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

27th April 2021

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

epi has already filed preliminary *amicus curiae* briefs dealing with formal issues on 12th April and 26th April 2021. The present letter is the main *amicus curiae* brief of **epi**, dealing with the referred question itself.

Introduction

epi appreciates the opportunity to comment on the question of law referred to the Enlarged Board of Appeal in case **G 1/21**.

As explained in detail below, a thorough application of the methods of interpretation usually applied by the Enlarged Board of Appeal to construe legal provisions of the EPC leads to the conclusion that the conduct of oral proceedings by videoconference without the consent of the parties is not in conformity with Article 116 EPC: **epi** is therefore of the opinion that the answer to the question of law should be negative.

Background

As acknowledged in the referring decision **T 1807/15** (see point 5.1.1), the meaning of the term «oral proceedings» has barely been discussed in the case law; furthermore, the issue of whether Article 116 EPC stipulates requirements for the format of oral proceedings and, if so, what they are, does not appear to have been properly clarified in the case law.

Several decisions that touched upon the meaning of the term, such as **T 2320/16**, **T 2028/14**, **T 1378/16** and **T 1012/03** will be discussed in the body of this brief.

epi considers that any in-depth discussion of Article 116 EPC should start with a discussion of **G 2/19.** In this decision the Enlarged Board of Appeal states in the context of a discussion of Article 116 EPC (reasons for the decision, C.IV.2, translation according to the Official Journal of the EPO, 2020, A87):

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Users of the European Patent Organisation's services can legitimately expect that the European Patent Office's departments will not perform acts at whatever other place they choose.

The meaning of this statement, made in **G 2/19** in the context of a discussion of the protection of legitimate expectations, is unambiguous: the departments of the European Patent Office are expected to carry out their duties, including the conduct of oral proceedings, at one of the places where the Office is located.

There is no room for stating, as the board of appeal in **T 2320/16** did (s. point 1.5.6 of the reasons), that the clear statement of **G 2/19** is not relevant for oral proceedings by videoconference because, in such proceedings «*the potential for location to adversely effect* [sic] *the parties' rights does not arise: oral proceedings by videoconference do not take place at a specific geographical location, or alternatively, could be considered to be "located" everywhere with access to a reliable internet connection of sufficient bandwidth*».

Oral proceedings by videoconference do not take place at one of the locations "users" of the European Patent Organisation's services expect: in fact, they are carried at different locations, if the members of the department sit at different places. "Everywhere" or "whatever other place" the members of the department choose to be at cannot be considered to meet the definition given in **G 2/19** of the place where departments of the EPO are expected to perform their duties.

Although **G 2/19** does not discuss whether Article 116 EPC stipulates requirements for the format of oral proceedings, it does however support the results of the literal interpretation of Article 116 EPC presented below, according to which oral proceedings are proceedings taking place at one place, with the members of the department concerned and the parties being physically present at that place.

The question referred to the Enlarged Board of Appeal

The question referred to the Enlarged Board of Appeal is the following:

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?

No reformulation of the question will be assumed in the following.

In order to answer the question, which will also be referred to as the main question, it is necessary first to establish what the right to oral proceedings pursuant to Article 116(1) EPC is. In other words, it is necessary to answer a first preliminary question:

What is the content and the extent of the right embodied in Article 116(1) EPC?

Since the main question asks whether oral proceedings conducted in a *specific form* (namely *as a videoconference*) and under a *specific condition set by the parties* (namely *no* consent to oral proceedings by videoconference) are compatible with the right enshrined in Article 116(1) EPC, answering the first preliminary question requires ascertaining whether the right embodied in Article 116(1) EPC stipulates any requirements for the format of oral proceedings and, if so, what these requirements are (cf. point 3.7 of the referring decision) and whether they are contingent upon any condition set (or susceptible to be set) by the parties.

Identifying the content and the extent of the right embodied in Article 116(1) EPC, as required by the first question, requires that the provision be *interpreted*.

Principles of interpretation

The interpretation of legal norms of the EPC has been undertaken by the Enlarged Board of Appeal on numerous occasions on the basis the principles set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (see **G 2/12**, point V.(3) of the reasons for the decision).

Those principles will be applied in the following, in order to answer the question.

As recalled in the referring decision (see point 5.3 of the reasons), 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.

The requirement of good faith entails that the interpreter of a legal norm, or the judge called to apply that norm, is not entitled to depart from clear provisions of law (see **G 2/08**, point 4.2 of the reasons).

The further requirement that interpretation of a legal provision should be undertaken in accordance with the ordinary meaning to be given to the terms of the treaty in their context means that interpretation should start from the literal wording of the provision (**grammatical interpretation**;

see **G 2/12**, point VII.1.(1) of the reasons) and the wording should be considered both in the context of the provision itself and taking into account its position and function within a coherent group of related legal norms (**systematic interpretation**).

Finally, the requirement that a legal provision should be interpreted in the light of its object and purpose entails that the objective sense and purpose of the provision, i.e., the goal (the so-called *ratio legis*) that the norm aims to achieve be identified and taken into account in the construction of the provision (**teleological interpretation**; see **G 2/12**, point V.3.(1) of the reasons[1]).

Furthermore, Article 32 of the Vienna Convention stipulates recourse to supplementary means of interpretation, including the preparatory work ("*travaux préparatoires*") of the treaty, either in order to confirm the meaning resulting from the application of Article 31, or in order to determine the meaning when the interpretation according to Article 31 leaves that meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

For the purpose of interpretation of legal provisions of the EPC, the text in the **three official languages** shall be taken into account pursuant to Article 177(1) EPC.

In accordance with the principles set out above, the interpretation of Article 116 EPC will start with the analysis of the wording of the provision.

Grammatical interpretation

The text of the article in **English**, **German** and **French** is as follows (emphases added):

> **Oral proceedings**
>
> (1) **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.
>
> (2) Nevertheless, oral proceedings shall **take place before the Receiving Section** at the request of the applicant only where the Receiving Section considers this to be expedient or where it intends to refuse the European patent application.

[1] cf. also B. Schachenmann, «*Die Methoden der Rechtsfindung der Großen Beschwerdekammer*», GRUR Int., 2008, pp. 702-706.

(3) Oral proceedings **before the Receiving Section, the Examining Divisions and the Legal Division** shall not be public.

(4) Oral proceedings, including delivery of the decision, shall be public, as regards the Boards of Appeal and the Enlarged Board of Appeal, after publication of the European patent application, and also before the Opposition Divisions, in so far as **the department before which** the proceedings are **taking place** does not decide otherwise in cases where admission of the public could have serious and unjustified disadvantages, in particular for a party to the proceedings.

Mündliche Verhandlung

(1) Eine **mündliche Verhandlung findet** entweder auf Antrag eines Beteiligten oder, sofern das Europäische Patentamt dies für sachdienlich erachtet, von Amts wegen **statt**. Das Europäische Patentamt kann jedoch einen Antrag auf erneute mündliche Verhandlung **vor demselben Organ** ablehnen, wenn die Parteien und der dem Verfahren zugrunde liegende Sachverhalt unverändert geblieben sind.

(2) **Vor der Eingangsstelle findet** eine mündliche Verhandlung auf Antrag des Anmelders nur **statt**, wenn die Eingangsstelle dies für sachdienlich erachtet oder beabsichtigt, die europäische Patentanmeldung zurückzuweisen.

(3) Die mündliche Verhandlung **vor der Eingangsstelle, den Prüfungsabteilungen und der Rechtsabteilung** ist nicht öffentlich.

(4) Die mündliche Verhandlung, einschließlich der Verkündung der Entscheidung, ist **vor den Beschwerdekammern** und der Großen Beschwerdekammer nach Veröffentlichung der europäischen Patentanmeldung sowie vor der Einspruchsabteilung öffentlich, sofern das angerufene Organ nicht in Fällen anderweitig entscheidet, in denen insbesondere für einen Verfahrensbeteiligten die Öffentlichkeit des Verfahrens schwerwiegende und ungerechtfertigte Nachteile zur Folge haben könnte.

Procédure orale

(1) Il est recouru à la **procédure orale** soit d'office lorsque l'Office européen des brevets le juge utile, soit sur requête d'une partie à la procédure. Toutefois, l'Office européen des brevets

peut rejeter une requête tendant à recourir à nouveau à la procédure orale **devant la même instance** pour autant que les parties ainsi que les faits de la cause soient les mêmes.

(2) Toutefois, il n'est recouru, sur requête du demandeur, à la procédure **orale devant la section de dépôt** que lorsque celle-ci le juge utile ou lorsqu'elle envisage de rejeter la demande de brevet européen.

(3) La procédure orale **devant la section de dépôt, les divisions d'examen et la division juridique** n'est pas publique.

(4) La procédure orale, y compris le prononcé de la décision, est publique **devant les chambres de recours** et la Grande Chambre de recours après la publication de la demande de brevet européen ainsi que devant les divisions d'opposition, sauf décision contraire de l'instance saisie, au cas où la publicité pourrait présenter, notamment pour une partie à la procédure, des inconvénients graves et injustifiés.

Before considering the meaning of the English expression "oral proceedings" (and of the corresponding German and French expressions) within the frame of the grammatical interpretation, it is important to clarify a question of method that is relevant for a correct application of that method of interpretation.

The large majority of words and expressions can have a *literal* meaning, which represents their most basic, generally –although necessarily– concrete meaning: the literal meaning of the English word "seat", for example, is "a special chair of one in eminence", which refers to a real, concrete entity (a chair), whereas the literal meaning of the English word "unicorn" is a "mythical horse with a spiralled horn in the middle of the forehead", which clearly does not refer to anything real or concrete.

Words and expressions, however, can also have a *figurative*, more *abstract* sense: a "seat" in a figurative sense refers to the "status" represented by the physical object called "seat": clearly, "status" in this figurative sense does not refer to any concrete entity.

When discussing the meaning of a word or expression, it should always be specified whether the literal or any figurative sense is being referred to; failure to do so, whenever a word or expression has literal as well as figurative meanings, is methodologically incorrect.

It is also useful to recall a further principle that was enunciated by the Enlarged Board of Appeal under point VII.1.(3) of **G 2/12**: if more than one meaning could in principle be attributed to the wording of a provision, then the true and intended meaning of the provision needs to be analysed further.

Turning now to the **grammatical interpretation** of the text of Article 116 EPC in the three official languages, it is observed with reference to the **French** version of the provision that the well-known "Dictionnaire juridique" by Serge Braudo[2], although not containing a specific entry for "*procédure orale*", provides a definition of this term under the entry "*oralité*" (see Annex A1; emphases added):

> *L'"**oralité**" caractérise les **procédures** qui se déroulent par des échanges verbaux **à la Barre du Tribunal**. La **procédure orale** se justifiait naguère parce qu'elle avait été instituée pour le règlement des petites affaires […].*
>
> (free translation: The oral character characterises proceedings taking place through verbal exchanges at the bar of a court of law. Oral proceedings were justified in the past because they had been instituted for settling small claims […])

A "*procédure orale*" therefore designates proceedings taking place **in a court of law**, i.e., **in a physical place**, and thus necessarily requires the **presence** of the parties and the judge(s).

These conclusions are reinforced by the evidence provided by the definition of the entry "*audience*" (see Annex A2), i.e., "hearing", in the same dictionary (emphases in the original):

> *L'"audience" est le moment de la procédure au cours duquel le juge, lorsque la procédure est "à juge unique" ou le tribunal, lorsque la cause est entendue par une formation collégiale, entend les parties et/ou leurs conseils (avocats, représentant légal ou mandataires ad hoc) en leurs observations orales. […] Les audiences se tiennent au "Palais de justice", mais il existe des cas où afin de rapprocher la justice du justiciable, les juges tiennent des "audiences foraines" dans des bâtiments publics (écoles, Mairies)[…].*
>
> Free translation: The "hearing" is the stage of the procedure during which the judge, if the procedure foresees a single judge, or the court, if the case is heard by a panel, hears the oral

[2] The dictionary is available on the Internet: https://www.dictionnaire-juridique.com/index.php; it has been occasionally cited by the Boards of Appeal, for example in the decision T 1914/12, point 7.1.2 of the reasons.

observations of the parties and/or their representatives (barristers, legal representative or ad hoc representatives.

As regards **German**, the renowned "Rechtswörterbuch" by Dr. Carl Creifelds defines the expression "*mündliche Verhandlung*" as follows (see Annex A3; emphasis in the original):

> ***Mündliche Verhandlung*** *ist die Verhandlung, die vor dem Gericht bei Anwesenheit der Beteiligten durch mündlichen Vortrag (wenn auch aufgrund vorbereitender Schriftsätze) durchgeführt wird*.
>
> Free translation: Oral proceedings are proceedings that are carried out by oral presentation (although also on the basis of preparatory briefs) before the court in the presence of the parties.

The **literal** meaning of the words "*vor dem Gericht bei Anwesenheit der Beteiligten*" used in this definition clearly and unambiguously indicates that a "*mündliche Verhandlung*" designates proceedings **taking place in a court** and in the **presence** of the parties in the court.

That the words "*vor dem Gericht*" in their literal, most basic sense mean "in a court" is plainly evident from their translation into English in the entry for "Gericht" in the "Duden Oxford Großwörterbuch Englisch" (see Annex A4; emphases in the original):

> **Gericht**[1] /gə'rıçt/ *das;* [...] **jmdn. dem vor ~ laden** *od.* **zitieren** summon sb. to appear in court; **vor ~ erscheinen/aussagen** appear/testify in court; [...]

This is an important point that was wholly overlooked in decision **T 2320/16**. At point 1.5.4 of the reasons, the decision sweepingly affirms with reference to Article 116 EPC:

> *the term "before" in a judicial context is to be understood as "under the consideration of, or being judged or decided by"*.

In support of this interpretation the board refers to a number of provisions of the EPC «*in which the same term is employed in relation to proceedings before the EPO or a department thereof, none of which are to be understood as requiring physical presence*» (see p. 27 of the decision).

The first point to observe is that the board in **T 2320/16** neither stated that it was considering the term in its figurative meaning only, nor undertook any analysis of Article 116 EPC based on the literal, most basic meaning of the term "before".

As already explained above, this approach is flawed methodologically.

The second point to observe is that the provisions of the EPC cited by the board in **T 2320/16** do not use the term "*before*" in relation to any of the specific departments mentioned in Article 116 EPC: all the provisions cited, namely Article 14(2) EPC, Article 60(3) EPC, Article 70(1) EPC, Article 114(1) EPC, Article 115 EPC, Article 123(1) EPC and Article 134 EPC (see point 1.5.4), use the expression "*before the European Patent Office*".

That makes quite a difference. Words do not have meanings in isolation[3]: they have meaning in context.

As explained at point 5.4.1 of the referring decision **T 1807/15**, Article 116 EPC itself defines the EPO *departments* before which oral proceedings take place and these departments are defined in Articles 16 to 22 EPC both in terms of their **composition** and their **function.**

Article 18(2) EPC, for example, defines the composition of examining divisions by specifying that they shall consist *of* three technically qualified examiners and may be enlarged by the addition of a legally qualified examiner. Article 18(1) EPC defines the function of examining divisions.

The words "*Oral proceedings before the Examining Divisions shall not be public*" in Article 116(3) EPC, read in context with Article 18 EPC, have a perfectly clear literal meaning: oral proceedings shall be conducted in the presence of three technically qualified examiners (and possibly a legally qualified examiner) but without any member of the public being present. For the avoidance of doubt it is underlined that the expression "*in the presence of*" is used here to mean that the examiners and the parties are "*physically present in person at the same place*".

That the word "*before*" ("*vor*" in German and "*devant*" in French) has, in the context of Article 116 EPC, its most basic *physical* meaning of "*in front*", "*in the presence of*"[4] is due to the reference, in

[3] cf. L. Trask, «Language: The Basics», reissue of the 2nd edition, Routledge, 2004, p. 53, «Word meanings and the structure of the vocabulary».

[4] see, for example, the definition of the preposition «before» provided in the online version of the Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/before. For the German preposition «vor» see its definition in the online version of the Duden dictionary, available at https://www.duden.de/rechtschreibung/vor_bevor_aus_gegen_heraus; for the French preposition «devant» see the corresponding entry in the Dictionary of the French Academy at https://www.dictionnaire-academie.fr/article/A9D2185.

the same context, to examining divisions that, in the larger context of the EPC are defined not only in terms of their function but also of their personal composition.

This does not mean that the aforementioned words do not possess a figurative meaning; however, to completely disregard the most basic and natural meaning of those words is incorrect from the methodological point of view.

What about, then, the words "before the European Patent Office" (and their equivalent in German and French) used in the context of the provisions cited by the board in **T 2320/16**?

The European Patent Office is mentioned for the first time in Article 4(2)(a) EPC, which defines the Office as an organ ("Organ" in German, "organe" in French) of the European Patent Organisation referred to under Article 4(1) EPC as having administrative and financial autonomy.

An organ of an organisation having administrative and financial autonomy is a functional, subordinate part of an administrative and financial *structure*: the European Patent Office is thus defined purely as a *functional* entity. The expression "European Patent Office" is not defined or used in the EPC to designate its staff or a building where departments of the Office are located.

Nobody reading the provisions cited by the board in **T 2320/16** would ever think that the words in those provisions, either in the context of the provisions themselves or in the larger context of the EPC, could literally mean, for example, that the words "*before the European Patent Office*" could mean "*in front and in the presence of the staff of the Office*" or "*in front of the premises of the Office at one of its locations*".

The words "*before the European Patent Office*" (and their German and French equivalents "*vor dem Europäischen Patentamt*" and "*devant l'Office européen des brevets*") never have any physical meaning in the context of these provisions: "*before the European Patent Office*" is used in a figurative sense only.

In summary, the word "*before*" in a legal context can have - in general - a basic, literal meaning and a figurative meaning.

Correspondingly, the Cambridge dictionary[5] differentiates, in a legal context, between the basic, concrete meaning of "*before*" and its abstract, figurative meaning:

> «*If a legal case comes before a Law Court or a Judge, it is dealt with by them and when someone comes before a Court or Judge, they are present while the case is dealt with*».

Already on this ground, any comparison with the expressions used in Article 116 EPC, which instead admits of a perfectly natural interpretation in a physical sense, is methodologically flawed and no correct conclusions can be derived from such comparison.

As specifically concerns the wording of the English version of Article 116 EPC, the expression "*oral proceedings*" does not appear to be recorded as such in any dictionary, be it a general or a legal one.

The expression "*oral proceedings*" does not seem to be in use in the British legal system, in contrast to its German and French counterparts, which instead have a codified meaning in German and French law and are used in the statutes[6].

The expression does not appear to have ever been in use in British patent law either: no instance can be found in the UK Patents Act 1977, for example[7].

In view of the historical analysis of Article 116 EPC presented in detail below, it appears that the English expression was purposely coined to translate the German and French expressions in the EPC.

It may be said, in general, that the English word "*proceedings*" in a legal context designates an "*action taken **in a court** to settle a dispute*"[8] (emphasis added) and that "*oral proceedings*" refer to such an action involving at least an oral exchange between the judge(s) and the parties.

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[5] https://dictionary.cambridge.org/dictionary/english/come-before-sth-sb

[6] See, for instance, part 3, title 1 ("**Mündliche Verhandlung**"), section 128 of the German Code of Civil Procedure (ZPO) and Articles 446-1 to 446-4 of the French Code of Civil Procedure (Code de Procédure Civile) in sub-section I ("Les débats"), paragraph 2 ("Dispositions propres à la **procédure orale**").

[7] Section 101, "Exercise of comptroller's discretionary powers" and section 102, "Right of audience in proceedings on appeal from the comptroller", for example, only refer to the "opportunity to be heard" for a party and to a "right to audience" according to which a party "may appear **before** the comptroller **in person**". Found in the CIPA Guide to the Patents Act 1977, 2nd edition, Sweet & Maxwell, 1984.

The English expression "*oral proceedings*" in itself, absent any clear evidence of a codified meaning, does not appear to necessarily imply that the parties and the judge(s) are physically present at a place, as it is instead the case for the German and French counterparts, as shown above.

However, at least the English and the German version of Article 116 EPC contain a further element indicating that the proceedings referred to request physical presence at a place.

The German text repeatedly uses the verb "***statt**finden*", literally meaning "*to take **place***", which is the verb used in the English version of the provision: both verbs mean "happening", "occurring at a specific place" (this is also the etymology of both words). The French version uses the more anodyne verb "*recourir*", meaning "*to have recourse to*".

It is true that both "*stattfinden*" and "*to take place*" may be used, both in German and in English, in the sense of "happening", "occurring" arguably without necessarily implying that the event or action occurs at a specific place. On the other hand, it seems unlikely that speakers would use those terms to refer to events which, as the Board in **T 2320/16** wrote, «...could be considered to be "located" everywhere».

The basic meaning of "*stattfinden*" and "*to take place*" is to occur at a place.

However, the historical analysis of Article 116 EPC (see below) shows that the wording of Article 116 EPC in all the three languages underwent a significant amendment: whereas the original wording of the provision referred to the "*hearing*" of the parties, in 1970 the text was amended by removing any reference to the parties being "*heard*"; instead, the English and German versions referred to the "*taking place*" of the oral proceedings, while the French version indicated that "*recourse*" was had to oral proceedings.

It is undeniable that the meaning of the provision underwent a shift in all the three languages: "*hearing*" does not necessarily imply that the speaker and the hearer are at the same physical place; removing references to "*hearing*" and replacing them, at least in English and German, to proceedings "taking **place**" indicates an intention to stress the **location** at which the proceedings are carried out. Not surprisingly, hence, the Board in **T 1012/03** concluded at point 36 that in the context of Article 116 EPC «*the word "before" ... implies a location "where" the proceedings have*

[8] This is the definition provided, for example, in the online version of the Oxford English Dictionary.

to be carried out, namely at least at the place where the relevant department is located». The Board of Appeal in **T 1012/03** added that such implementation was never questioned because «*it was self-evident*» that the parties or their representatives must travel to the place of the respective department. At point 38 of **T 1012/03** the board thus concluded that «*the term "oral proceedings before the respective department" in Article 116 EPC not only concerns the function of the deciding Division but also the* ***location*** *where oral proceedings are to take place*» (emphasis added).

Although the French version does not provide the same positive evidence that the words "*stattfinden*" and "take place" provide in the German and English version of Article 116 EPC, it does nevertheless indicate that reference to "hearing" only was felt to be unsatisfactory: oral proceedings are more than just hearing and being heard.

Taking into account that, at the time, «*the assumption was that oral proceedings would take place in person*» (see **T 2320/16**, point 1.5.8 of the reasons), it may be inferred that the amendment of the French version aimed at avoiding misunderstandings on the nature of a «*procédure orale*»: such proceedings would not just involve hearing and seeing.

It will be shown below, in the discussion of the systematic interpretation, that this is indeed the case for oral proceedings according to Article 116 EPC.

It can be thus concluded from the grammatical interpretation of Article 116 EPC in the three languages that the expression "*oral proceedings*"/"*mündliche Verhandlung*"/"*procédure orale*" designates proceedings requiring physical presence in an actual room (cf. the conclusions at the end of point 5.4 of the referring decision **T 1807/15**).

It should be added that, as correctly pointed out in the referring decision **T 1807/15** (see point 5.5 of the reasons), there are also no indications that the meaning of the term "oral proceedings" changed when the EPC was revised in 2000.

The wording of Article 116 EPC 1973 remained essentially the same in the revised Convention. The EPO introduced the possibility of holding oral proceedings in the form of a videoconference in 1998, i.e., before the Diplomatic Conference for the revision of the EPC. Oral proceedings as a videoconference had to be requested by applicants and were possible before examining divisions only. For a request to be granted, applicants were required to submit a declaration waiving their right to traditional oral proceedings. The EPO suggested the following wording to applicants: «*The*

applicant renounces in advance and irrevocably his right to oral proceedings being held in the traditional form at the EPO premises on the same subject after the requested video conference». The language used by the EPO in this notice shows that, at the time of the Diplomatic Conference in 2000, the term "oral proceedings" as used in Article 116 EPC was understood to designate proceedings requiring physical presence «*at the EPO premises*».

These conclusions are not altered by the fact that, in 2006, the EPO rescinded the requirement for applicants to submit a declaration to the effect of waiving their right to oral proceedings at the EPO premises: there is no evidence that the meaning of the term "oral proceedings" underwent any shift.

It is observed in passing that the principle recalled at the beginning, by reference to point VII.1.(3) of **G 2/12**[9], appears to have been forgotten in the explanatory remarks[10] that accompany the proposal of amendment of the Rules of Procedure of the Boards of Appeal (hereinafter "RPBA"), by the addition of Article 15a RPBA, that has led to the present referral.

Under point 5 of those remarks it is stated:

> «*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***» (emphasis added).

It is undisputed that the text of Article 116 EPC in the three languages does not mention oral proceedings by videoconference (otherwise there would be no need for the referral).

Even if it were accepted (contrary to the position of **epi**) that the term "oral proceedings" does not stipulate a requirement of physical presence and is to be understood as not excluding oral proceedings by videoconference either, as indicated in the aforementioned remarks, then this could only mean that more than one meaning could in principle be attributed to such term in the context of Art 116 EPC.

[9] If more than one meaning could in principle be attributed to the wording of a provision, then the true and intended meaning of the provision needs to be analysed further

[10] Available here: https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201113.html

It follows from the principle recalled above that the true and intended meaning of the provision needs to be analysed further; it does not follow from it –without any further analysis– that oral proceedings by videoconference, albeit not expressly mentioned in the wording of the provision, are provided for under Article 116 EPC.

Yet, this is precisely what happened with the introduction of Article 15a RPBA: secondary legislation providing for the conduct of oral proceedings according to Article 116 EPC by videoconference has come into force on the 1st April 2021, following a proposal from the President of the Boards of Appeal Unit to the Boards of Appeal Committee (hereinafter "BOAC")[11], *before* any further analysis as to the true and intended meaning of Article 116 EPC was undertaken.

Oral proceedings according to Article 116 EPC by videoconference were furthermore held by the boards of appeal before the formal entry into force of Article 15a EPC, which took place on 1 April 2021, following the approval of the new provision by the Administrative Council on 23 March 2021.

It thus appears that the principle recalled above was wholly disregarded and that the conclusions at point 5 of the explanatory remarks were arrived at without applying the established methods of interpretation of legal provisions that the Boards ordinarily apply.

Arguing that oral proceedings in the form of a videoconference are allowed under Article 116 EPC because the provision does not exclude a hearing in that form is like arguing that inventive step under Article 56 EPC is to be assessed by reference to a notional person having *above-average* knowledge and abilities, in view of the fact that Article 56 EPC does not define who the skilled person is and does not exclude that this person should possess exceptionally high knowledge and abilities.

Nobody conversant with the jurisprudence of the boards of appeal of the EPO would accept this conclusion, as they would know that, as a result of judicial interpretation by the boards, it has been established that the skilled person is to be construed as an experienced practitioner who has *average* knowledge and abilities (cf. the Case Law of the Boards of Appeal, hereinafter "CLBoA", 9th edition 2019, I.D.8.1.1).

[11] see the document **BOAC/16/20** available here:
http://documents.epo.org/projects/babylon/eponet.nsf/0/ABB07FC3026814D7C125863F004CF531/$File/boac-16-20_en.pdf

In view of the circumstance that some of the words used in each of the three versions of Article 116 EPC may also have a figurative meaning, the **systematic interpretation** of Article 116 EPC will be discussed in the following, in order to ascertain whether the preliminary findings of the grammatical interpretation can be confirmed or not.

Systematic interpretation

Article 116 EPC belongs to the "*Common provisions governing procedure*" that, within the body of the Convention, have been grouped together in Chapter I of Part VII defining a set of **common provisions applicable to all the proceedings under the EPC**[12].

These common provisions define a number of fundamental principles, such as for example the right to be heard ("*rechtliches Gehör*", in German; "*principe d'être entendu*" or "*principe du contradictoire*", in French) or the principle of party disposition ("*Dispositions-*" or "*Verfügungsgrundsatz*", in German; "*principe dispositif*", in French), governing all the procedures foreseen under the EPC.

During the elaboration of the Convention, it was considered advisable not only to define a number of principles common to all the procedures but also to arrange the articles of the EPC enshrining these principles in a common part of the Convention, so as to define a coherent legal system of fundamental norms.

Within this system of legal norms embodying the fundamental principles governing the procedure under the EPC, it is possible to clearly identify a sub-system centred around one of the most important principles of the Convention, namely the principle of the right to be heard mentioned above.

This principle, enshrined in Article 113(1) EPC, stipulates that the decisions of the departments 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.

Article 113(1) EPC is an expression of the right of the parties to a fair trial[13] and defines a right of the parties to present comment on the grounds or evidence on which decisions of the departments

[12] Cf. Singer/Stauder/Luginbühl, 8th edition, 2019, "Vorbemerkung zu Art. 113-126" (Preliminary note to Art. 113-126), marginal note 1.

and to have those comments duly considered, that is, reviewed with respect to their relevance for the decision on the matter (see CLBoA, III.B.2.4.1 and, amongst many, **R 8/15**).

The right of the parties to a fair trial is a generally recognised procedural principle under Article 125 EPC (cf. **T 669/90**, cited in CLBoA, III.B.1).

This principle is also enshrined in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), which has been recognised in **G 1/05** and **G 2/08** of 15 June 2009 as a binding standard for proceedings before the boards of appeal because it relies on principles of law common to all member states of the European Patent Organisation (cf. **R 19/12** of 25 April 2014).

The right to be heard is to be observed in the entire procedure before the EPO (cf. **R 2/14** of 17 February 2015, loc. cit.). The necessity to respect it is absolute (see **R 3/10**, point of the reasons).

As particularly apparent from the wording in the English version, the right embodied in Article 113(1) EPC encompasses the right of the parties to present comments on evidence.

To the sub-system centred around the right to be heard according to Article 113(1) EPC also belong Article 116 EPC and Article 117(1) EPC; these provisions embody **specific** aspects of the right to be heard.

Within this sub-system, Article 116 EPC embodies the right of the parties to present their comments and to have them duly considered in an appropriate format that allows

> «*...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*»

as stated at point 2.11 of the reasons of **R 3/10**.

The procedure before the EPO is primarily conducted in writing, that is, through the medium of documents in written form (cf. **G 4/95**, point 4(c) of the reasons), consistently with the objective of the patent granting system set up under the EPC (cf. Article 4(2) EPC) to issue a written document

[13] cf. Singer/Stauder/Luginbühl, 8th edition, 2019, "Vorbemerkung zu Art. 113-126" (Preliminary note to Art. 113-126), "Grundsätze des gerechten Verfahrens" ("Principles of a fair procedure"), marginal note 6.

defining in detail the protection granted upon an applicant. A document fulfils the requirement of written form if its content can be reproduced in a legible form on paper (Rule 1 EPC).

Oral proceedings according to Article 116 EPC represent a further element of the procedure before the EPO, based on the oral form. They are thus based on the principle of oral character ("*Grundsatz der Mündlichkeit*" in German; "*principe d'oralité*" in French)[14]

Furthermore, in contrast to written proceedings, oral proceedings are based on the principle of immediacy ("*Grundsatz der Unmittelbarkeit*" in German; "*principe d'immédiateté*" in French)[15]: the presentation of the case by a party, the questions asked by the deciding body and the responses to these questions, as well as the discussion of controversial or crucial issues are conducted without an intervening medium: the deciding body and the parties interact with each other directly and personally, without needing an intermediary.

The form of the procedure enshrined in Article 116 EPC, seen in the larger system of the procedure before the EPO, which is primarily written, thus gives the parties a right to present their comments and have such comments duly considered by means of a non-mediated personal interaction with the members of the deciding body.

A non-mediated, personal interaction between the parties and the members of the deciding body, as opposed to the mediated form of written proceedings in which the procedure before the EPO is primarily conducted, is not restricted to oral, i.e., purely verbal exchanges: it follows clearly from the position of Article 116 EPC within the procedural system of the EPC that oral proceedings are designed to enable any form of non-mediated personal interaction, thus including, for example, the possibility of inspecting, touching and taking an object in one's hands, observing the workings and the details of an apparatus, examining an original document for the purpose of ascertaining its authenticity, sketching an explanatory diagram or drawing on a flipchart or illustrating the details of a calculation, as will be explained in the following.

[14] Cf. Singer/Stauder/Luginbühl, 8th edition, 2019, «Vorbemerkung zu Art. 113-126» (Preliminary note to Art. 113-126), «Grundsätze der Verfahrensformen» («Principles of the procedural forms»), marginal note 9.

[15] See footnote 13.

There is no basis to assert, as the board in **T 2320/16** did (cf. point 1.5.2), that oral proceedings according to Article 116 EPC merely require that the parties and members of the board can see each other and that it be possible

> «*...in real time for the members of the board to interrupt or question the parties where necessary*»

The conclusions of the board in **T 2320/16** in respect of

> «*the form in which the parties orally present their arguments*» (emphasis added),

namely that this form

> «*is not predetermined by Article 116 EPC* [to be] *with or without physical presence*»,

are based on an entirely arbitrary selection of some forms of non-mediated personal interaction out of all those that are possible and foreseen under the EPC.

The board in **T 2320/16** did not justify this arbitrary selection; furthermore, it arrived at these arbitrary conclusions in the context of a discussion of the literal interpretation only: it did not discuss a systematic interpretation or a teleological interpretation of Article 116 EPC and completely failed to explain what the object and purpose of Article 116 EPC is. The board thus did not arrive at its conclusions by considering Article 116 EPC in the light of its object and purpose, as it should have done according to Article 31 of the Vienna Convention.

The latter deficiency is particular striking, as the board in **T 2320/16** repeatedly referred to the object and purpose of the provision (see the end of point 1.5.3) and the legislative intent underlying Article 116 EPC (see the end of point 1.5.11) and rejected the respondent's objections on the ground that

> «*...the identification of a **causal relationship** between a specific difference or differences* [between oral proceedings by videoconference and in-person oral proceedings] *and a non-compliance with the object and purpose of oral proceedings pursuant to Article 116 EPC*»

was not identified by the respondent (boldface in the original; text underlined by the authors of the present brief).

There is no explanation whatsoever, in the entire decision, of what the board considered to be the

«object and purpose of oral proceedings pursuant to Article 116 EPC».

It cannot be fathomed how the respondent could have identified any non-compliance of proceedings by videoconference with an object and purpose that is never spelled out or even hinted at by the board in **T 2320/16**.

As already mentioned, in this decision the board arbitrarily singled out visibility in their characterisation of the «*prerequisite*[s]» of oral proceedings, stating at point 1.5.2 that

«...this distinguishes oral proceedings pursuant to Article 116 EPC from a telephone conference in which the board members and parties are not visible to each other».

The board in **T 2320/16** gave no reason why it considered visibility a "*prerequisite*" of oral proceedings according to Article 116 EPC, while it did not include, to mention an example relating to a different sense that may be relevant in oral proceedings, the ability of handing out and receiving an object or an original document, in order to exhibit or inspect it. As shown below, there is no reason for excluding this form of interaction which may well be necessary for taking a decision in a case involving, for example, the prior use of an object.

If one follows the board's reasoning presented the first paragraph of point 1.5.2 of **T 2320/16**, it must be assumed that Article 116 EPC «*does not define in any way the exact form of those proceedings, other than the proceedings being **oral** in nature*» (emphasis added).

If this were indeed the case, where does the board derive the prerequisite of visibility from, considering that the wording of the provision does not refer to the parties and the members of the deciding body being visible?

The fact that the wording «*does not explicitly exclude oral proceedings by videoconference*», as the board nonchalantly writes at the end of that first paragraph, cannot be the reason for introducing the prerequisite of visibility, since the issue under discussion at point 1.5.2 is the grammatical interpretation of the provision, that is, the interpretation of the wording, as indicated in the preceding point 1.5.1.

If the wording contains no mention of visibility and only refers to the oral character, it cannot be concluded –as a matter of logic– that the wording defines a prerequisite of visibility. The

conclusions of the board at point 1.5.2 appear to be logically flawed: they appear to assume to be true precisely what they intend to prove.

As explained above by reference to the principle set out in point VII.1.(3) of **G 2/12**, the silence of the wording can only mean that a further analysis of the provision is required, in order to establish the authentic meaning of the provision; but this is precisely what **T 2320/16** fails to do: there is not the slightest hint at an attempt to construe Article 116 EPC systematically or teleologically, that is, in terms of its object and purpose.

The decision **T 2320/16** quite simply fails to fully investigate the content and extent of the right enshrined in Article 116 EPC; as explained below, similar shortcomings affect decision **T 1378/16,** referred to in **T 2320/16** (see the end of point 1.5.2) and decision **T 2068/14**, where the notion of "*essence of oral proceedings*" was first brought up.

Turning again to the determination, on the basis of a systematic interpretation, of the content and extent of the right enshrined in Article 116 EPC, it is established in the case law of the boards that the right to oral proceedings regulated by Article 116 EPC forms a substantial part of the right to be heard granted by Article 113(1) EPC (see CLBoA, III.B.2).

Non-compliance with a request for oral proceedings deprives a party of an important opportunity for presenting his case in the manner he wishes and using the possibilities open to him under the EPC, as explained in **T 1050/09**, point 2 of the reasons), by reference to **T 209/88**, point 4.3 of the reasons.

Within the sub-system centred around the right to be heard according to Article 113(1) EPC, Article 117(1) EPC enshrines a basic procedural right that is generally recognised in the contracting states, i.e., the right to give evidence in appropriate form and the right to have that evidence heard (see **T 1110/03**, point 2.4 of the reasons), i.e., duly taken into account.

This right is a fundamental right of any party to EPO proceedings.

In the procedure before the EPO, parties are free to choose the evidence they wish to submit –the kinds listed in Article 117(1) EPC are merely examples (cf. **T 142/97**, point 2.1 of the reasons)– in support of their case.

The departments of the EPO have a discretionary power to admit or not any of the means of evidence listed in Article 117(1) EPC (cf., for instance, point 2.2 of the reasons of **T 142/97**); this discretionary power finds its legal basis in Article 117(3) EPC 1973, now Rule 117 EPC (see T 860/01, point 4 of the reasons and CLBoA, III.G.1). However, if the evidence offered as proof of contested facts essential to the settlement of a dispute is decisive, the department hearing the case must, as a rule, order that the evidence be taken.

The right enshrined in Article 117(1) EPC, considered within the sub-system centred around the right to be heard according to Article 113(1) EPC, thus guarantees the right to have relevant grounds that could potentially influence the outcome taken into account in the written decision, including facts and evidence put forward in support of such grounds.

Failure to consider evidence normally constitutes a substantial procedural violation of the fundamental right to give evidence in appropriate form and to have that evidence heard, since it deprives a party of the right to have its case fully heard (see **T 1538/08**, point 2.1 of the reasons).

The right to have relevant facts and evidence taken into account applies in the whole procedure before the EPO, thus including oral proceedings according to Article 116 EPC.

This entails that a party must be able to offer evidence as proof of contested facts essential to the settlement of a dispute and to have that evidence "heard", in the sense of being duly considered, also in oral proceedings According to Article 116 EPC.

Two simple examples can best illustrate this point.

In the first example, based on the situation underlying the case decided in **T 1536/08**, an opponent rests on photocopies of printed documents O1 to O3 as evidence of prior art and files these photocopies with the statement of ground of opposition. At the same time, in the statement of grounds the opponent offers original printed versions of the timely filed photocopies to give evidence on the authenticity of the photocopies (cf. point 2.2 of **T 1536/08**).

The original printed versions of O1 to O3 represent means of evidence according to Article 117(1)(c) EPC ("*production of documents*"; "*Vorlegung von Urkunden*"; "*production de documents*"). As indicated above, parties to proceedings before the EPO are free to choose the evidence they wish to submit in support of their case: the opponent is thus entitled to offer the original printed versions of O1 to O3.

In the subsequent procedure the opposition division informs the opponent that authenticity has become an issue and appoints oral proceedings according to Article 116 EPC to decide the case.

It is clear that the offer of the original printed version cannot be considered to be belated, since it has been made with the statement of grounds of opposition: hence, the division has no discretion to refuse the admission of the original printed version under Article 114(2) EPC.

It is plainly evident that, under Article 113(1) EPC, the opponent must be given the opportunity, at the oral proceedings, to comment on the issue of authenticity, because facts that are essential for settling the dispute and that have been contested can only be proven on the basis of the timely-offered evidence; it is also plainly evident that this requires that the opposition division, during the oral proceedings, be able to take and examine the evidence offered in the form of original printed versions.

In **T 1536/08** the board found that the right to be heard had been violated because the timely offer of evidence in the form of original printed original versions had been ignored by the competent department (see point 2.4 of the reasons).

It is readily apparent that the party that offered original printed original versions of documents O1 to O3 cannot have those documents examined by the opposition division at oral proceedings conducted as a videoconference, because the party could not file the original during the oral proceedings**.** Transmitting the documents electronically, e.g., by e-mail, would amount to filing a copy.

In a second example, based on the situation underlying the case decided in **T 142/97**, an opponent rests on a prior use, duly substantiated through the timely filing of copies of written documents (e.g., invoices, commercial correspondence, technical drawings) with the statement of grounds. At the same time, in the statement of grounds of opposition the opponent offers the inspection of a portable apparatus in support of the prior use, should the drawings be considered to be insufficient to prove which technical features of a claimed subject matter were made available to the public before the relevant date.

The inspection of the portable apparatus represents means of evidence according to Article 117(1)(f) EPC ("*inspection*"; "*Einnahme des Augenscheins*"; "*descente sur les lieux*").

The offer of inspection made with the statement of grounds is timely and cannot be refused under Article 114(2) EPC (cf. point 2.3.1 of **T 142/97**).

In the subsequent procedure the opposition division informs the opponent that the relevance of the drawings has become an issue, in the sense that not all the relevant features are derivable from the drawings, and appoints oral proceedings according to Article 116 EPC to decide the case.

It is plainly evident also in this second case that, under Article 113(1) EPC, the opponent must be given the opportunity, **at the oral proceedings**, to comment on the relevance of the drawings; it is also plainly evident that this requires that the opposition division, during the oral proceedings, may **take** and examine the **evidence** offered in the form of an **inspection of an object**, namely the portable apparatus.

In **T 142/97** the board found that the right to be heard had been violated because the timely offer of evidence in the form of an inspection had been ignored by the competent department (see point 2.4 of the reasons).

It is clear also in this example that the party that offered inspection of an object cannot have that object, including its operation, examined by the opposition division at oral proceedings conducted as a videoconference, because the object could not be brought before the competent department, in order for the members of the department to perceive and appreciate all relevant features of the object by means of their senses.

It is observed in this respect that the Notice of the EPO dated 17 December 2020, concerning the taking of evidence by videoconference[16], acknowledges that videoconferencing does not enable the taking of certain kinds of evidence, in that point 17 of the Notice states:

> «*An inspection will not be carried out by videoconference where the taking of **evidence** concerns the haptic feel, texture, handling experience or any other feature that **cannot be properly transmitted by videoconference***» (emphasis added).

It is readily apparent that, since the right embodied in Article 117(1) EPC and Article 113(1) EPC to have evidence duly taken into account must be guaranteed also in oral proceedings according to Article 116 EPC, the form in which oral proceedings are conducted must allow a party to fully avail

[16] Available at https://www.epo.org/law-practice/legal-texts/official-journal/2020/12/a135.html

itself of that right, without limiting the choice of the means of evidence which, as explained above, is free under the EPC.

In other words, oral proceedings according to Article 116 EPC, interpreted within the sub-system that defines the right to be heard, must have a format that allows parties to those proceedings to fully avail themselves of the right to freely choose the evidence they wish to submit in support of their case and to have that evidence duly taken into account, for the purpose of taking a decision.

The only limits imposed on this right are the time limits and the procedural conditions defined in general in Article 114(2) EPC[17]. However, these time limits and procedural condition do not restrict the range of means of evidence parties may choose from: they merely preclude parties from submitting evidence (of any kind) beyond certain points in time and/or when certain procedural conditions are not fulfilled (e.g., if the subject of the proceedings has not changed after the final date for making final submissions before the oral proceedings).

Any format that pre-emptively limits this right of free choice encroaches upon that very right and thus limits the choice of means of evidence only to those means that may be accommodated for by the selected format.

The list of means of evidence in Article 117(1) EPC shows that in the procedure before the EPO, which includes oral proceedings according to Article 116 EPC, a party may legitimately have recourse to the production of original printed documents or to the exhibition and inspection of an object, in order to allow a direct, sensorial perception of predetermined features of an object or a process[18] by the members of a department of the EPO.

The conduct of oral proceedings in the form of a videoconference does not allow a party to have recourse to such means of evidence, because it pre-emptively prevents reliance upon those means for the purpose of exercising the right to present comments.

It is plainly evident that the conduct of oral proceedings in the form of a videoconference without the consent of that party prevents that party from having that evidence taken into account and duly considered, for the purpose of deciding the case: hence, the conduct of oral proceedings in the

[17] cf. also Rule 116 EPC and Articles 12(4), 12(6), 13(1) and 13(2) RPBA.

[18] see T 142/97, point 2.1 of the reasons: «Die Einnahme des Augenscheins ermöglicht die direkte sinnliche Wahrnehmung bestimmter Eigenschaften eines Gegenstands oder Verfahrens».

form of a videoconference without the consent of that party violates the specific aspect of the right of that party to be heard embodied in Article 117(1) EPC.

These conclusions are not affected by the fact, recalled above, that the departments of the EPO have a discretion as concerns the admission of means of evidence: it is the fact that the right embodied in Article117(1) EPC cannot be freely enjoyed by a party, in oral proceedings held as a videoconference without the consent of that party, that violates the right to be heard.

Parties can no longer enjoy the right to freely choose the evidence they want to submit in oral proceedings before the EPO, enshrined in Article 117(1) EPC, if a format of oral proceedings that limits the freedom of choice of evidence is imposed without the consent of the parties.

It should be borne in mind, in this respect, that if the subject of the proceedings has changed at the oral proceedings, for example because the department of the EPO, during the hearing, comes to the conclusion that a fact decisive for the outcome of a case needs to be proven by a party through inspection of the original printed version of a document, rather than by means of a photocopy timely filed at the beginning of the written procedure, it would be impossible for the party concerned to file the original and thus have this evidence taken, if the oral proceedings are conducted as a videoconference.

This would be true even if the party concerned had submitted a timely offer to take evidence by producing the original printed version of the document: no such production of the original could be performed during a videoconference and thus evidence could not be taken.

It is useful to clarify one point, in order to avoid misunderstandings on the conclusions reached thus far.

Written proceedings, by their nature, only allow recourse to evidence that satisfies the requirement of written form as defined in Rule 1 EPC, i.e., evidence the content of which can be reproduced in a legible form.

This does not mean that the specific form of the right to be heard embodied in Article 117(1) EPC and Article 113(1) EPC is violated in written proceedings, because parties cannot avail themselves of the full range of means of evidence.

Such a conclusion would be at odds with the choice of the legislator that the procedure before the EPO is primarily written.

The only reasonable conclusion, compatible with this deliberate choice as well as with the position of Article 116 EPC within the legal system of the EPC and the right embodied in Article 117(1) EPC, is that oral proceedings represent the specific part of the overall procedure before the EPO which is designed to enable the full exploitation of the right enshrined in Article 117(1) EPC, as explained above, in that specific part of the overall procedure that is represented by "oral proceedings". The restrictions that written proceedings by their nature impose on the choice of evidence imply that no limitation on the selection of evidence must exist in oral proceedings.

The conclusions reached thus far, within the frame of a systematic interpretation, on the issue whether Article 116 EPC stipulates requirements for the format of oral proceedings have been based on the analysis of the relation between the right to be heard according to Article 113(1) EPC as specifically embodied in Article 116 EPC, where the form in which parties may present their comments ("oral", as opposed to written) is defined, and the right to be heard as specifically embodied in Article 117(1) EPC, where the means of evidence that the parties may choose to offer is defined to be open.

The conclusions above are likewise not affected by the fact that, within the aforementioned sub-system centred around Article 113(1) EPC, Article 114(2) EPC empowers the departments of the EPO to disregard facts or evidence which are not submitted in due time by the parties concerned.

Article 114(2) EPC, which is an expression of the principle of concentration ("*Grundsatz der Konzentration*" in German; "*principe de concentration*" in French)[19], i.e., of procedural economy, only sets limits on the timeliness of the submission of facts or evidence; it sets no limits on the form of evidence that parties may submit.

It is a purpose of Article 114(2) EPC to ensure that the procedure before the EPO is concluded within a reasonable time.

It is also accepted that, as indicated for example at point 2.2.4 of the reasons of decision **T 328/16**, oral proceedings serve "first and foremost" ("*zuvörderst* [sic]"; presumably: "*zuvorderst*") to ensure that the case is ready for decision ("*entscheidungsreif*") at the end of the - scheduled and

[19] See footnote 14 above.

commenced - oral proceedings. It therefore marks the procedural end of an otherwise essentially written procedure, as explained in the aforementioned decision **T 328/16** (*loc. cit.*) with reference to the appeal procedure (cf. the clause "*vor der Beschwerdekammer*", i.e., "*before the Board*", and the reference to the "*Beschwerdeverfahren*", i.e., the "*appeal procedure*"):

> «*Sie setzt damit den prozessualen Schlusspunkt im ansonsten [...] als ein im wesentlichen schriftliches Verfahren ausgestaltet ist* [sic]»
>
> (the syntactic order in the original German text appears to be defective; the Board presumably meant to write: «*Sie setzt damit den prozessualen Schlusspunkt im Beschwerdeverfahren, das ansonsten [...] als ein im wesentlichen schriftliches Verfahren ausgestaltet ist*»; free translation: "[oral proceedings] mark the procedural final point in the appeal procedure, which is otherwise shaped as an essentially written procedure").

Bodies of the EPO (e.g., the Boards of Appeal) therefore expect that the parties act prior to the "oral proceedings" such that unnecessary postponements of oral proceedings be avoided.

But this is precisely a problem that oral proceedings conducted in the format of a videoconference without the consent of the parties may well cause, as explained in the following on the basis of a simple example.

For the sake of simplicity, first-instance proceedings will be considered, in which the principle of examination *ex officio* pursuant to Article 114(1) EPC plays a fundamental role, as underlined by the Enlarged Board of Appeal in its seminal decision **G 10/91** (cf. point 16 of the reasons, where it is stressed that the opposition procedure is aimed at avoiding the maintenance of European patents which are invalid).

Article 114(1), Article 114(2) and Rule 116(1), last sentence EPC together guarantee that opposition divisions, when exercising their discretion under Article 114(2) EPC and Rule 116(1) EPC to admit any late-filed facts and evidence supporting those facts, must at least examine the relevance of such belated facts and evidence on a *prima facie* basis. According to the Guidelines, III, 8.6:

> «*In exercising this discretion, the division will in the first place have to consider the relevance of the late-filed facts or evidence (see E-VI, 2) or the allowability of the late-filed amendments, on a prima facie basis*» (emphasis added).

In other words, for new facts and evidence to be disregarded under Article 114(2) EPC, opposition divisions must first examine whether such new facts and evidence appear to affect the outcome of the proceedings (see **T 320/15**), that is, whether on a *prima facie* basis the new facts appear to be proven by the evidence offered and to be decisive ("relevant") for the case.

Hence, opposition divisions must at least examine the *prima facie* relevance of new facts and evidence submitted at oral proceedings, when exercising their discretion under Article 114(2) EPC and Rule 116(1), last sentence EPC. It is underlined, for the avoidance of doubt, that relevance is not the only factor that opposition divisions should examine: procedural expediency, the possibility of abuse of the procedure and the question whether parties can be reasonably be expected to familiarise themselves in the time available with the new facts or evidence obviously have to be considered. However, as unambiguously stated in the quoted passage of the Guidelines,

> «*the division will in the first place have to consider the relevance of late-filed facts or evidence*» (emphasis added).

Whilst in traditional oral proceedings held at the EPO premises all kinds of practice-relevant evidence (e.g., original documents, prior publicly used products, personal witness testimony) can be presented to opposition divisions in actual practice, the videoconference format does *a priori* not allow for the adequate submission of many practice-relevant forms and means of evidence.

This inherent deficiency of the videoconference format indicates that this format is not suitable to serve "first and foremost" the purpose of ensuring that a case is ready for decision at the end of the - scheduled and commenced - oral proceedings, to quote again the decision **T 328/16** (see point 2.2.4 of the reasons) mentioned above.

One might counter argue that this inherent deficiency could be healed by subsequently holding traditional, in-person oral proceedings, after a first instance of "oral proceedings" conducted as a videoconference. But that is not the point. The potential need for subsequent in-person oral proceedings shows that the first instance of oral proceedings as a videoconference cannot be held to represent oral proceedings according to, i.e., in conformity with Art 116 EPC, because the inherent deficiency of the videoconference format can only be healed by having recourse to oral proceedings in the traditional format.

An even more crucial point is that, if the videoconference format does not allow to decide a case at the end of a hearing conducted in that format without the consent of the parties, then this means that such format cannot serve the purpose of ensuring that a case be ready for decision at the end of the oral proceedings. In other words, oral proceedings conducted as a videoconference without the consent of the parties also fail to serve the purpose that the board in **T 328/16** considered to be paramount and thus also contravene the principle of procedural efficiency.

epi observes that, at least in a post-pandemic scenario, oral proceedings conducted as a videoconference without the consent of the parties will therefore inevitably prolong the proceedings, rather than accelerating them.

While the arguments presented so far have focussed on evidence, it should be borne in mind that the right to be heard in Article 113(1) also concerns the grounds: it therefore also encompasses the right of parties to comment on facts and arguments provided in support of the grounds and to have those comments "heard", in the sense of being duly taken into account.

It is acknowledged that this right does not entail that departments of the EPO should consider every argument (cf. CLBoA, III.B.2), nor does such a right entail that facts may be submitted at any time, including at oral proceedings: the aforementioned principle of concentration, enshrined in Article 114(2) EPC, empowers the departments to disregard facts not submitted in due time as well as arguments based on such belated facts.

However, the EPC does not prescribe a predetermined format for submitting facts or arguments in support of a ground.

A fact or an argument will, of course, always be expressed verbally, either in written form (in the course of the written procedure) or orally (in oral proceedings); however, since the requirement of substantiation of the grounds necessarily requires that facts be supported by evidence and that arguments –based on the facts– be submitted in support of the grounds, it may be derived from the above conclusions on the right for parties to freely choose the evidence they wish to rely upon that, in oral proceedings, parties must in general at least be able to comment on facts and arguments on the basis of any kind of evidence admissible under Article 117(1) EPC.

Being able to comment on facts and arguments in oral proceedings means *inter alia* that, if the subject of the proceedings has changed at the oral proceedings, then pursuant to Rule 116(1),

second sentence EPC it should be possible for a party to present new facts and evidence and to have such new facts and evidence duly taken into account, with no pre-emptive limitation imposed by the format of the oral proceedings on the kind of evidence a party wants to rely upon.

Having new facts and evidence duly taken into account requires that the relevance of new evidence be assessed: this is only possible if evidence can be taken.

This implies that oral proceedings according to Article 116 EPC cannot stipulate a format that would in fact limit the kinds of evidence that a party could require to take, in order to support its facts and arguments.

A format of oral proceedings which would not allow a party to present an argument based on a fact that can only be ascertained, in a conclusive manner, upon inspection of an object (in the sense of Article 117(1)(f) EPC), would also unallowably limit a party's right to be heard with respect to facts.

Such a format would pre-emptively limit the right of a party to be heard on facts relevant for a decision and would deprive the party of the possibility of successfully arguing its case on the basis of those facts.

It may be thus said that there is no basis in the EPC for a limitation on the "expressive means" that a party can resort to, in order to present its case and be "heard" in the sense of Article 113(1) EPC.

In conclusion, a systematic interpretation of Article 116 EPC shows that this provision stipulates the requirement that the format of those proceedings be such as to allow a non-mediated, personal interaction between the members of the departments of the EPO and the parties, i.e., a direct physical interaction not requiring any intermediary, so as to allow free recourse to any means of evidence, including for example means involving tactile perception.

This is the "*essence of oral proceedings*", if one accepts to use this misleading and vague expression first coined in **T 2068/14** (see point 1.2.3 of the reasons); the "*essence of oral proceedings*" is not, as arbitrarily affirmed in **T 2068/14** and **1378/16**, the mere possibility for the board and the parties to communicate with each other simultaneously.

This notion of "*essence of oral proceedings*" has been formulated in those decisions without analysing the position of Article 116 EPC within the legal system of the EPC. As a matter of fact, that notion has been advanced without any reasoning.

Looked at in retrospect, it can be understood why the boards were misled to think that the "*essence of oral proceedings*" is just that the board and the parties can hear and see each other, such that they can communicate with each other simultaneously.

In the majority of oral proceedings before the EPO, the matters to be discussed are mainly related to evidence in written form: even in cases concerning prior uses, evidence is primarily in the form of invoices, drawings and pictures.

Evidence of this kind can be easily conveyed via electronic means and thus does not require that members of the EPO departments and parties be physically present at the same place, in order for the members to examine that evidence.

It is apparent that evidence of that kind may be reproduced on paper in a form that is "legible", in a wide sense, and may be understood to represent "written evidence".

However, as explained above in the analysis of the kinds of evidence listed in Article 117(1) EPC, means of evidence under the EPC are not –and cannot be– limited to written evidence; as a matter of fact, the analysis above has shown that even the production of documents as a means of evidence in the sense of Article 117(1)(f) EPC (cf. the German term: "Urkunde" as used in Art 117 (1) (f)) cannot be confused with written evidence in general: "producing" a document, literally meaning "bringing forward", implies a physical act, namely that a party hands the document directly –with no mediation– to the members of the department; this in turn requires that the party and the members be physically present at the same place, in order to be able to inspect the document and ascertain, for example, whether that document is authentic and can support any allegations of fact that are relevant for deciding a case.

The only format of oral proceedings that allows the exchange and use of any kind of means of evidence in accordance with the EPC is the traditional form of oral proceedings in person.

In order to avoid any misunderstanding, it must be stressed that, if a party gives its consent to oral proceedings by videoconference, thus willingly waiving its right to have evidence of any kind as well as facts and arguments based on that evidence considered in oral proceedings, then no violation of the right to be heard occurs: *volenti non fit iniuria*, in line with the reasoning of the referring board at point 3.4 of **T 1807/15**.

Although the conclusions reached through a systematic interpretation of Article 116 EPC are clear, as concerns the requirement of physical presence, it is nevertheless appropriate, in view of Article 32 of the Vienna Convention, to also consider an historical interpretation, in order to check whether the results of the systematic interpretation are confirmed; furthermore, for the reasons presented below, a teleological interpretation of the provision should also be undertaken.

For the sake of completeness, it will also be discussed below whether a dynamic interpretation of Article 116 EPC is required.

Historical interpretation

As also indicated under point 5.8.1 of the referring decision T **1807/15**, the preparatory work ("*travaux préparatoires*") and the circumstances of the conclusion of the EPC serve only as supplementary sources of evidence to confirm the result of the interpretation or if no reasonable meaning can be determined by applying the general rule of interpretation (Article 32 of the Vienna Convention; cf. **G 2/12**, point V.(4) of the reasons of the decision).

An analysis of the *travaux préparatoires* for Article 116 EPC[20] shows that, originally, there was a distinction between "hearings" and "oral proceedings". As explained in the referring decision at point 5.8.3 of the reasons,

> «*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)*».

The relevant provisions were respectively Article 75a, for the hearings, and Article 96a, for oral proceedings.

Article 75a, for example, originally read as follows (see documents IV/215/62-D and IV/215/62-F; the languages used by the working group "Patents" were German and French only; emphases added):

[20] Available here:
http://webserv.epo.org/projects/babylon/tpepc73.nsf/0/55EC6146E659D105C12574270047BCF4/$File/Art116eTPEPC1973.pdf

«***Anhörung vor der Prüfungsstelle***

Die Prüfungstelle ***hört*** *den Anmelder oder sonstige Beteiligte von Amts wegen oder auf Antrag, wenn sie dies für sachdienlich erachtet.*»

«***Audition devant la section d'examen***

La section d'examen ***entend****, d'office ou sur requête, lors qu'elle le juge utile, le demandeur out toute autre partie à la procédure.*»

As indicated above in the discussion of the grammatical interpretation, the provision thus initially foresaw that the applicant be heard, as apparent from an English version of the provision (which had meanwhile been renumbered to Article 83) in the "Translation of a Draft Convention relating to a European Patent Law" (emphasis added):

«***Article 83. Hearings before the Hearing Section***

The Examining Section shall either on its own initiative, or if considered expedient, on request ***give a hearing*** *to the applicant or any other party to the proceedings.*»

As already mentioned above in the discussion of the grammatical interpretation, the provisions concerning hearings and oral proceedings initially referred to hearing only ("*hört*", "*entend*", "*give a hearing*").

In the 1965 Draft, there were still two distinct provisions for the examining divisions (Article 102) and the boards of appeal (Article 111); the terminology and the wording of the provision concerning the boards of appeal, which had meanwhile been renumbered to Article 111, underwent a significant change.

Article 111 in the German and French version (available in 2335/IV/65-D and 2335/IV/65-F) read as follows (emphases added):

«***Mündliche Verhandlung***

Eine mündliche Verhandlung ***findet*** *entweder von Amts wegen oder auf Antrag eines Beteiligten* ***statt****, wenn die Beschwerdekammer dies für sachdienlich erachtet.*»

«**Procédure orale**

Lorsque la chambre de recours le juge utile, ***il est recouru*** *à la procédure orale, soit d'office, soit à la requête d'une partie.*»

Later on, the article concerning hearings before the examining division was deleted and transferred to Article 139 (see BR/87 e/71, point 73), which read as follows (see BR/70 e/70, page 172; emphasis added):

«***Oral proceedings***

(1) 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.*

(2) Oral proceedings shall take place before the Examining Section at the request of the applicant only where the Examining Section considers this to be expedient or where it envisages refusing the application wholly or in part.»

The language used in Article 139 ("*shall take place*", its German exact counterpart "*findet statt*" and the French "*il est recouru*") remained in the final version of the provision, namely Article 116 EPC 1973.

There is no doubt that the language used in the provisions governing oral proceedings before departments of the EPO underwent a semantic shift, as anticipated above, as a consequence of the change of their wording.

Although the *travaux préparatoires* do not appear to contain any document giving an explanation for this change, it is undisputable that the text in the three languages was consistently amended by removing any reference to the parties being "heard"; furthermore, the English and German versions were amended to refer to the "taking place" of oral proceedings.

This suggests that the reference to "hearing" was regarded as inadequate and not properly characterising the nature of "oral proceedings", as –see above– the only stage of the proceedings allowing full presentation of all forms of evidence.

It may be furthermore inferred that the amendment had the purpose of characterising oral proceedings as proceedings taking place in person, the reason being the following.

As already explained above, at the time when the various versions of the Convention were drafted, «*the assumption was that oral proceedings would take place in person*» (as acknowledged in **T 2320/16**, point 1.5.8 of the reasons): this is clearly evident from the passage of document IV/6514/61-D, cited both in the referring decision **T 1807/15** (at point 5.8.5 of the reasons) and in **T 2320/16** (at point 1.5.8 of the reasons).

The document describes the discussion, at a meeting of the working group "Patents" on 13 November 1961, on the issue whether oral proceedings before the boards of appeal should be obligatory or optional. On page 83, second paragraph of document IV/6514/61-D it is stated (emphasis added):

> «*Die Gruppe genehmigt einstimmig die fakultative Lösung. Die obligatorische Lösung scheitert nämlich an den Schwierigkeiten, die sich aus den* ***grossen Entfernungen im Geltungsbereich des europäischen Patents****, aus den hohen Kosten und aus den Sprachproblemen ergeben.*"
>
> Free translation: "*The group unanimously approves the optional solution. The obligatory solution fails due to the difficulties arising from the* ***great distances within the area of validity of European patents****, from the high costs and from language problems*».

As acknowledged in **T 2320/16**, the passage shows that the conduct of oral proceedings was associated with the need for travel: it thus indicates that oral proceedings were understood as proceedings conducted at one place and with the physical presence of the members of the boards and the parties.

In view of this passage, it may be inferred that the removal of any reference to "hearing" in the three language versions of the provision defining oral proceedings had the purpose of clarifying that oral proceedings were to be understood as proceedings conducted at one place and with the physical presence of the members of the boards and the parties.

The board in **T 2320/16** reasoned that it cannot be deduced, on the basis of the conclusions drawn from document IV/6514/61-D, that

> «*oral proceedings by videoconference in its present-day form would not have been found acceptable by the legislator*» (see point 1.5.8 of the reasons).

The board also alleges without proof that

«*the technology was not sufficiently accessible, reliable, cost-efficient and of sufficient quality to the extent that its consideration as a feasible alternative to in-person oral proceedings could reasonably have been contemplated*» (*loc. cit.*).

As concerns the first statement, it must be observed first that, according to Article 32 of the Vienna Convention, the preparatory work and the circumstances of the conclusion of the EPC serve only as supplementary sources of evidence to confirm the result of the interpretation or if no reasonable meaning can be determined by applying the general rule of interpretation.

As noted above, the board in **T 2320/16** did not undertake any interpretation of Article 116 EPC in the light of its object and purpose, as required by Article 31 of the Vienna Convention: it merely considered the wording of the provision on its own (grammatical interpretation), **with no analysis whatsoever** of Article 116 EPC within the system of the EPC (systematic interpretation) or from the point of view of its *ratio legis* (teleological interpretation). The decision refers to the "object and purpose" of Article 116 EPC without defining it explicitly.

The grammatical interpretation of Article 116 EPC presented in **T 2320/16** did not come to the result that oral proceedings according to Article 116 can be undisputedly interpreted as oral proceedings by videoconference.

The analysis of the sole wording of Article 116 EPC in **T 2320/16**, without any analysis of the provision in the light of its object and purpose, provides no result of the interpretation; furthermore, a perfectly reasonable meaning can be determined by a literal analysis of the provision, in view at least of the lexicographic definition of "*mündliche Verhandlung*" and "*procédure orale*" and of the common understanding of the expression "oral proceedings" until at least 2006: oral proceedings are proceedings in person.

Hence, it is methodologically wrong to proceed to the application of Article 32 of the Vienna Convention, as the board did in **T 2320/16**, directly after an analysis of the literal meaning of Article 116 EPC that has not provided any positive and conclusive result as to the authentic meaning of the provision.

Furthermore, the statement made by the board with reference to document IV/6514/61-D, namely that

> «*it cannot be deduced from this conclusion that oral proceedings by videoconference in its present-day form would not have been found acceptable by the legislator*» (emphasis added)

appears to be based on retrospective considerations (cf. point 5.4.1 of the referring decision)[21].

At any rate, the purpose of the historical interpretation is not to ask hypothetical questions like the one formulated by the board in **T 2320/16**: the sole purpose of historical interpretation is either to confirm the result of the interpretation or to determine the meaning, if no reasonable sense can be determined by applying the general rule of interpretation.

Neither condition is fulfilled by the analysis provided in **T 2320/16**.

As concerns the board's opinion that the legislator could not have contemplated proceedings based on the technology available in the sixties of the past century as an alternative to in-person proceedings, it is only necessary to note here that this opinion is entirely speculative and, as such, it cannot provide positive evidence that oral proceedings according to Article 116 EPC may be proceedings by videoconference.

It is enough to observe that, when the discussions for setting up the European patent system began, live television technology based on the use of satellite links for broadcast communication[22] was already established and commercially available[23] and the use of closed-circuit television technology in combination with broadcast television was likewise technically possible (an example is the famous worldwide televised coverage of the Eichmann trial in 1961). Hence, technologies for establishing a point-to-point bidirectional television link existed at the time.

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[21] The conclusions drawn by the Board could be likened to concluding that Democritus, the Greek philosopher who is said to have been the founder of the ancient atomistic theory, would not have found Bohr's theory of the hydrogen atom acceptable.

[22]The coronation of Queen Elizabeth II was televised in 1953 and could be watched by millions of people in Europe and worldwide: see https://www.royal.uk/50-facts-about-queens-coronation-0.

[23] In 1962, the first Telstar satellite was launched, setting the beginning of interatlantic television communications; see: https://www.britannica.com/science/space-exploration/Satellite-telecommunications

It may be added that video telephony allowing a form of video conferencing (the Picturephone system by AT&T Bell Labs) was already available commercially in 1964[24].

As explained above, it is irrelevant within the frame of the historical interpretation of Article 116 EPC to ascertain whether the legislator *would* have considered these technologies; however, the historical evidence available proves that the board's statements in **T 2320/16** are not based on factual evidence and have no merit.

It is observed that the approach to historical interpretation applied in the decision **T 2320/16** appears to be questionable also from a further point view. At point 1.5.9 of the reasons, the Board observed that

> *«oral proceedings by videoconference were not only an accessible technical reality, but as noted above, had been proposed by the President of the EPO as an alternative to in-person oral proceedings in examination».*

Commenting on the undisputable fact, also noted in the referring decision **T 1807/15**, that the legislator did not substantially amend the wording of Article 116 EPC, when the EPC was revised in 2000, and did not add any clarification to Article 116 EPC or to the Implementing Regulations to the effect of considering oral proceedings by videoconference (cf. point 5.5 of the reasons of **T 1807/15**), the Board in **T 2320/16** reasoned that

> «*If the legislator revising the EPC had intended for Article 116 EPC to exclude oral proceedings by videoconference, it is implausible that it would decide not to amend the provision accordingly and in particular, accept the provision as it stood, not comprising any explicit limitation to in-person oral proceedings, or at least being open to interpretation. To the board, it is much more plausible that the legislator did not intend any limitation in Article 116 EPC to a specific form for oral proceedings, and hence, saw no need to amend it. This serves as an indirect pointer to the interpretation of Article 116 EPC provided by the board above*» (point 1.5.9 of the reasons).

The reasoning seems to have no logical base.

It assumes to be true what it purports to prove because, by speculating that the legislator in 2000 should have included an explicit limitation to in-person oral proceedings, it assumes that Article

[24] https://www.lifesize.com/en/blog/history-of-video-conferencing/

116 EPC encompasses oral proceedings by videoconference, although the literal interpretation of the provision in **T 2320/16** fails to conclusively prove this assumption.

The reasoning is furthermore inconsistent.

Whilst, with reference to the legislator of 1965, the Board concludes that he could not have considered videoconferencing, because this technology was either not available or simply not mature, with reference to the legislator of 2000, for whom videoconferencing was a reality, the Board concludes that the legislator did not intend any limitation in Article 116 EPC to a specific form for oral proceedings and thus saw no need to amend it.

If oral proceedings conducted as a videoconference were undisputedly considered by the EPO not to represent oral proceedings according to Article 116 at least until 2006, as proven by the requirement for applicants to waive their right to oral proceedings at the EPO premises, it cannot be argued that Article 116 EPC encompassed oral proceedings by videoconference, when the legislator revised the EPC.

The only apparent conclusion that can be drawn from the historical evidence is that the legislator did not amend Article 116 EPC, in 2000, because it saw no need to introduce oral proceedings by videoconference in the law, although this technology was available.

Arguing otherwise is based on unallowable retrospective considerations.

It is also noted that the decision **T 2320/16** shows, in general, an attitude by the board to present certain conclusions as statements of fact despite the lack of supporting factual evidence, an example being the discussion of the alleged extent of differences between in-person and videoconference oral proceedings at point 1.5.3 of the decision.

Several studies, some based on empirical evidence, show that videoconferencing cause significant fatigue and stress, thus negatively affecting participants to proceedings by videoconference[25], in contrast to the conclusions presented in cavalier fashion by the board.

[25] see, for example, J. Bailenson, «Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue», Technology, Mind and Behavior, vol. 2, issue 1, 23 February 2021, and Angela Chang, Zoom Trials as the New Normal: A Cautionary Tale, The University of Chicago Law Review Online, available at https://lawreviewblog.uchicago.edu/2020/11/19/zoom-chang/

Teleological interpretation

Although at least the systematic interpretation of Article 116 EPC gives an unambiguous result, meaning that there is no need for any further interpretation, it is considered appropriate, for the sake of completeness, to examine the provision also from the point of view of a teleological interpretation, that is, in the light of its object and purpose (i.e., the goals) it aims to achieve (see **G 2/12**, point VII.3.(1) of the reasons).

As is often the case, already a discussion of a provision within the frame of a systematic interpretation inevitably calls for a discussion of the object and purpose of the provision[26].

In fact, the systematic interpretation of Article 116 above has revealed that the purpose of this provision within the legal system of the EPC is to give parties a fair opportunity to present comments and evidence in the manner they wish and using all the possibilities open to them under the EPC and to have those comments and evidence be duly taken into account, with respect to their relevance for the decision on the matter.

Article 116 EPC, being an expression of the right to be heard and thus of the right to a fair trial enshrined in Article 6(1) ECHR, also pursues the goal of effectively ensuring that justice be done. As explained above, Article 6(1) ECHR is binding in the procedure before the EPO, particularly in proceedings before the boards of appeal.

There can be no doubt that "justice delayed is justice denied" and that, as a consequence, ensuring that justice be done requires that the administration of justice not be delayed and that all parties to proceedings before the EPO be effectively guaranteed access to justice, which means *inter alia* within a reasonable delay of time.

What is reasonable may depend on the circumstances: there can be no doubt that, if a party is prevented from participating in a hearing by *force majeure*, for example because of a prolonged and serious illness, that party cannot and should not be forced to waive his right to present comments at a hearing before the deciding body in the appropriate form, merely because the duration of the procedure could become longer than a predetermined term, for example rigidly set in advance.

[26] see B. Schachenmann, «*Die Methoden der Rechtsfindung der Großen Beschwerdekammer*», GRUR Int., 2008, pp. 702-706.

Bringing proceedings to a conclusion solely for the sake of concluding them, without having regard to all the rights that parties enjoy on the basis of their right to a fair trial, cannot be unreservedly considered just.

Having regard to the fact that Article 6(1) ECHR also implies the need to provide effective access to justice without undue delay, Article 116 EPC is understood to pursue not only the purpose of giving parties a fair opportunity to present comments and to have those comments duly taken into account in a format fulfilling the requirements discussed above in the systematic interpretation, but also to pursue the purpose of ensuring that justice be done within a reasonable time.

This goal may be inferred not only from the fact that Article 116 EPC embodies principles ultimately enshrined in Article 6(1) ECHR, but also from the fact that Article 114(2) EPC, expressing the principle of concentration, sets time limits on the exercise of the right embodied in Article 116 EPC, as may be derived from Rule 116(1), last sentence, EPC.

Rule 116 EPC is an implementing rule of Article 116 EPC and states that new facts and evidence presented after the final date for making written submissions in preparation to oral proceedings need not be considered, unless admitted on the grounds that the subject matter of the proceedings has changed.

It is thus apparent already from this implementing provision that the exercise of the right embodied in Article 116 EPC is subject to time limits.

The current pandemic due to the spread of CoViD-19 no doubt represents a *force majeure* event that objectively poses restrictions on the physical participation of the parties to oral proceedings before the EPO. The current travel limitations across Europe prevent parties not residing in Germany or the Netherlands from personally attending oral proceedings on the premises of the EPO in Munich (including Haar) or The Hague.

Since the right to oral proceedings under Article 116 EPC gives the parties a right to present comments and have those comments duly heard in a format that allows the parties to use all the possibilities open to them under the EPC, including the presentation or discussion of evidence requiring the physical presence of the parties and the members of the EPO department at the same place, it is evident that the pandemic limits the exercise of the right under Article 116 to its full extent.

This is an objective circumstance.

Justice is only done if all the rights of the parties are duly taken into account in the administration of justice.

In particular, as the case law of the European Court of Human Rights shows with regard to the application of the principle of a fair trial as embodied in Article 6 ECHR[27], duly taking all the rights into account requires that, in the application of a provision, the deciding body takes the **principle of proportionality** into due account.

This principle is by no means a stranger to the case law of the boards of appeal, for example for the purpose of interpreting legal provisions of the EPC in the context of the right of access to a court[28].

The principle of proportionality requires that any legislative restriction of a fundamental right should pursue a legitimate purpose, that this purpose should be pursued through legitimate means and that the means for achieving the aim be suitable, necessary and proportionate.

Even regardless of the conclusions reached above in the context of a systematic interpretation, the conduct of oral proceedings by videoconference without the consent of the parties undisputedly deprives the parties of the right, until recently accorded to them, to have oral proceedings in person.

At any rate, the systematic interpretation of Article 116 EPC has shown that parties have a right to present their comments orally and have them duly considered in a form permitting recourse to all kinds of means of evidence possible under the EPC.

Conducting oral proceedings by videoconference without the consent of the parties thus limits the basic right enshrined in Article 116 EPC. The restriction of this basic right has been introduced by the legislator through secondary legislation, by introducing new Article 15a RPBA.

[27] see the case Asciutto v. Italy of 27 November 2007, 35795/02 and the case Marcello Viola v. Italy of 5 October 2006, 45106/04

[28] see **T 1465/07**, points 7-16 of the reasons.

As noted above, the current pandemic also restricts the exercise of the basic right embodied in Article 116 EPC. This restriction is however caused by the current circumstances; it is not the result of action taken by the legislator.

In the context of a teleological interpretation, the question of law asked by the referring board with reference to Article 116 EPC may be looked at from the point of view of proportionality.

Having regard solely to the legislative restriction imposed on Article 116 EPC through the introduction of Article 15a RPBA, does this restriction of the basic right enshrined in Article 116 EPC pursue a legitimate aim with legitimate means that are also suitable, necessary and appropriate?

This question, formulated in these terms, may be referred to as the "*issue of proportionality in an ordinary scenario*".

Having also regard to the restriction imposed by the current pandemic on the exercise of the right enshrined in Article 116 EPC, a second question may be asked: does this restriction of the basic right enshrined in Article 116 EPC pursue a legitimate aim with legitimate means that are suitable, necessary and appropriate?

This second question may be referred to as the "*issue of proportionality in a pandemic scenario*".

An answer to this question needs to take account of the right of parties and members of the EPO department to also have their health protected.

The answer to the question in an ordinary scenario can only be negative.

It is not necessary to establish whether the purpose of the restriction, which can be seen in bringing pending procedures before the EPO to a conclusion without undue delay, is legitimate.

Nor is it necessary to ascertain whether the means for achieving this purpose, consisting in the adoption of videoconferences against the will of the parties, is against the EPC, although the systematic interpretation already indicates that this is the case.

It is sufficient to observe that the means are not necessary, in the first place: there is, under an ordinary scenario, no reason or circumstance whatsoever justifying a limitation of the basic right enshrined in Article 116 EPC.

At any rate, the means are at least not proportionate because they fail to distinguish between oral proceedings absolutely requiring the physical presence of the parties and members of the department at the same place, for example in cases where evidence pursuant to Article 117(1) (f) EPC should be examined for the purpose of taking a decision, and oral proceedings where it could be dispensed with physical presence at the same place.

Since the means are at least not proportionate, also the answer to the question in the pandemic scenario must, in general, be negative for the following reason.

Regardless of whether the means adopted (i.e., the conduct of oral proceedings by videoconference without the consent of the parties) could be regarded as being suitable and necessary for ensuring access to justice during a pandemic, as argued for example in the communication of the EPO dated 24 March 2021[29], those means force parties wishing to rely on certain kinds of evidence to waive the right to comment on evidence of that kind and to have their comments duly taken into account, regardless of whether evidence of that kind is relevant for taking a decision.

In order to avoid any misunderstanding: the fact that departments of the EPO have the discretion to admit evidence or to postpone oral proceedings is wholly irrelevant for the purpose of establishing whether proportionality is ensured: what matters is that the departments of the EPO are entitled to appoint and conduct oral proceedings by videoconference without the consent of the parties and thus unconditionally, that is, also independently of the evidence that a party should be free to choose.

It is the position of **epi** that recourse to videoconferencing might be justified under exceptional circumstances, for example where a *force majeure* event like the current pandemic makes physical attendance at traditional oral proceedings difficult or impossible.

However, Article 15a RPBA gives the Boards "*carte blanche*" as regards the format of oral proceedings and empowers them to have unconditional recourse to videoconferencing, regardless of the circumstances and of the preferences of the parties: the Boards may thus in the future, on the basis of Article 15a RPBA, conduct oral proceedings as a videoconference without the consent of the parties, even after the current pandemic comes to an end.

[29] https://www.epo.org/news-events/news/2021/20210324a.html

It is not difficult to see the implications of this state of affair also for first-instance proceedings, as apparent from the remark made by the referring board at point 3.6 of **T 1807/15**.

It is important to remember, at this juncture, that the European Court of Human Rights, in cases involving the appreciation of the requirement of proportionality in cases involving videoconferencing, has not only constantly stressed the need to weigh up all relevant rights and circumstances, but also pointed out that national legal provisions providing for the use of videoconferencing ought to specify the cases in which videoconferencing can be used (see, for example, the judgement *Marcello Viola v. Italy*, point 65, cited above in footnote 26).

Article 15a RPBA is a blanket provision that does not specify any circumstances, cases or conditions under which recourse may be had to videoconferencing. It is stressed that the explanatory remarks to the article cannot heal this fundamental deficiency of the legal provision.

In conclusion, all the methods of interpretation according to Articles 31 and 32 of the Vienna Convention lead to the same conclusion: the conduct of oral proceedings in the form of a videoconference without the consent of the parties is not in conformity with Article 116 EPC.

Further considerations

Under Article 31(3)(a) and Article 31(3)(b) of the Vienna Convention, account is to be taken of any subsequent agreement between the parties regarding the interpretation of the treaty or its application, and of any subsequent practice in the application of the treaty which establishes agreement of the parties regarding its interpretation.

As also indicated by the referring board at point 5.10.1 of **T 1807/15**, **epi** is unaware of any subsequent agreements among all contracting states that could affect the interpretation of Article 116 EPC.

It is noted in respect of the decision CA/D 3/21, whereby the Administrative Council approved Article 15a RPBA, that this approval can by no means be seen as implying the agreement of all Contracting States on the interpretation of Article 116 EPC for the following reasons.

The reasoning applied by the Enlarged Board of Appeal under point XXVI.5 **of G 3/19**, drawing an inference on the intention of the Contracting States from the result of a vote of the Administrative Council on the introduction of Rule 28(2) EPC, which is a provision of the Implementing

Regulations, cannot be applied in the present case, where Article 15a RPBA is a provision of the Rules of Procedure of the Boards of Appeal.

The Administrative Council is empowered to amend Parts II to VIII and Part X of the Convention, in order to bring them into line with an international treaty relating to patents or European community legislation relating to patents, under Article 33(1)(b) EPC; furthermore, the Administrative Council is empowered to amend the Implementing Regulations, under Article 33(1)(c) EPC.

An amendment of the Rules of Procedure of the Boards of Appeal, as is the case for the introduction of Article 15a RPBA, cannot be regarded as an act undertaken by the Administrative Council in the exercise of the powers conferred upon it by Article 33 EPC.

According to the first sentence of Article 23(4) EPC, new Article 15 RPBA was adopted pursuant to Rule 12c(2) EPC by the Committee (the "BOAC") set up by the Administrative Council under paragraph 1 of the same Rule. According to Article 23(4), second sentence, EPC, the Rules of Procedure of the Boards of Appeal are subject to the approval of the Administrative Council, which the Council granted on 23rd March 2021 by its decision CA/D 3/21 recalled above.

Article 23(4), second sentence, EPC in combination with Rule 12c(2) EPC does not vest the Administrative Council with a power to amend parts of the EPC, in order to bring them into line with an international treaty relating to patents or European community legislation relating to patents, nor does it confer on the Administrative Council a power to amend the Implementing Regulations.

Article 23(4), second sentence, EPC in combination with Rule 12c(2) EPC vests the Administrative Council - through the intermediary of the BOAC - with a power to amend the Rules of Procedures of the Boards of Appeal only.

The Administrative Council has no power to amend certain parts of the EPC or the Implementing Regulations through an amendment of the Rules of Procedure of the Boards of Appeal, because such a power is not foreseen under Article 33(1)(b) and (c) EPC.

Hence, whatever effect an amendment of the Rules of Procedure might have on primary legislation, for example on the interpretation Article 116 EPC as a consequence of the introduction of Article 15a RPBA, cannot be considered to have been legitimately imparted by the Administrative Council in the exercise of its powers under Article 33(1)(b) and Article 33(1)(c) EPC.

Since the Administrative Council has no such power, it cannot be argued that, by approving Article 15a RPBA, the introduction of this provision could be considered to reflect the intention of the Contracting States to give a special meaning to the term "oral proceedings" in Article 116 EPC, as the Enlarged Board argued at point XXVI.6 of the reasons **G 3/19** with respect to the introduction of Rule 28(2) EPC.

Hence, there is no need to examine whether and to what extent the introduction of Article 15a RPBA calls for a **dynamic interpretation**, as the Enlarged Board of Appeal argued under point XXVI of **G 3/19** in view of Article 31(4) of the Vienna Convention.

Furthermore, it cannot be argued either that the approval of Article 15a RPBA by the Administrative Council represents a «*subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*» pursuant to Article 31(3)(a) of the Vienna Convention, justifying a dynamic interpretation of Article 116 EPC.

First, such a conclusion would entail that the Administrative Council could circumvent the precise limits imposed on its powers to amend the Convention by Article 33(1)(b) and Article 33(1)(c) EPC merely by voting by a large majority or unanimously a provision of the Rules of Procedures of the Boards of Appeal. This would render Article 33(1)(b) and Article 33(1)(c) EPC nugatory.

Secondly, the vast majority of the Contracting States does not foresee that their judiciary could summon parties to a hearing without the consent of the parties.

The evidence available indicates that the vast majority of the Contracting States has adopted *temporary* legislative measures to allow the judiciary to appoint hearings as a videoconference with the consent of the parties **only**.

Furthermore, Germany has a *permanent* provision in its civil law, namely section 128a of the German Code of Civil Procedure, providing for the appointment of hearings by videoconference without the agreement of the parties (since 2013; agreement was required formerly); however, judges have to be present **in the courtroom** and any party is **free** to attend the hearing in the courtroom: in other words, parties cannot be forced to attend the proceedings online.

The results of a survey on national practice in the Contracting States regarding virtual court proceedings, recently carried out by **epi** among the members of its Litigation Committee and the members of the drafting group of this *amicus curiae* brief, shows that –with one exception

discussed below– in none of the Contracting States for which answers were received until 26 April 2021 (i.e., in at least 32 of the 38 Contracting States) there has ever been a case where a court conducted proceedings by videoconference without the consent of the parties and without an explicit legal basis in the national law, i.e., merely on the ground that the term "oral proceedings" or "hearing" also covers videoconference proceedings.

The only case known to **epi** where this occurred is a case where the Commercial Court (*Handelsgericht*) of Zurich, Switzerland, had ordered oral proceedings by videoconference against the will of one of the parties. The Swiss Federal Court (*Bundesgerichtshof*) quashed the decision of the Zurich court, ruling that all the parties had a right to a conduct of the hearing that complies with the law, unless they waive such right. It further noted that there was no legal basis in the Swiss Rules of Civil Procedure (ZPO) for holding oral proceedings as a videoconference without the consent of all the parties[30].

Furthermore, no case is known in which a court of the European Union conducted hearings as a videoconference, rather than as an in-person hearing, without the consent of the parties and without legal basis.

In summary, there does not seem to be a single case in the territory of the Contracting States to the EPC in which a court conducted a hearing as a videoconference rather than as an in-person hearing, unless there was a legal basis in national law explicitly allowing for hearings by videoconference.

Hence, there is no need to examine whether and to what extent the introduction of Article 15a RPBA calls for **a dynamic interpretation** in view of Article 31(3)(a) of the Vienna Convention, either.

In view of the evidence as concerns the practice in the vast majority of the Contracting States, there is also no need to examine whether a dynamic interpretation of Article 116 EPC is required in view of Article 31(3)(b) of the Vienna Convention.

[30] see Entscheid 4A_180/2020 of 4 July 2020 (BGE 146 III 194): «*Die Parteien haben Anspruch auf rechtskonforme Abhaltung der Hauptverhandlung, soweit sie nicht gemeinsam auf eine solche verzichten. Es fehlt im Anwendungsbereich der ZPO an einer rechtlichen Grundlage, die Hauptverhandlung ohne Einverständnis aller Parteien im Rahmen einer Videokonferenz durchzuführen*»

Conclusions

In conclusion, **epi** believes that the answer to the question of law referred should be negative: the conduct of oral proceedings in the form of a videoconference without the consent of the parties is not in conformity with Article 116 EPC.

Proceedings on 28 May 2021

epi would be pleased to elaborate on the arguments made above in the virtual proceedings scheduled for 28 May 2021, if the Enlarged Board of Appeal considers it helpful.

Signed on behalf of **epi**,

Francis Leyder
President

Annexes

A1: entry for «Oralité» in the online «Dictionnaire juridique» by S. Braudo, available online;

A2: entry for «Audience» in the online «Dictionnaire juridique» by S. Braudo;

A3: entry for «mündliche Verhandlung» in the «Rechtswörterbuch» by Dr. Carl Creifelds, C.H. Beck Verlag, Munich, 1992;

A4: entry for «Gericht» in the «Duden Oxford Großwörterbuch Englisch», 2nd revised edition, 1999.