspected** partiality does not require that there is actual partiality on the part of the member: it suffices that there is an **appearance** of partiality (see **R 2/14**, point 24 of the reasons).

3.10 According to Rule 12c(2) EPC:

"On a proposal from the President of the Boards of Appeal and after the President of the European Patent Office has been given the opportunity to comment, the Committee set up under paragraph 1 shall adopt the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal".

3.11 According to document BOAC/16/20<sup>3</sup>, annexed to this brief, on 10th December, 2020, the BoA President submitted a proposal for amendment of the RPBA to the BOAC, which is the Committee mentioned in Rule 12c(2) EPC and set up under Rule 12c(1) EPC, as clearly indicated in the summary of that document:

**“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” (emphasis added).

3.12 In particular, under point 20 of BOAC/16/20, the document submitted by the BoA President made the following suggestion:

“It is **suggested** that proposed new Article 15a RPBA enters into force on 1 April 2021, subject to its approval by the Administrative Council under Article 23(4), second sentence, EPC, and applies to all oral proceedings scheduled to take place on or after that date. As outlined above, proposed new Article 15a RPBA clarifies the practice of the Boards of Appeal since May 2020 of conducting oral proceedings by videoconference. Therefore, **the Boards of Appeal may adapt their practice before the date of entry into force.** The existing discretionary power of the Boards of Appeal to hold oral proceedings by videoconference remains unaffected. Accordingly, **Boards may summon parties to oral proceedings by videoconference for a date before 1 April 2021** and may convert oral proceedings scheduled to take place on the premises before that date to oral proceedings by videoconference, **even without requiring the parties' agreement to this format**” (emphasis added).

It thus **appears** that the BoA President proposed the adoption of new Article 15a RPBA to the BOAC, i.e. the provision forming the subject of **G 1/21** and giving the Boards the power to summon oral proceedings by videoconference, even without the parties' consent.

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<sup>3</sup> Document BOAC/16/20 is available at the following Internet address:  
[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)

3.13 It is irrelevant, for the purpose of assessing **suspected** partiality, that the BoA President proposed the adoption of new Article 15a RPBA in his management function. The act of proposing the new provision to the BOAC, including that of conducting oral proceedings by videoconference even without the consent of the parties, would have been objectively ascribed by a reasonable person to the BoA President. The BoA President in his management function has, pursuant to Rule 12a(2) EPC, the task of exercising the executive, administrative and supervisory direction of the Boards. By making the aforementioned recommendation to the BOAC on 10th December, 2020, it **appears** that the BoA President availed himself of his executive powers to direct the activities of the Boards and decided to recommend a new legal provision which entails a significant change in the practice of the Boards.

3.14 It is submitted that the recommendation of Article 15a RPBA was perceived by the public, and therefore would have been **perceived** by a reasonable person, as showing that the BoA President had decided, in his management function pursuant to Rule 12a(2) EPC, to steer the practice of the Boards in the direction of holding oral proceedings by video conference even if the parties do not consent to such a manner of conducting proceedings.

3.15 It also **appears** from document BOAC/16/20 that the BoA President even suggested that the Boards were, prior to the entry into force of new Article 15a RPBA, entitled to summon parties to oral proceedings by videoconference without the consent of the parties.

3.16 It is irrelevant, for the purpose of assessing **suspected** partiality, whether the reason adduced by the BoA President for suggesting this course of action, namely the alleged clarification of a previous practice of the Boards, was factually correct or not: from the explicit suggestion that the Boards could summon parties to oral proceedings by videoconference without the consent of the parties prior to the entry into force of new Article 15a RPBA, it **appears** that the BoA President viewed holding oral proceedings by videoconference without the consent of the parties as being in conformity with Article 116 EPC. It would have been assumed that, had the BoA President any doubts, he would have refrained from suggesting application of the new provision before it was approved by the Administrative Council.

3.17 In other words, because the public suggestion referred to above was made before the entry into force of Article 15a RPBA, it would have **appeared** that the BoA President had no doubts in his mind that the conduct of oral proceedings in the form of a videoconference *is* compatible with the right to oral proceedings as enshrined in Article 116(1) EPC, even 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. This is precisely the question that has been referred to the Enlarged Board in **G 1/21** and, as apparent from the foregoing explanations, the BoA President **appears** to have a clear opinion on how the question should be answered.

3.18 The conclusion that the BoA President **appears** to have a clear opinion on the question of law that has been referred in **G 1/21** is reinforced by a further circumstance. On 15th December, 2020, well before the entry into force of new Article 15a RPBA<sup>4</sup>, a communication (annexed to this complaint) was published on the public web site section of the Boards of Appeal<sup>5</sup>, stating *inter alia* the following:

“Oral proceedings before the Boards of Appeal can also be conducted using VICO technology. Oral proceedings to be conducted by VICO are also listed in the online oral proceedings calendar. **From 1 January 2021 boards may conduct oral proceedings by VICO even without the agreement of the parties concerned**, as has now been made clear in the new Article 15a RPBA adopted by the Boards of Appeal Committee” (emphasis added).

As noted above, under Rule 12a(2) EPC, the BoA President exercises an executive, administrative and supervisory function with respect to the Boards. These functions would be assumed to include any decision as to the contents of the information to be made available to the public on the web section of the Boards: hence, it would have **appeared** that the publication of the aforementioned communication of 15th December, 2020 was made under the direction of the BoA President or at least with his consent. That the communication was issued to the public before the entry into force of the new provision can only reinforce the **appearance** that the BoA President considered the practice to be in conformity with Article 116 EPC.

3.19 Although **epi** has no reason to believe that the BoA President acted in bad faith, the communications referred to above give the clear **appearance** that he considered Article 15a RPBA to be in conformity with Article 116 EPC, which gives rise to the **appearance** of partiality.

3.20 Whether the BoA President was convinced that Article 15a RPBA merely codified an existing practice of the Boards is irrelevant. What matters is that the public statements made on at

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<sup>4</sup> <https://www.epo.org/law-practice/legal-texts/official-journal/ac-decisions/archive/20210323.html>

<sup>5</sup> <https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201215.html>



least two occasions before the entry into force of Article 15a RPBA were such as to give the **appearance** that the BoA President had no doubts as to the legality of the practice whose conformity with the EPC is to be scrutinised now in **G 1/21**.

3.21 A reasonably objective and informed person would have concluded, on the basis of above communications, that he had good reason to **suspect** the partiality of the BoA President.

3.22 As pointed out above, the BoA President is advised by the Presidium of the Boards of Appeal (see Rule 12b EPC). It **appears** unlikely that the BoA President would have proceeded with the proposal to introduce new Article 15a RPBA if the members of the Presidium were opposed to it. It therefore **appears** that the members of the Presidium who are on the Panel for **G1/21** are also of the view that oral proceedings by videoconference, even when not all parties agree, are in conformity with Article 116 EPC. There is therefore the **appearance** of partiality for these members.

3.23 It is therefore submitted that the Enlarged Board should apply the procedure under Article 24(3) EPC in respect of the members of the Panel referred to above.

#### 4. Procedural Points

4.1 In accordance with Article 4(1) RPEBA, the Enlarged Board is invited to apply the procedure under Article 24(4) EPC.

4.2 Pursuant to Article 4(3) RPEBA, it is furthermore expected that there will be no further proceedings in **G 1/21** before a decision is taken on the basis of the information submitted in the present *amicus curiae* brief.

4.3 The brief is being filed within the frame of proceedings under Article 112(1)(a) EPC initiated upon a referral of a question of law by Technical Board of Appeal 3.5.02 in **T 1807/15**. **T 1807/15** concerns the maintenance of European patent 1 609 239 in amended form and was taken by the referring board during appeal proceedings following an opposition against that patent. **epi** is not a party to the proceedings in **T 1807/15** and is therefore also not a party to the proceedings under Article 112(1)(a) EPC in the pending referral **G 1/21**: the brief thus originates from a third party. Despite not being a party to the proceedings of referral **G 1/21**, **epi** may, under Article 4(1) RPEBA, bring “knowledge” to the attention of the Enlarged Board so that the Enlarged Board may set the procedure under Article 24(4) EPC in motion, as prescribed by Article 4(1) RPEBA.



4.4 According to **G 2/98**, point 2.3 of the reasons, in order to decide whether to proceed under Article 4(1) RPEBA, the Enlarged Board must, as a preliminary matter, assess whether the filing of a third party brief would amount to an abuse of procedure. Examples of an abuse of procedure include a complaint that is not substantiated at all, that ignores case law or that has been maliciously filed in order to damage the reputation of a member or with the purpose of delaying the proceedings.

4.5 The Board is also referred to **R 19/12**, point 5 of the reasons, **R 2/14**, point 4 of the reasons, as well as to the interlocutory decisions **R 8/13** of 20th March, 2015, points 1 and 5 of the reasons, and **G 2/08** of 16th October, 2009, point 1.2, as concerns the possibility for third parties, under Article 4(1) RPEBA, to submit knowledge for the attention of the Board.

4.6 **G 1/21** concerns the question of law whether oral proceedings by videoconference are compatible with the right to oral proceedings, as enshrined in Article 116(1), if not all the parties have given their consent to the conduct of the hearing by videoconference. The decision of the Enlarged Board in **G 1/21** will influence the procedural rights of parties to *any* future oral proceedings taking place after the decision is handed down (cf. point 2.2 of the reasons of the referring decision **T 1807/15**) whether or not the Board comes to the conclusion that conducting oral proceedings by videoconference without the consent of all the parties is compatible with the right enshrined in Article 116 EPC, in so far as parties would no longer be unconditionally free to request in-person oral proceedings. Since **epi** represents all European patent attorneys, any one of the professional representatives represented by **epi** will thus be objectively and concretely affected in *any* oral proceedings in which they will participate by the outcome of the decision of the Board in **G 1/21**.

4.7 Furthermore, **epi** submitted a letter dated 31st March, 2020 to the President of the European Patent Office and a letter dated 26th November, 2020 to the President of the Boards of Appeal, expressing serious misgivings as to whether oral proceedings held by videoconference without the parties' consent are compatible with the parties' right to be heard as enshrined in Article 113(1) EPC and with the specific form of that fundamental right embodied in Article 116 EPC. Both letters are annexed to this brief.

4.8 The filing of the aforementioned letters *well before* **T 1807/15** issued provides evidence, if any is considered necessary by the Enlarged Board, that **epi** regarded the introduction of measures empowering the Boards of Appeal to appoint oral proceedings by videoconference

without the parties' consent as negatively influencing the procedural rights of parties represented by any of the members of **epi** in proceedings before the EPO in which those members would be involved.

4.9 The filing of those letters before the point of law was referred to the Enlarged Board also provides evidence that the present brief is not being filed in an attempt to abuse the procedure foreseen under Article 4(1) RPEBA: it is motivated by genuine and serious concerns on the part of **epi** and by its interest in a fair and unbiased decision on a matter of fundamental importance.

4.10 The present brief clearly identifies the party from which it originates and is furthermore signed by its President, who represents the Institute according to Article 10(1) of the Regulation on the establishment of **epi**, such that no objections could be raised as to its admissibility on the ground that it would be deemed not to have been filed (cf. point 4 of the reasons of **T 146/07** as well as decisions **G 1/03** and **G 2/03**).

4.11 The brief is filed by a third party on the basis of Article 4(1) RPEBA regarding **suspected** partiality according to Article 24(3) EPC; the brief therefore does not present third-party observations under Article 115 EPC.

4.12 This *amicus curiae* brief to the Enlarged Board is filed within the framework of the provisions announced by the Enlarged Board by a communication pursuant to Article 10(2) RPEBA on 24th March, 2021<sup>6</sup>, allowing third parties to submit written statements in the course of proceedings under Article 112 EPC in **G 1/21**.

4.13 **epi** refers the Enlarged Board to **G 3/08**, point 1.2 of the reasons, where the Enlarged Board expressly indicated that *amicus curiae* briefs raising an objection of **suspected** partiality may be admissibly filed and taken into account on the basis of Article 4(1) RPEBA in the course of proceedings under Article 112 EPC.

4.14 On timeliness, **G 5/91** imposes an obligation on a party wishing to raise an objection under Article 24(3) EPC before a first-instance department to immediately raise that objection after the party concerned has become aware of the reason for the objection (see **G 5/91**, reasons, point 4). In so far as the requirement set out in **G 5/91** could be deemed to apply in the present case, which however concerns an objection of **suspected** partiality raised by a third party in proceedings before the Enlarged Board, it is submitted that the knowledge is being brought to the attention of

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<sup>6</sup> <https://www.epo.org/law-practice/case-law-appeals/communications/2021/20210324.html>

the Enlarged Board as soon as this has become procedurally possible for the third party. As indicated above, written statements by third parties in the course of **G 1/21** have only become possible as of 24th March, 2021, when the Board announced on its public web page that third parties could submit written statements. Hence, it is submitted that the requirement of timeliness set out in **G 5/91**, even if it were held to apply to the present proceedings, has been fulfilled.

4.15 **epi** submits that the statements presented in above *prima facie* are not an abuse of procedure purporting to delay the proceedings or to damage the reputation of the member(s) concerned, but rather present facts providing “knowledge” the Enlarged Board is respectfully requested to evaluate as required by Article 4(1) RPEBA (cf. **G 2/08**, point 2.4 of the reasons).

4.16 If the Enlarged Board requires any further information in respect of any of the points made above, **epi** will be pleased to provide them.

Signed on behalf of **epi**



Francis Leyder  
President

Annexes:

- Decision BOAC/16/2020;
- Communication of the Boards of Appeal dated 15th December, 2020 concerning the revised practice on oral proceedings by videoconference;
- Letter of 31st March, 2020 submitted by **epi** to the President of the EPO; and
- Letter of 26th November, 2020 submitted by **epi** in the user consultation on the introduction of new Article 15a RPBA.

**BOAC/16/20**

Orig.: en

Munich, 10.12.2020

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

SUBMITTED BY: President of the Boards of Appeal

ADDRESSEES: Boards of Appeal Committee (for decision)

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#### SUMMARY

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.

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## PART I

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

1. Operational.

### **II. RECOMMENDATION**

2. It is proposed that the Boards of Appeal Committee (BOAC) adopts the amendment to the Rules of Procedure of the Boards of Appeal set out in Part II of this document.

### **III. MAJORITY NEEDED**

3. Simple.

### **IV. CONTEXT**

4. The Rules of Procedure of the Boards of Appeal were last revised in 2019 and the revised version (RPBA 2020) came into force on 1 January 2020 (see BOAC/5/19, CA/D 5/19 Corr. 1, CA/3/19). The present amendment involves adding one new Article to the RPBA 2020. Proposed new Article 15a RPBA clarifies that the Boards of Appeal may hold oral proceedings pursuant to Article 116 EPC by videoconference.
5. In the course of 2020, Boards of Appeal have conducted oral proceedings in two different formats, namely with the parties attending either in person or by videoconference. From May to November 2020, oral proceedings were held by videoconference in over 150 appeal cases. Initially, they were held by videoconference only if all parties to the proceedings agreed. This enabled the parties and the members of the Board to become accustomed to oral proceedings being conducted in the new format. 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.
6. Some Boards of Appeal have furthermore conducted oral proceedings without all board members being present in the oral proceedings room, as board members have been able to participate by connecting remotely from another location, in particular from home.

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

## **V. EXPLANATORY REMARKS**

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

11. Article 116 EPC regulates oral proceedings before the European Patent Office. Neither this Article nor any other Article of the EPC or the RPBA 2020 stipulates that parties to the proceedings, their representatives, or members of the Board must be physically present in the oral proceedings room. Therefore, neither the EPC nor the RPBA 2020 exclude oral proceedings by videoconference. At the same time, it is self-evident that in all oral proceedings before the Boards of Appeal the rights and safeguards under the EPC and the RPBA 2020 must be respected.



12. The Board holds oral proceedings if it considers these to be expedient or if they are requested by any party to the proceedings (Article 116(1) EPC).
13. Where oral proceedings are to take place in a given case, then according to **proposed new Article 15a(1) RPBA** the Board in the particular appeal determines whether it is appropriate to hold them by videoconference. If the Board decides to hold oral proceedings by videoconference, they are conducted using technical means for the electronic transmission of audio and video signals in real time. Oral proceedings in this format constitute oral proceedings pursuant to Article 116 EPC.
14. The Board in a particular appeal can decide to hold oral proceedings by videoconference if a party so requests, or it can decide to do so of its own motion. In either case the decision is a discretionary one, in which the Board will be guided by the principles of fair proceedings, in particular the fair conduct of oral proceedings (Article 15(4) RPBA 2020), the parties' right to be heard (Article 113(1) EPC) and the public's right of access to oral proceedings (Article 116(4) EPC). When considering whether it is appropriate to hold oral proceedings by videoconference, the Board will take into account all relevant aspects, such as the suitability of the case to be heard in this way – notably in terms of its complexity and any need for interpretation –, the parties' willingness or not to attend remotely and their arguments for or against remote attendance, any foreseeable travel restrictions, and the personal circumstances of the persons due to be involved in the oral proceedings.
15. **Proposed new Article 15a(2) RPBA** concerns oral proceedings scheduled to be held on the premises of the European Patent Office and allows for the use of videoconferencing means during those proceedings. Under proposed new Article 15a(2) RPBA, any party, representative or accompanying person may, upon request, be allowed to attend by videoconference, rather than in person.

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

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

20. It is suggested that proposed new Article 15a RPBA enters into force on 1 April 2021, subject to its approval by the Administrative Council under Article 23(4), second sentence, EPC, and applies to all oral proceedings scheduled to take place on or after that date. As outlined above, proposed new Article 15a RPBA clarifies the practice of the Boards of Appeal since May 2020 of conducting oral proceedings by videoconference. Therefore, the Boards of Appeal may adapt their practice before the date of entry into force. The existing discretionary power of the Boards of Appeal to hold oral proceedings by videoconference remains unaffected. Accordingly, Boards may summon parties to oral proceedings by videoconference for a date before 1 April 2021 and may convert oral proceedings scheduled to take place on the premises before that date to oral proceedings by videoconference, even without requiring the parties' agreement to this format.
21. The Boards of Appeal Committee intends to evaluate the experience gained from the use of videoconferencing in oral proceedings before the Boards of Appeal. This evaluation is envisaged to be initiated at the latest 18 months after the date of the entry into force of proposed new Article 15a RPBA. The user community will also be consulted on how the new provision operates in practice.
22. After approval by the Administrative Council, a consolidated version of the RPBA 2020 as amended, having as its basis the version published in OJ EPO 2019, A63 and including proposed new Article 15a RPBA, should be published in the Official Journal of the EPO.

**VI. PROPOSED NEW PROVISION**

23. New Article 15a RPBA will be inserted after Article 15 RPBA 2020 and should read as follows:

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

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

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

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

**VII. LEGAL BASIS**

24. Rule 12c(2) EPC.

**VIII. DOCUMENTS CITED**

25. BOAC/5/19, CA/3/19, CA/D 5/19 Corr. 1.

**IX. RECOMMENDATION FOR PUBLICATION**

26. Yes.

## PART II

### DECISION OF THE BOARDS OF APPEAL COMMITTEE of [date of decision] adopting an amendment to the Rules of Procedure of the Boards of Appeal of the European Patent Office

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THE BOARDS OF APPEAL COMMITTEE,

Having regard to Rule 12c, paragraph 2, of the Implementing Regulations to the European Patent Convention,

Having regard to the revised version of the Rules of Procedure of the Boards of Appeal which came into force on 1 January 2020, as approved by decision of the Administrative Council dated 26 June 2019 and published in OJ EPO 2019, A63,

HAS DECIDED AS FOLLOWS:

The Boards of Appeal Committee adopts the following amendment to the Rules of Procedure of the Boards of Appeal:

#### Article 1

With effect from 1 April 2021, a new Article 15a is inserted in the Rules of Procedure of the Boards of Appeal, which shall read as follows:

#### **Article 15a**

##### **Oral proceedings by videoconference**

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

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

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

## Article 2

Article 15a shall apply to all oral proceedings scheduled to take place on or after 1 April 2021.

Done at Munich, [date of decision]

For the Boards of Appeal Committee  
The Chairman

Derk-Jan De Groot

# Oral proceedings before the Boards of Appeal – continuation of the measures adopted due to the coronavirus (COVID-19) pandemic and revised practice on oral proceedings by VICO

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## URL

<https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201215.html>

## Location

Home > Law & practice > Boards of Appeal  > Communications > 2020 > 20201215

## 15 December 2020

In the light of the developments in the coronavirus (COVID-19) pandemic, the Boards of Appeal have reassessed some of their measures for the arrangement and conduct of oral proceedings. In particular, the practice on conducting oral proceedings using videoconferencing (VICO) technology has been revised (see below).

Please note that these measures differ from those decided by the President of the European Patent Office for oral proceedings before examining and opposition divisions.

## Request for a change of date

If parties cannot attend oral proceedings for which they have been summoned, they have to request a change of date (see Article 15(2) RPBA 2020).

## Oral proceedings on the premises in Haar and in the Isar building in Munich, and staggered starting times

Owing to the need for physical distancing, only a limited number of suitable rooms are available on the Boards of Appeal premises in Haar and therefore some oral proceedings may have to be held in the Isar building in Munich instead. Similarly, some oral proceedings which have already been scheduled to take place on the Haar premises will be moved to the Isar building.



In addition, if necessary to ensure that the rules on minimum physical distancing can be respected, the starting times of oral proceedings may be staggered (9.00, 9.30, 10.00 hrs, etc.).

As a general rule, parties will not be sent a communication informing them of a change of venue or starting time. As such changes may take place at short notice, it is up to the parties to consult the [online calendar](#) approximately three days before their oral proceedings to check whether they will take place on the Haar premises or in the Isar building and when exactly they are scheduled to start.

## Maximum attendance: two persons per party

Owing again to the need for physical distancing, parties are asked to consider whether all representatives and accompanying persons need to attend. Attendance is generally restricted to a maximum of two people per party. Parties wishing to attend with more than two people should submit a reasoned request to that effect in advance of the oral proceedings. It will be for the board to decide on their request.

## Access to the buildings

Parties, representatives and accompanying persons wishing to enter the buildings must complete a simple [self-declaration form](#), which they should do in advance of their arrival. For the third statement in the form, please refer to the regularly updated list of international risk areas on the [Robert Koch Institute \(RKI\) website](#). Any person not confirming all statements will be denied access to both the Haar premises and the Isar building. The competent board will be informed accordingly and will then decide whether the oral proceedings can be held without that person or whether they will need to be postponed.

## Members of the public

It is possible for members of the public to attend oral proceedings. However, in view of the current circumstances, only limited places are available. Those interested in attending oral proceedings are therefore encouraged to announce this well in advance by email to [reception-haar@epo.org](mailto:reception-haar@epo.org). They will be required to complete the same [self-declaration form](#) as parties and representatives and will likewise be denied access to the buildings if they don't confirm all statements. For the third statement in the form, please refer to the regularly updated list of international risk areas on the [Robert Koch Institute \(RKI\) website](#).

## Oral proceedings conducted by VICO

Oral proceedings before the Boards of Appeal can also be conducted using VICO technology. Oral proceedings to be conducted by VICO are also listed in the online oral proceedings calendar. From 1 January 2021 boards may conduct oral proceedings by VICO even without the agreement of the parties concerned, as has now been made clear in the new [Article 15a RPBA](#) adopted by the Boards of Appeal Committee. Since the new provision merely clarifies an existing possibility, boards may adapt their practice as regards dispensing with the need to obtain the agreement of the parties concerned even before the date of its entry into force. The parties will be sent a communication informing them in good time before the date of the oral proceedings of any change from an in-person to a VICO format.

For information on technical aspects of the use of VICO technology, please see the [information provided by the Office](#).

Members of the public wishing to follow oral proceedings conducted by VICO may do so in a dedicated room on the premises in Haar. In view of the current circumstances, however, only limited places will be available. It is not permitted to make photographic images or sound recordings or to retransmit any part of the oral proceedings. As is the case generally for visitors to the Haar premises, members of the public wishing to attend oral proceedings conducted by VICO will be required to complete a [self-declaration form](#) (for the third statement in the form, please refer to the regularly updated list of international risk areas on the [Robert Koch Institute \(RKI\) website](#)), which they should do in advance of their arrival, and are encouraged to announce their plans to attend well in advance.

Members of the public can always follow oral proceedings held by VICO remotely upon giving prior notice by email to [reception-haar@epo.org](mailto:reception-haar@epo.org). Some of these hearings can also be followed on the premises of the Boards of Appeal in Haar.

It is not allowed to record the oral proceedings or forward the link received for connecting to the oral proceedings.

## Hygiene measures

Strict hygiene measures are in place to ensure that oral proceedings are held in optimum conditions. These measures include, in particular, rules on minimum physical distancing and the requirement to wear a face mask on the way to the oral proceedings room. Boards may also require the use of face masks inside the oral proceedings room. Parties, representatives and other visitors are required to bring their own face masks.

## Continuous monitoring

The President of the Boards of Appeal will continue to monitor developments in the COVID19 situation and take any appropriate measures in response.

Given that this situation is still evolving rapidly, all parties to scheduled oral proceedings are advised to check the web section of the Boards of Appeal regularly for updated information.

Last updated: 16.12.2020



Institut der beim Europäischen Patentamt zugelassenen Vertreter  
Institute of Professional Representatives before the European Patent Office  
Institut des mandataires agréés près l'Office européen des brevets

European Patent Institute · Bayerstrasse 83 · 80335 Munich · Germany

Mr António Campinos  
President  
European Patent Office  
80298 Munich  
Germany

By email to [president@epo.org](mailto:president@epo.org)  
Cc: [patentlaw@epo.org](mailto:patentlaw@epo.org)

31 March 2020

Dear Mr Campinos,

Concerns: Oral Proceedings by Video Conference in Examination and Opposition

I trust that you are keeping well. **epi** is grateful for the careful attention you have been giving to dealing with the present difficult situation.

Thank you for your letter on the above subject and the draft Notice of the President. **epi** much appreciates you letting us know of this draft proposal.

This matter was discussed at the SACEPO-WPR meeting held today and a number of points not raised here were raised. These cautioned against such a precipitate change in established practice without extensive testing.

**epi** understands that, during this emergency situation, it may be necessary to adopt measures which might otherwise not have been needed. However, **epi** considers that such emergency measures should not be allowed to become permanent without much more extensive testing of any possible technical solution and also extensive consultation as to their long term effect, in particular on support given to users of the system, which is one of the main points in your strategic plan.

A first point here is that, despite the fact that a number of applicants request oral proceedings (OP) by video conference (VC), on many occasions the request has been denied, apparently because the Office does not have the facilities to do so.

It is pointed out that the use of VC relies on the internet. This could lead to discrimination against a party using a representative from a member state or district where the internet service is not fast and/or reliable. If the connection fails, or is disconnected, the OP may need to be rescheduled. It could also lead to extra work for the Office in determining that the representative is actually in a member state when conducting the VC. The present system used by the EPO appears to be

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deficient because only the speaker can be seen, thus denying the other party or parties the opportunity of seeing the reaction of any other persons or parties present.

It may be that having OP before an Examining Division (ED) could become the norm but this could only be the case if the technology used to implement this is fully tested and effective, not only for the Office but also for the users. It appears that, at the moment, the use of a VC system only works at all where there is a single representative discussing an application with the ED. However, it does not support the users when the applicant wishes more than one representative or a technical expert to be present at the OP.

It may not be appreciated by the Office that, where there is more than one person in the applicant's party, there is a lot of interaction between the representative making the presentation and the other members of his or her party. This takes place during the discussions with the ED and also during the breaks when the ED is considering a point. These discussions can be very useful as they can lead to a resolution of a problem, for instance to a claim amendment. It also facilitates the making of amendments as this can be done in the breaks and presented immediately to the ED.

We are not aware of systems that would permit the applicant's party to have this interaction in the VC organised by the Office. Can they have a separate VC using the same device, when that device uses the same speaker and microphone? Is it possible to mute for one VC while being unmuted for the other VC? If not, it would require each party to use a separate device to have a separate VC. This would increase the bandwidth required for each party. It could also lead to inefficient proceedings, as the representative would need to monitor both VCs. Thus, **epi** considers that it will be necessary for the Office to implement a system that –both technically and procedurally– allows the applicant's party to have internal discussions during the breaks. There is also the problem of providing amended claims for the ED to study. At present, they are sent by email and then printed out by the ED, which makes the OP inefficient.

These problems are exacerbated in the present situation as most attorneys are working remotely from their colleagues and from their clients. When travel again becomes possible, the applicant may assemble a team in one location and have its discussions offline. However, in these times, even this is not possible and the applicant's team will have to adopt a very inefficient means for communication.

The situation for OP before an opposition division (OD) is even more complicated. Not only are there necessarily three parties involved, the OD, the Proprietor and the Opponent, there are often the additional problems of the presence of more than one opponent, providing translations, taking evidence and providing access to the public. These may be compounded by the desire to prevent recording of oral proceedings as well as personal data protection and image rights issues. At present, if we understand the discussion paper SACEPO WPR 3/20, the technology to cope with all these possibilities is not available. It is therefore considered that OP for OD cases should only be by way of VC if all the parties agree and if all the people in each party agree to waive any image rights and any rights under the General Data Protection Regulation.

It is also considered that there are very good reasons why having OP by VC without the agreement of the applicant or all the parties to opposition proceedings does not meet the requirements of Article 113 EPC. Although Article 113 EPC is headed "Right to be heard ...", the Article itself is not limited to "hearing". It provides that the EPO is required to give the parties an opportunity to present their comments. There is nothing in Article 113 EPC that gives the Office the power to limit the way in which a party gives its comments. It is considered that it is common to all legal systems that a party is allowed to present his or her case in any way it wishes to and by a representative of



his or her choice. Limiting presentation of comments in OP to the use of VC could be considered to be a violation of this fundamental human right.

The draft paper does concede that VC may not be the best way in certain cases, but it puts a high burden on the parties to show “serious” reasons. Having such a provision will inevitably lead to many arguments about what is or is not a serious reason, as we have already seen in appeal proceedings. Such arguments should be avoided. **epi** considers that it should be up to each party to decide for itself whether it can agree to having OP by VC so that the Office does not have to concern itself with making judgements about “serious” reasons.

It is also considered that presenting comments in a face-to-face setting is much more efficient. In such a setting, it is possible for the parties to judge the body language of the ED, OD and/or, in the case of opposition proceedings, the other party(ies). This usually leads to much more efficient OP since the parties then concentrate more closely on the points which the body language shows are important to the case. This is not possible by VC.

If parties feel pressured into VC OP and the outcome is adverse to them, the likelihood of appeals generally and appeals based on Article 113 EPC in particular will be much higher. The cost and delay of appeal proceedings is not trivial. It is no good achieving a short-term gain in processing at the first instance if the result is simply an increased backlog of appeal cases. The overall performance of the office will suffer.

For all these reasons, it is **epi**’s view that OP before an OD should only be by way of VC if all the parties agree. Overall, **epi** considers that it is a sensible idea to facilitate, as far as possible, the extensive use of VC for OP, especially for ED OP. However, **epi** strongly suggests that this facilitation should be part of an evolutionary, not revolutionary, process. A draconian change should not be implemented overnight but should follow a process of development of a complete system which not only works for the Office but also properly supports the users and which has benefitted from extensive consultation with users.

A better approach would be to keep the current rules but to facilitate new users exploring the capabilities of the software systems and the connections in some “demo” environment before they are expected to commit to VC as a solution. Presently, access to the practice facility seems limited to those who have already committed to using VC in a live hearing. While users have no way of trying the experience before making such a commitment, they simply cannot afford to put their clients’ rights at risk.

With best wishes for your health and that of your colleagues

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Francis Leyder', with a stylized flourish at the end.

Francis Leyder

President



Institut der beim Europäischen Patentamt zugelassenen Vertreter  
Institute of Professional Representatives before the European Patent Office  
Institut des mandataires agréés près l'Office européen des brevets

Bayerstrasse 83 · 80335 Munich · Germany

Ausschuss für Europäische Patentpraxis  
European Patent Practice Committee  
Commission pour la Pratique du Brevet Européen

26th November, 2020

**epi COMMENTS ON PROPOSED ARTICLE 15a RoPBA**

To: Derk-Jan De Groot – Chairman of the BOAC and  
Carl Josefsson – President of the Boards of Appeal

**epi** is pleased to provide observations on the User Consultation regarding a proposed new Article 15a Rules of Procedure of the Boards of Appeal (RoPBA) launched by the Board of Appeal Committee (BOAC).

**Introduction**

**epi** is the organisation set up according to Articles 134 and 134a EPC and representing all persons entered on the List of Professional Representatives before the EPO. At present, there are over 12,000 members of **epi**. The members work in both private practice and industrial practice and come from all 38 member states of the EPC.

**Face-to-Face Oral Proceedings**

The launch of the consultation coincided with a meeting of **epi**'s ruling Council and gave rise to discussion of the matter of oral proceedings in general. As a result of the discussion, Council demanded that a Resolution be presented to Council. The wording of the Resolution is as follows:

Council considers that, after the Covid-19 pandemic is over, oral proceedings should as a rule be held face-to-face but any party should be free to attend oral proceedings by videoconference, even if the other parties are attending in person.

This Resolution was passed by a large majority.

It can thus be seen that the Council of **epi** considers that, after the pandemic is over, the default for oral proceedings should be face-to-face. This is considered to be required especially for the Boards of Appeal as the Boards are a court of final instance and so operate in a judicial manner and need to be perceived to be acting in a judicial manner. The perception of acting in a judicial manner is not present for videoconference oral proceedings. Moreover, oral proceedings before a Board may be

Chair Chris Mercer

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the final instance for the case and so all parties should be allowed to present their arguments in whatever way they deem appropriate.

The main driver for this proposed new Article seems to be to deal with the backlog of appeal proceedings caused by the pandemic. **epi** understands the need for emergency measures to deal with the pandemic but considers that such a radical change in law should not automatically be made permanent. The Boards, as a diligent judicial body, should tread very carefully in making new, permanent legislation without much more extensive consultation<sup>1</sup>. As can be seen from the resolution above, **epi**'s Council considers that the permanent introduction of videoconference should not be adopted and so it is clear that a large number of users are against making Article 15a permanent.

It is indicated in the Consultation that oral proceedings by videoconference are equivalent to oral proceedings in person. However, this has not been proved but is merely an assertion. It is not clear that holding oral proceedings by videoconference fully complies with Article 113 EPC. It is clear from T492/18 that not all Boards consider that this is the case. That Board in point 2.3 of the decision indicated that it is necessary for oral proceedings held by videoconference to be perceived as equivalent to usual oral proceedings. It is certainly the case that many users perceive oral proceedings by videoconference not to be equivalent to "usual" oral proceedings.

#### **epi** Point 1

In light of the above, the first point **epi** has regarding the Consultation is that it should be made clear that Article 15a will only remain in force for the duration of the pandemic and should thereafter be removed from the RoPBA. It should be part of the decision bringing Article 15a into force that Article 15a expires one year from coming into force and that there will a review of the Article before its expiry.

**epi** has many more points about the apparent move by the BOAC to making oral proceedings by videoconference the norm. These are not set out in detail here as they are not relevant to the situation during the pandemic. However, if the BOAC were to make Article 15a a permanent part of the RoPBA, contrary to **epi**'s Point 1 above, **epi** will present all these points for consideration by the BOAC.

#### Article 15a(1)

**epi** understands that, in the present time, with the pandemic still affecting all EPC member states, it is necessary to take measures to ensure that the Boards can operate effectively and so would welcome some clarity from the Boards as to the circumstances in which oral proceedings can proceed. However, **epi** considers that the proposed Article 15a(1) does not provide this clarity.

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<sup>1</sup> Il est vrai que, par une bizarrerie qui vient plutôt de la nature que de l'esprit des hommes, il est quelquefois nécessaire de changer certaines lois. Mais le cas est rare; et lorsqu'il arrive, il n'y faut toucher que d'une main tremblante: on y doit observer tant de solennités et apporter tant de précautions que le peuple en conclue naturellement que les lois sont bien saintes, puisqu'il faut tant de formalités pour les abroger (Montesquieu – Lettres persanes)

(It is true that, through a quirk which comes more from nature than from the minds of men, it is sometimes necessary to change certain laws. But the case is rare; and when it arrives, it should only be touched with a trembling hand: so many solemnities should be observed and so many precautions taken that the people naturally conclude that the laws are very holy, since so many formalities are required to repeal them.)



In particular, Article 15a(1) is clearly discretionary, as it starts with “The Board may decide ...”. However, the Article provides no details of what factors will influence the Board to decide to hold oral proceedings by videoconference. It is not sufficient to put the guidance in accompanying documents as these have no legal force. In *inter partes* proceedings, this may lead to a large amount of argument from the parties as to whether the Board has exercised its discretion properly.

#### epi Point 2

**epi** therefore considers that Article 15a(1) should make clear the factors the Board will take into account when deciding to exercise its discretion.

#### Article 15a(2) and 15a(3)

In **epi**’s view, the lack of clarity in Article 15a(1) is compounded by the wording of paragraphs (2) and (3). The use of “may” three times in these two paragraphs indicates that everything is at the discretion of individual Chairs. Again, there is no clarity as to what factors will affect the Chair’s exercise of his or her discretion. Again, having nothing in Article 15a(2) and (3) which explains these factors may well lead to much argument between the parties in *inter partes* cases.

There are particular instances where, during the pandemic, there could be a lot of argument. For instance, what would be the situation if a representative employed in house works in a country where there are no travel restrictions but works for a company which has forbidden all travel? Will that representative be required to attend in person? What would be the situation for a representative who is told that he or she must attend oral proceedings by videoconference but lives in an area where internet access is unreliable and so the representative requests attendance in person? There are many other situations which can arise during the pandemic and could give rise to much argument about whether the Chair has exercised his or her discretion appropriately to ensure that the requirements of Article 113 EPC are met.

#### epi Point 3

**epi** therefore considers that Articles 15a(2) and (3) should make clear the factors the Chair will take into account when deciding to exercise his or her discretion.

#### Hybrid Oral Proceedings

The wording of Article 15a(2) and (3) appears to allow what have been called “hybrid” oral proceedings, with some people present in person and some attending by videoconference. **epi** considers that, in principle, hybrid oral proceedings should be possible. However, it can be seen that hybrid oral proceedings could become unwieldy, especially if there are multiple parties, multiple languages and not all or none of the members of the Board are present in person. It will be very difficult for the Chair to keep control and to be fair and be seen to be fair to all parties. This difficulty will increase if there are members of the public in attendance both in person and by videoconference. It will also put a strain on the required IT systems used for the hybrid oral proceedings.

#### epi Point 4

**epi** therefore considers that Article 15a(2) should make clear that, during the pandemic, hybrid oral proceedings should only take place exceptionally. After the pandemic, hybrid oral proceedings should only take place where all the parties agree or the party requesting attendance by videoconference has serious reasons not to attend in person (which would require a definition of what serious reasons might be).

### Compulsory Attendance by Videoconference

According to proposed Article 15a(2), a Chair may order a person to attend by videoconference. This seems to be a draconian power. Why should a person who wishes to attend in person be forced against his or her wishes to attend only by videoconference? This would seem to be contrary to Article 113 EPC and could give rise to an increase in the number of petitions to the Enlarged Board. If a person wishes to attend in person but is prevented from doing so for serious reasons, such as quarantine or travel restrictions, then this should be treated in the same way as if a person becomes ill shortly before an oral proceedings, in which case the oral proceedings are usually postponed.

**epi** does understand that there is the possibility of a representative trying to postpone oral proceedings if an adverse outcome is expected. In such circumstances, it may be appropriate for a Chair to order a representative to attend by videoconference. However, this should only occur in exceptional circumstances and only for the duration of the pandemic.

### **epi** Point 5

**epi** therefore considers that Article 15a(2) should make it clear that a Chair can only order a representative to attend by videoconference in exceptional circumstances and there should be guidance as to what constitutes such exceptional circumstances.

### IT Systems

The above point also gives rise to a point which is not addressed in the Consultation, which is the IT system used. There are clearly deficiencies in the systems presently used by the Boards and so the use of videoconference oral proceedings suffers from these deficiencies. Both the Boards and the parties to the proceedings, where everyone is present in person, benefit from being able to see all those present clearly and to take notice of the "body language" of the Board members and the parties. This is not readily possible with the present IT systems used by the Boards. It is possible for attendees to be almost invisible. There would be greater acceptance of the need, during the pandemic, for videoconference oral proceedings if all representatives and all the members of the Board were required to be visible in reasonable close up. A remote view of a group of people (a party or the Board) from a camera a long way away from the group does not satisfy this requirement.

There are problems for some parties in even accessing the IT system used by the Board. Many companies have forbidden the use of certain videoconferencing systems and so representatives from such companies may not be able readily to access the EPO's system.

There are other ways in which the system used by the Boards are deficient and these have been brought to the attention of the EPO through other channels and so are not repeated here. However, if the BOAC would like to have more details, **epi** would be pleased to supply them.

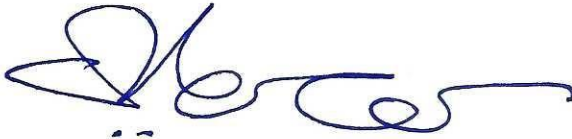
### **epi** Point 5

**epi** therefore considers that the Boards should aim to provide an improved videoconferencing system so that any oral proceedings which take place by videoconferencing are as close to an in person oral proceedings as possible.

**epi** looks forward to discussing the proposed Article 15a and the points made above at the meeting with the BOAC and the President of the Boards on 27th November, 2020.

With kind regards,

Yours sincerely,

A handwritten signature in blue ink, consisting of a stylized 'C' followed by a series of loops and a long horizontal stroke.

Chris P Mercer

Chair – European Patent Practice Committee