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

The Enlarged Board of Appeal
Richard-Reitzner-Allee 8
85540 Haar
Germany

Attention: Mr. Nicolas Michaleczek

Via email: EBAamicuscuriae@epo.org

Re: Enlarged Board of Appeal Case R16/23
European Patent Application No. 14811009.1

6 November 2025

Third Party Observations by epi

Dear Members of the Enlarged Board of Appeal,

The Institute of Professional Representatives before the European Patent Office (**epi**) has been monitoring the above-referenced application, including the decision J 6/22 of the Legal Board of Appeal and the petition for review filed by the applicant. **epi** considers that the case raises matters of interest to all its members and so presents these third party observations to assist the Enlarged Board in its deliberations. **epi** would be happy to further assist the Enlarged Board should this be regarded useful.

Introduction

The present case has arisen as the result of the issuance of a decision by the Legal Board of Appeal where oral proceedings, which had specifically been requested by the applicant, did not take place.

Article 116 EPC

In the view of **epi**, the provision of the EPC underlying the whole discussion is Article 116 EPC. As this is an Article of the EPC, it is a fundamental part of the law. It is worth noting that this Article has remained essentially unchanged since the EPC came into force and so there has been no suggestion that it is anything other than a fundamental part of the law.

The overriding principle embodied by Article 116 EPC is set out in the first sentence of paragraph 1, which states that:

> "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" (emphasis added)

We cannot see any uncertainty in this sentence. It uses the verb "shall", which means that what follows is compulsory. In the "either" part of this sentence, there is a discretion for an instance of the EPO not to hold oral proceedings of its own motion if the instance considers this not to be expedient.

President • Peter R. Thomsen
epi Secretariat · Bayerstrasse 83 · 80335 Munich · Germany
Phone +49 89 242052-0 · Fax +49 89 242052-220
info@patentepi.org · www.patentepi.org

Direct Phone: : +41 79571 0076
president@patentepi.org

However, in the "or" part of the sentence, there is no discretion for the EPO and so oral proceedings **must** be held if there is a request for oral proceedings from any party to the proceedings.

The only exceptions to this first sentence are specified in the second sentence of paragraph 1 and in paragraph 2. The first exception is where there have previously been oral proceedings before an instance of the EPO and one of the parties makes a request to that same instance for "further" oral proceedings. If, and only if, the parties, the instance and the subject of the proceedings are all the same, that instance can refuse the request for further oral proceedings. The second exception relates to proceedings before the Receiving Section. If the Receiving Section decides that it is not expedient, the Receiving Section can refuse a request for oral proceedings. No other exceptions are provided in Article 116 EPC.

It can therefore be seen that the Article has been drafted to specify very clearly the only circumstances in which a request for oral proceedings made by a party to the proceedings can be refused. As exceptions are always to be treated restrictively, this means that there can be no other exceptions.

Thus, the clear and unambiguous requirement set out in Article 116 EPC is that oral proceedings shall take place at the request of a party to the proceedings unless one of the two specified exceptions applies.[1]

In the present case, neither of the two specified exceptions applies and so the Legal Board should have held oral proceedings as requested by the applicant.

The Legal Board referred *inter alia* to G 2/19. Indeed, the Enlarged Board had held in B.II.2 that "it cannot be ruled out that exceptions to this basic rule [of Art. 116(1), first sentence, EPC] may be made where – as in the case underlying this referral – its application would make no sense in the specific circumstances of an individual case." It must not be overlooked that, in the case leading to G 2/19, the appeal was clearly inadmissible because i) the appellant had not been a party to the proceedings in which the underlying decision was taken; and ii) they were not adversely affected by the decision. It was only in this very special scenario, i.e. where a third party had lodged an appeal, that there was no absolute right to oral proceedings.

However, the Enlarged Board also held that Article 116(1), first sentence, EPC, was intended by the legislator to govern the cases facing the departments of the EPO in their everyday practice. The present petition for review pertains to restitution under Art. 122 EPC. This clearly is everyday practice of the EPO.

[1] It is also interesting to note that the EPO's new Legal Interactive Platform agrees with **epi**'s view, as shown in the "conversation" with the LIP attached at the end of this letter as **Annex I**.

Dynamic Interpretation

In the Communication issued by the Enlarged Board on 18th September, 2025 in preparation for oral proceedings, the issue of "dynamic interpretation" according to the Vienna Convention is raised. However, **epi** considers that the conditions for applying a dynamic interpretation do not even exist. As noted above, Article 116 EPC is without any ambiguity. There is no room for interpretation as concerns any additional exceptions to Article 116 EPC.

First, there appears to be only room for a dynamic interpretation if the lawmaker does not execute its power to further develop legal provisions in order to reflect new economic and/or policy developments. The fact that the lawmaker intentionally has decided to maintain a rule unchanged after nearly 5 decades of its existence cannot but be understood as a strong indication that the lawmaker does not deem any modification appropriate, despite a possible change in the socio-economic environment.

Second, it would appear inappropriate to interpret such a stipulation, which is one that had remained unchanged in a significant overhaul of the law, to become inapplicable contrary to the express words of the law. Rather, if anything, there might be reasons for an interpretation on how oral proceedings are being held. Indeed, this interpretation had been made by the Enlarged Board of Appeal in G 1/21.

As noted above, Article 116 EPC was not amended during the revision which led to the 2000 version of the EPC. There have been no significant amendments regarding the Implementing Regulations relating to oral proceedings. This further shows that the legislator did not contemplate adding any further exceptions to the general requirement that oral proceedings "shall" take place at the request of a party to the proceedings.

In G2/24[2], in Reasons 98, the Enlarged Board indicated that, *"in the absence of any substantive change to the relevant legal framework ..."*, there was no reason to differ from the previous decision. The same must be true here. As there has been no change to the legal framework, there is no reason to change the existing understanding of Article 116 EPC. If there is no legislative intent, there is no reason to change the interpretation of a piece of legislation. Thus, the lack of legislative amendment intention in respect of Article 116 EPC is a compelling reason for not applying a dynamic interpretation.

[2] Notably, Reasons 1 of G2/24 shows that the Enlarged Board was working on the accepted understanding of Article 116 EPC in that it held that it was possible in that case not to hold oral proceedings because, using the either and or options of Article 116 EPC, "No party has requested oral proceedings, and the Enlarged Board does not consider this to be expedient." The Enlarged Board in this case should acknowledge that the Enlarged Board in that case was correct.

It is noted that the most recent piece of legislation referring to patent law on a European level is the Unified Patent Court Agreement, which foresees mandatory oral proceedings, clearly making oral proceedings by video conference the exception (only if all parties agree to it).

Moreover, in the accompanying Reasons to Rule 21 UPPR, lit. 1, the European UPC lawmaker, which included a high number of member states of the EPC, starts with this clear and unambiguous statement:

> "In accordance with Article 116(1) EPC which enshrines **the fundamental right to oral proceedings**, …" (emphasis added)

Finally, there is from our perspective no change in the general policy and/or economic environment or the attitudes of the legislating parties (the EPC member states) such that there is a need to further develop implementation of this Article. It is not out-of-date. The fact that a judicial body may consider a change in legislation being desirable does not allow that judicial body to use the idea of dynamic interpretation to compete with the law-making power of the legislative authority.

If anything, we observe that the general perspective regarding access to justice goes rather against the view expressed in J 6/22. All parties to legal proceedings of any kind are entitled to fair proceedings (see also Article 6 ECHR), which includes the right to use all available procedural options. Thus, if anything, a dynamic interpretation of Article 116 EPC would make it even more clear that, except for the two specified exceptions, there is an absolute right to oral proceedings for any party making a request for oral proceedings.

Consequently, it remains from our perspective without doubt, that the prerequisites for applying a dynamic interpretation to Article 116 EPC are not present.

Eventualmaxime

The preliminary opinion also refers to the principle of "Eventualmaxime".

In its pure form, the Eventualmaxime states that a party participating in a lawsuit must submit all its submissions and defences within a specific stage of the proceedings. According to this principle, procedural actions are limited to specific stages of the proceedings and their later assertion is inadmissible. The Eventualmaxime in its purest form can lead to unjust results if, for example, evidence only arises after the procedural stage at which evidence can be presented has already passed. In the legal systems of Germany and Switzerland, the pure Eventualmaxime is therefore only applied sporadically, for example, in Germany in appeal proceedings or in counterclaims in enforcement law. The frequently-encountered relaxed form of the Eventualmaxime generally obliges the parties in the same way as the pure form. However, under certain circumstances, it allows for submissions to be made later.

Oral proceedings are a specific stage in proceedings before the EPO and it is a stage at which submissions are made. Thus, it cannot be seen how the Eventualmaxime can affect the right to oral proceedings, even if a principle which is not present in all the member states could be applied to the EPC.

Other Considerations

In the part of the preliminary opinion referring to the Eventualmaxime, there is reference to the wishes of other parties to have a speedy decision, the interests of stakeholders and the efficiency of the Boards. It is the view of **epi** that these factors should have no influence on this case. For several years now, the workload of the Boards of Appeal has been decreasing, as has pendency time. The Boards of Appeal have twice adopted changes to their rules of procedure to front-load the procedure and essentially rule out any delays caused at the stage of the oral proceedings. In comparison with the overall pendency time, oral proceedings still represent a negligible portion of a matter pending before a Board.

Against this backdrop, an efficiency-related argument, much as one based on timeliness, appears not to be relevant. Even if it was a factor, the way to deal with any perceived delay in reaching a decision could only be to make the proceedings before the EPO and the Boards of Appeal more efficient rather than withdrawing a fundamental right of the parties to oral proceedings under Article 116 EPC. In this respect, **epi** notes with appreciation that, at all instances of the EPO, there have been significant improvements in efficiency such that the speed at which decisions are reached, even where there are oral proceedings, has improved significantly. The further efficiency improvements which are already underway will deal with the issues raised by the Legal Board and so these are no justification for restricting or removing what we consider a fundamental right.

epi believes the Enlarged Board should realise that maintaining a fair, balanced and well working legal system always comes with effort and cost which, however, is necessary to ensure the system will remain just that. Allowing convenience to become a factor in justice cannot but lead to favouritism, risk of influence-taking and, consequently, the erosion of the system.

The Specific Case

epi considers that the failure to hold oral proceedings is a fundamental violation of Article 113 EPC (Article 112a (2)(c) EPC) and also a fundamental procedural defect in the procedure defined by the Implementing Regulations (Rules 115-116 EPC) relating to oral proceedings (Article 112a (2)(d) EPC).

Article 113 EPC

Article 113 (1) EPC specifies that:

The decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

A large amount of the decision of the Legal Board of Appeal provides the grounds on which the Legal Board decided that it was not necessary to hold oral proceedings. There was no indication anywhere in the proceedings prior to the issue of the decision that the Legal Board considered that it was possible to dispense with oral proceedings. Therefore, the applicant did not even know of the grounds presented by the Legal Board and so had absolutely no opportunity to comment on these grounds, which form an essential part of the decision. Therefore, in our view there has clearly been an infringement of Article 113 EPC.

The Implementing Regulations - Rules 115-116 EPC

Rule 115 EPC specifies that:

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

Rule 116 EPC specifies that:

When issuing the summons, the European Patent Office shall draw attention to the points which in its opinion need to be discussed for the purposes of the decision to be taken. At the same time a final date for making written submissions in preparation for the oral proceedings shall be fixed.

It can readily be seen that the Legal Board did not follow any of these mandatory ("shall") provisions in these Rules and so it is clear that the requirements of the Implementing Regulations were not followed.

Fundamental

In the preliminary opinion, the question of the meaning of "fundamental" is raised. The question here is whether the violation (Article 112a (2)(c) EPC) or the procedural defect (Article 112a (2)(d) EPC) is fundamental. It does not relate to the question as to whether the Legal Board would have made a different decision had it held the requested oral proceedings. **epi** has no position as to whether the decision made by the Legal Board would have been the same in case oral proceedings had taken place. However, **epi** believes that this is not relevant.

It is our view that the violation of Article 113 EPC is a fundamental violation because it clearly violates the right of the party in this case to the benefit of oral proceedings under Article 116 EPC at which it would have been able to make submissions in support of its case. The Legal Board therefore denied the applicant the opportunity to make arguments, on the basis of the facts and evidence already on

file, which may have persuaded the Legal Board to make a different decision. By not holding oral proceedings, the Legal Board prevented the applicant from making arguments regarding the right to have oral proceedings and this is a further fundamental violation of the right to be heard.

Similarly, it is our view that the failure to arrange oral proceedings necessarily involves a fundamental procedural defect because the relevant Implementing Regulations were not followed at all. This is not just a case of an accidental misapplication of a particular rule but was a deliberate action to avoid following the relevant rules. In our view, this is a fundamental procedural defect.

Summary

In our view, Article 116 EPC is unambiguous and requires that, if a party so requests, oral proceedings must be held. The Enlarged Board should re-state this requirement in its decision on this petition.

The principles of dynamic interpretation and Eventualmaxime do not apply to Article 116 EPC, at least not under the circumstances of this case.

It would be the task of the legislator to introduce any restrictions or limitations to the right on an Oral proceeding, if that would be regarded necessary.

Administrative efficiency cannot be used to deprive parties to proceedings before the EPO of their fundamental rights as set out in the EPC.

The Enlarged Board is requested to take the above comments into consideration at the forthcoming oral proceedings.

Thank you for your kind consideration.

Yours sincerely,

Peter R. Thomsen
President

Annex I

Response from EPO Legal Interactive Platform

YOU is there an absolute right to oral proceedings?

Yes, there is a right to oral proceedings under the European Patent Convention (EPC). According to Article 116(1) EPC, parties involved in proceedings before the European Patent Office (EPO) can request oral proceedings at any time before a decision is issued. If a party requests oral proceedings, the competent department must grant this request before making a decision. This right is considered a substantial part of the right to be heard under Article 113 EPC.

However, the EPO may reject a request for further oral proceedings if the parties and the subject of the proceedings remain the same, as stated in Rule 21 of the Unitary Patent Regulations Rule 21 – Oral proceedings.

For more details, you can refer to the guidelines on oral proceedings at 2. Oral proceedings at the request of a party.