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**Datasheet for the decision  
of 16 July 2021**

**Case Number:** G 0001/21  
**Appeal Number:** T 1807/15 - 3.5.02  
**Application Number:** 04758381.0  
**Publication Number:** 1609239  
**IPC:** H03F1/02  
**Language of the proceedings:** EN

**Title of invention:**

DOHERTY AMPLIFIER WITH OUTPUT HYBRID COUPLER

**Patent Proprietor:**

Andrew AG

**Opponent:**

Rohde & Schwarz GmbH & Co KG

**Headword:**

Oral proceedings by videoconference

**Relevant legal provisions:**

EPC Art. 24, 112(1)(a), 113(1), 116(1)

**International Conventions:**

European Convention on Human Rights: Art. 6  
Vienna Convention on the Law of Treaties: Art. 31

**Keyword:**

Admissibility of referral-(yes)  
Oral proceedings by videoconference in case of general emergency  
Role of consent of the parties

**Decisions cited:**

G 0001/19, G 0002/19, R 0003/10, T 1012/13, T 1378/16,  
T 2068/14, T 2320/16

**Headnote:**

During a general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises, the conduct of oral proceedings before the boards of appeal in the form of a videoconference is compatible with the EPC even if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference.



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**Case Number:** G 0001/21

**D E C I S I O N**  
**of the Enlarged Board of Appeal**  
**of 16 July 2021**

**Appellant:**  
(Opponent)

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**Respondent:**  
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**Referring Decision:**

**Interlocutory decision of the Technical Board  
of Appeal 3.5.02 of the European Patent Office  
of 12 March 2021.**

**Composition of the Board:**

**Chairman:** F. Blumer  
**Members:** W. van der Eijk  
T. Bokor  
R. Arnold  
E. Chatzikos  
G. Eliasson  
A. Ritzka

## **Summary of Facts and Submissions**

I. During the oral proceedings of 8 February 2021 in case T 1807/15 the Chairman of Board of Appeal 3.5.02 ("the Board") informed the parties that the Board would refer a question under Article 112 EPC to the Enlarged Board of Appeal.

II. By interlocutory decision of 12 March 2021 the Board referred the following question:

*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?*

III. With regard to the appeal proceedings in case T 1807/15, the following is noted.

IV. The appeal was filed by the opponent against the opposition division's decision to maintain European patent No. 1609239 in amended form. The parties were summoned to oral proceedings before the Board on 3 June 2020. The respondent/patent proprietor requested postponement of the oral proceedings because of the COVID-19 pandemic. The oral proceedings were then rescheduled to 8 February 2021. Again the respondent asked for postponement and indicated that the case was not suitable for videoconferencing, in particular because there would be simultaneous interpreting during the proceedings. The appellant agreed with the respondent. Although the parties did not give their consent, the Board maintained the summons to oral proceedings on 8 February 2021 in the form of a videoconference.

- V. The appellant had requested in writing that the decision under appeal be set aside and the patent be revoked. Furthermore, during the oral proceedings the appellant requested as an auxiliary measure that the question whether oral proceedings under Article 116 EPC can be replaced by a videoconference without the consent of the parties be referred to the Enlarged Board of Appeal. According to the minutes of the oral proceedings, only the auxiliary request was discussed.
- VI. In order to avoid any procedural violation, the Board considered it reasonable to seek clarification of the legal situation by referring a point of law to the Enlarged Board. The Enlarged Board understands that, after receiving the answer of the Enlarged Board, the Board will again summon the parties to oral proceedings to discuss the main request, and that the form in which these oral proceedings take place will depend on that answer. This follows from point 2.3 of the Reasons of the referring decision: "[The Board] sees no reason not to use a videoconference as long as the Enlarged Board of Appeal considers the format to be in line with Article 116 EPC."
- VII. After the date of the oral proceedings before the Board, at which it was announced that a referral would be made, the appellant withdrew its auxiliary request for a referral. The Board nevertheless issued the written decision with the above-cited question to the Enlarged Board.
- VIII. By order of 17 March 2021, the Chairman of the Enlarged Board of Appeal determined the composition of the panel to decide on the referral under case number G 1/21. On the same date the Enlarged Board invited the parties in appeal case T 1807/15 and the President of the European Patent Office to

file submissions on the referred question, and by a communication of 24 March 2021 it invited written statements on the referred question from the public.

IX. The appellant submitted that, although a videoconference may in certain cases be an acceptable format for oral proceedings, its use should always be dependent on the consent of the parties. The President of the EPO stated in his comments that videoconferences are a form equivalent to in-person oral proceedings that has in recent times proven to be a successful means of addressing the challenges of the COVID-19 pandemic. The President argued strongly in favour of leaving the choice of the format of oral proceedings to the EPO or the Boards of Appeal, respectively, and not to the parties. The respondent to the appeal proceedings did not file any written submissions on the referral, nor did it attend any of the oral proceedings before the Enlarged Board.

X. The referral attracted a lot of attention from third parties. Over fifty amicus curiae briefs and third party observations referring to Article 115 EPC were received from various organisations, companies, patent attorney firms and individuals. The majority of the submissions favoured a negative answer to the referred question, although many expressed the view that, in the circumstances of the COVID-19 pandemic, holding oral proceedings by videoconference without the consent of the parties might be justified. It was also argued that measures taken by the EPO and the Boards of Appeal in response to the pandemic should not be prolonged once it ended and should thus not constitute a "new normal". In a minority of submissions, oral proceedings by videoconference were seen as a useful alternative format to in-person oral proceedings. According to some, the choice

of this format should not depend on the consent of one or all of the parties.

- XI. In its submission dated 27 April 2021, the appellant raised an objection under Article 24(3) EPC against the Chairman and two members of the Enlarged Board for reasons of suspected partiality. The objection was based on the involvement of the Chairman and these members in the preparation of Article 15a of the Rules of Procedure of the Boards of Appeal (RPBA). This provision, entitled "Oral proceedings by videoconference" was proposed by the President of the Boards of Appeal, adopted by the Boards of Appeal Committee, and approved by the Administrative Council of 23 March 2021. It entered into force on 1 April 2021. A further member informed the Enlarged Board under Article 24(2) EPC of his involvement in the preparation of Article 15a RPBA and asked the Enlarged Board to decide on his continued participation in the referral case. The objections were found to be admissible and, for the purpose of dealing with them, the panel in G 1/21 was recomposed, with the above-mentioned members being replaced by their alternates.
- XII. By interlocutory decision dated 17 May 2021, the Enlarged Board decided pursuant to Article 24(4) EPC that the Chairman of the Enlarged Board and the member who had informed the Enlarged Board under Article 24(2) EPC should not take part in the referral case. The composition of the Enlarged Board was subsequently changed by an order dated 20 May 2021 of the Chairman of the Enlarged Board in case G 1/21.
- XIII. By order of 17 March 2021, the parties had been summoned and the President of the EPO had been invited to attend oral proceedings to be held on 28 May 2021. By further letter dated 24 May 2021, the appellant filed four objections

against the internal members of the Enlarged Board in its new composition for reasons of suspected partiality and personal interest and filed ten procedural requests, numbered 1 to 11 (there was no request 10).

- XIV. By communication dated 27 May 2021 (but sent on 26 May 2021), the Enlarged Board informed the appellant that it had decided to reject the first procedural request to postpone the oral proceedings scheduled for 28 May 2021 and to allow the second procedural request for oral proceedings on the four new objections, at least to the extent that the matter of their admissibility would be discussed during the oral proceedings on 28 May 2021.
- XV. During the oral proceedings held on 28 May 2021, the admissibility of the four new objections were discussed with the appellant in a non-public session, as were its procedural requests 3 to 11. The decisions on the admissibility of the objections and on the procedural requests were announced during the public session. The Enlarged Board decided to reject the four new objections as inadmissible. It also rejected procedural requests 3 to 11. The reasons for these decisions were given in the Enlarged Board's second interlocutory decision, which was issued on 28 June 2021.
- XVI. During the oral proceedings the appellant complained that it had not been sent the written comments of the President of the EPO in sufficient time to be able to submit its observations on them. It stated that its right under Article 9 of the Rules of Procedure of the Enlarged Board of Appeal to file observations on these comments was thereby violated.
- XVII. After a discussion of this matter, the Enlarged Board decided to allow the appellant more time to file its



observations on the comments of the President of the EPO, and postponed the discussion of the referred question. It was agreed that the time limit for filing these observations would be 25 June 2021 and that the oral proceedings would be postponed until a date in early July 2021.

XVIII. The parties were then summoned to further oral proceedings on 2 July 2021, which the President of the EPO was also invited to attend. The appellant filed its observations on the comments of the President of the EPO on 25 June 2021.

XIX. By further letter dated 30 June 2021, the appellant filed a request addressed to the Chairman of the Enlarged Board to correct the composition of the panel dealing with referral G 1/21. This letter was formulated as a reaction to the Enlarged Board's rejection of its procedural requests 7 and 8. These requests were:

7. *to replace the to be replaced members of the panel, Mr. Josefsson and I. Beckedorf with alternates pursuant to Art. 2(1)(b) of the Business Distribution scheme of the Enlarged Board of Appeal,*
8. *to appoint the substitute for the chairman in accordance with Art. 2(2) of the Business Distribution scheme of the Enlarged Board of Appeal.*

XX. The Enlarged Board had rejected these requests in its second interlocutory decision (cf. point XV. above) because it found that the competence to correct the composition of a panel dealing with a referral under Article 112 EPC lay with the Chairman of the Enlarged Board (see Reasons, points 34 to 36).

- XXI. During the oral proceedings on 2 July 2021, the appellant again addressed the question of the composition of the panel dealing with G 1/21. Although it understood that the panel itself was not competent to change the composition, it argued that as long as the incorrect composition was not corrected, the proceedings should not continue. It requested specifically that the Enlarged Board declare itself not competent to deal with the referral because of its incorrect composition. It also requested postponement of the oral proceedings until the panel was lawfully composed. After both requests had been discussed and the Enlarged Board had deliberated on them, the Chairman announced that the Enlarged Board had decided to reject them. Its reasons for rejecting the requests are given in points 1 to 4 below.
- XXII. The remaining part of the oral proceedings on 2 July 2021 was dedicated to discussing the referred question with the appellant and the representatives of the President of the EPO. After closure of the debate and deliberation by the Enlarged Board, the Chairman announced that the proceedings would be continued in writing.
- XXIII. By communication dated 13 July 2021, the Chairman informed the appellant that he had decided to reject its request to change the composition of the panel dealing with G 1/21.
- XXIV. On 16 July 2021 the Enlarged Board issued the order of the present decision.

## **Reasons for the Decision**

### **A. Procedural issues**

1. During the oral proceedings on 2 July 2021, the appellant requested that the Enlarged Board declare itself not competent to deal with the referral because of the panel's incorrect composition. It also requested postponement of the oral proceedings until the composition was corrected by the Chairman of the Enlarged Board.
2. The appellant's first request is based on the assumption that the legal consequence of an incorrect composition is that the incorrectly composed panel lacks competence. However, it must be noted that the EPC nowhere provides that a panel composed by the Chairman of the Enlarged Board may declare itself to lack competence by reason of its composition. For that reason alone, the request cannot be granted.
3. Furthermore, as already held in its second interlocutory decision, issued on 28 June 2021, the Enlarged Board is not competent to change its composition other than by the mechanism of Article 24 EPC. If the composition of the Enlarged Board needed to be corrected, it would fall to the Chairman of the Enlarged Board to make the correction. For this reason the Enlarged Board also refrained in its second interlocutory decision from commenting on the allegation that the panel dealing with G 1/21 was incorrectly composed. The Enlarged Board holds that since it is not competent to change its composition, it is likewise not competent to declare itself to lack competence to deal with the referral because of an alleged problem with its composition.

4. By requesting postponement of the oral proceedings until the panel's composition was corrected, the appellant asked the Enlarged Board to put the referral proceedings on hold until the Chairman gave a (positive) decision on its request to recompose the present panel. This request required the Enlarged Board to balance the interests at stake. On the one hand, the appellant has an interest in the referral being decided by lawfully appointed judges. On the other hand, in the interests of legal certainty the decision-making process in this referral should not be unnecessarily delayed. The Enlarged Board evaluated the appellant's arguments and concluded that they were not sufficiently compelling to justify putting the proceedings on hold until a decision was taken on the request. It furthermore considered that the request was aimed at a postponement until the panel's composition was changed in such a way that it was correct in the eyes of the appellant. However, it would have been wrong to make the continuation of these proceedings dependent on the appellant being in agreement with the decision on its request.

**B. The proceedings before the Board**

5. As indicated in point IV., the oral proceedings in appeal T 1807/15 were first scheduled for 3 June 2020 but were postponed at the request of the respondent until the new date of 8 February 2021. On 5 May 2020, the respondent, a company based in Switzerland and represented in the appeal proceedings by a law firm based in the United Kingdom, had requested that the oral proceedings be postponed until after the COVID-19 outbreak ended. In its request it also stated its view that oral proceedings by videoconference were not suitable for the case in hand because there would be simultaneous interpreting and moreover the attorney and his client would be joining from separate locations and so would

have difficulty conferring with each other during the oral proceedings.

6. At the time the decision to postpone was taken, the Boards of Appeal had started to hold oral proceedings by videoconference, but only when the parties agreed (see the communications of the Boards of Appeal published on the website of the EPO as from 6 May 2020). This was also the situation for the remainder of 2020. By the end of 2020 the COVID-19 outbreak had not ended. As a result there were still travel restrictions in Europe, and the restrictions on external persons entering the premises of the EPO were also still in force.
7. By letter of 8 January 2021, the respondent requested postponement of the oral proceedings scheduled for 8 February 2021, again referring to the COVID-19 outbreak and the travel restrictions. It furthermore expressed the view that the appeal case was not suitable for oral proceedings by videoconference. The appellant expressed its agreement with this view.
8. In the meantime - on 15 December 2020 - a communication of the Boards of Appeal had been published on the website of the EPO, under the title "Oral proceedings before the Boards of Appeal - continuation of the measures adopted due to the coronavirus (COVID-19) pandemic and revised on oral proceedings by VICO" (see <https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201215.html>). This communication contained the following sentence: "From 1 January 2021 boards may conduct oral proceedings by VICO even without the agreement of the parties concerned, as has now been made clear in the new Article 15a RPBA adopted by the Boards of Appeal Committee. Since the new provision

merely clarifies an existing possibility, boards may adapt their practice as regards dispensing with the need to obtain the agreement of the parties concerned even before the date of its entry into force."

9. The Board rejected the request for postponement and maintained the date for the oral proceedings. However, it changed the format to a videoconference. During the oral proceedings the appellant filed the following request by e-mail: "Hiermit stellen wir den Hilfs-Antrag, der Grossen Beschwerdekammer die Frage zur Entscheidung vorzulegen, ob eine mündliche Verhandlung nach Art. 116 EPC durch eine Video Konferenz ersetzt werden kann, wenn die Parteien dem nicht zustimmen." (Translation by the Board: "We thus make the auxiliary request that the question be referred to the Enlarged Board of Appeal for decision as to whether oral proceedings under Article 116 EPC can be replaced by a videoconference without the parties' consent".)
  
10. The appellant's request was discussed during the oral proceedings and the Board then announced that it would refer a question of law to the Enlarged Board. The appellant subsequently withdrew its request on 8 March 2021. By its interlocutory decision dated 12 March 2021 the Board referred the following question:  
"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?"

**C. The referred question**

**C.1 Admissibility**

11. According to Article 112 EPC, a Board of Appeal, in order to ensure a uniform application of the law or if a point of law of fundamental importance arises, shall refer any question to the Enlarged Board if it considers that a decision is required for the above purpose.
  
12. The Enlarged Board considers that these conditions are met in the present case. There are decisions by boards of appeal, albeit few in number, which have taken the view that oral proceedings by videoconference before the Boards of Appeal are oral proceedings within the meaning of Article 116 EPC (see T 1378/16, T 2068/14 and T 2320/16) and giving consent to oral proceedings by videoconference is not equivalent to waiving the right to oral proceedings. The Board questions whether this is so. The referral may thus serve to ensure a uniform application of the law.
  
13. The point of law in issue is also of fundamental importance, for two reasons. Firstly, the question whether a practice of the Boards of Appeal is compatible with a provision of the EPC which is related to the right of parties to be heard orally is of fundamental importance in itself. Secondly, oral proceedings take place in most appeal proceedings and the question is thus relevant for a large number of cases. The Enlarged Board is also of the view that an answer to the question is necessary for a decision that the Board has to take, namely whether to summon the parties to the further oral proceedings to discuss the appellant's main request in person or by videoconference.

## **C.2 Scope of the referral**

14. As far as the scope of the referral is concerned, the Enlarged Board takes the view that in two respects the question is formulated more broadly than is necessary for the decision the Board has to take. Firstly, in appeal case T 1807/15 the issue is whether the Board can summon the parties to oral proceedings by videoconference without their consent, not whether a department of first instance can do so. Secondly, as is clear from the history of the case before the Board, the issue of oral proceedings by videoconference and the role of the agreement or consent of the parties has arisen during and as a result of the COVID-19 pandemic. It has arisen because at the relevant time it was not possible, or at least from a public health perspective not desirable, to hold oral proceedings in person, as this would have required the parties to travel to the premises of the Boards of Appeal in Haar and also the members of the Board to be physically present on the premises.
15. The Board was thus faced with the choice of summoning the parties to oral proceedings by videoconference or postponing the oral proceedings until they could be held in person again. This choice is fundamentally different from the choice between holding oral proceedings in person or as a videoconference.
16. Therefore, in this regard, the Enlarged Board finds it justified to limit the scope of the referral to oral proceedings before the Boards of Appeal and to take the specific context of the referral, the COVID-19 pandemic, into account. This is in line with earlier decisions G 1/19 (OJ EPO 2021, A77) and G 2/19 (OJ EPO 2020, A87) in which the Enlarged Board took the position that a referred



question may remain unanswered to the extent that it exceeds the real need for clarification. See also in this regard Case Law of the Boards of Appeal of the EPO, 9th edition 2019, V.B.2.3.3 "Relevance of the referred question for the underlying case".

17. On the other hand, the Board limited its referral to the question whether holding oral proceedings by videoconference without the consent of the parties is compatible with Article 116 EPC. The Enlarged Board understands from the Board's reasoning that it saw no need to address the matter of its compatibility with Article 113(1) EPC, although the appellant raised concerns with respect to the right to be heard as laid down in that provision. In point 2.3 of the Reasons of its decision, the Board indicated that "...it [saw] no reason not to use a videoconference as long as the Enlarged Board of Appeal considers the format to be in line with Article 116 EPC". And according to point 3.7 of the Reasons, "[i]n this context, the Board would like to note that it has specifically not included the issue of Article 113(1) EPC in the question to be referred, because it considers the issue of compatibility with Article 116(1) EPC to be of primary nature. In the Board's view, the right under Article 113(1) EPC covers the right to be heard at oral proceedings that satisfy the requirements under Article 116 EPC." The Enlarged Board understands from these passages that if the Enlarged Board concludes that a videoconference is a format for oral proceedings that is not excluded by Article 116 EPC, there will be no issue with the right to be heard. This is borne out by point 4.1.3 of the Reasons, where the Board states: "In the Board's view, running videoconferences using a technology that generally functions properly is compatible with both the right to be heard and the right to a fair trial."

18. In the submissions of the appellant and in many amicus curiae briefs the view was expressed that oral proceedings in the form of a videoconference are not equivalent to in-person oral proceedings in that they inevitably pose limitations on the interaction between the parties and the board and on the opportunity for the parties to argue their case. In that connection, the specific concern was that the right to be heard and the right to a fair trial are infringed by oral proceedings being held by way of a videoconference.
19. The Enlarged Board is of the view that in order to clarify the legal framework for holding oral proceedings by videoconference it is appropriate also to consider the compatibility of this format with Article 113 EPC. This is all the more so as the right to be heard is the fundamental principle and the right to oral proceedings is an expression of that principle.
20. On the basis of the above considerations the Enlarged Board has reformulated the referred question as follows:

*During a general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises, is the conduct of oral proceedings before the boards of appeal in the form of a videoconference compatible with the EPC if not all of the parties have given their consent to the conduct of oral proceedings in the form of a videoconference?*

### **C.3 Interpretation of Article 116 EPC**

21. The first question to be answered is whether hearing the parties by means of a videoconference can be regarded as holding oral proceedings within the meaning of

Article 116 EPC. This requires an interpretation of Article 116(1) EPC, which provides: "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."

22. According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose. The Enlarged Board has consistently applied the provisions of this Convention for interpreting the EPC in the past, and will also do this in the present case.
23. It appears that Article 116(1) EPC is not primarily concerned with the question of what constitutes oral proceedings. It rather addresses the question of when oral proceedings, as distinct from written proceedings, are to take place and on whose initiative. The term "oral proceedings" itself is not further defined in the text of the Article. As acknowledged by the Board (see point 5.4.1 of the Reasons), the term is in itself very general and allows a broad interpretation. The Enlarged Board agrees that the ordinary meaning of the term is very general. The Board also notes in point 5.4.1 that the EPC does not contain any explicit provision on the form of oral proceedings. The Enlarged Board is not aware either of such a provision.
24. The Board then goes on to state that to find the "authentic" meaning of the term "oral proceedings" it must be borne in mind that at the time of the preparation and conclusion of

the EPC there were no technical options available to provide an alternative to traditional in-person oral proceedings. Therefore, read in context, the term "oral proceedings" inevitably meant in-person oral proceedings. There was thus no need to define the format of oral proceedings, and, in the Board's view, any attempt to construe the term as also encompassing other formats is based on retrospective considerations. The Board also cited Rule 71(2) EPC 1973 and Rule 115 (2) EPC in support of its view that the legislator only had in-person oral proceedings in mind.

25. The Enlarged Board does not agree with the Board in this respect. The first and most important element in interpreting a legal text is its wording. In the present case the wording is clear: Article 116 EPC relates to proceedings that are oral. According to entry 2.b. of the definition in the Oxford English Dictionary, 3rd edition, "oral" means "Of disputes, negotiations, agreements, contracts etc.: conducted by the means of the spoken word; transacted by word of mouth; communicated in speech; spoken; verbal", i.e. by the spoken word, by speech, by word of mouth. There is thus no basis in this word for limiting its scope to in-person hearings in a courtroom before the deciding body.
  
26. The Enlarged Board has no doubt that those involved in the legislative process leading to the EPC 1973 had in-person oral proceedings in a courtroom in mind. Nor does it dispute that terms such as "appearing" and "before" in provisions relating to oral proceedings were most likely used with this concept in mind. Thus, for the Enlarged Board it is beyond question that in-person oral proceedings, although not expressly mentioned, are encompassed by the term "oral proceedings" when read in context.

27. However, the above findings do not lead to the conclusion that the meaning of the general term "oral proceedings" is limited to the specific form that was known at the time the Convention was drawn up. Indeed, if parties to an appeal attend oral proceedings held by videoconference, they can also be said to appear before the board, albeit remotely. Thus, the appellant's representatives rightly accepted during the course of argument that "oral proceedings" within the meaning of Article 116 EPC are not restricted to proceedings using technology that was available in 1973, but they may also involve the use of newer technologies, such as laptops, PowerPoint presentations and digital whiteboards. What is lacking in particular is any indication that the "in-person" aspect, although not mentioned in the Article or anywhere else, was indeed considered essential to the concept of oral proceedings. Nor has it been demonstrated that it was the will of the legislator to limit the scope of oral proceedings to this particular format and no other. Such an intention cannot be deduced from the terminology used in Article 116 EPC, or from the other cited provisions. Furthermore, as has been acknowledged in all contributions in this case, the travaux préparatoires are silent on this issue. This is the case for both the documents concerning the EPC 1973 and those recording the preparatory discussions on the EPC 2000.

28. In the wider context of the EPC, the Enlarged Board notes that the object and purpose of the Convention is to provide a system for the grant of European patents with the aim of supporting innovation and technological progress. In the view of the Enlarged Board, it would be at odds with this object and purpose if the intention of the legislator was to exclude future formats for oral proceedings that might be made possible by technological progress. In more specific terms, since the object and purpose of oral proceedings is

to give parties an opportunity to plead their case orally, it is improbable that the legislator wished to rule out potential future formats which would allow them to do so.

29. There is thus no basis to conclude that the term "oral proceedings" is to be understood in a more limited sense than its ordinary meaning, or that oral proceedings held in a particular format that only became available after the conclusion of the legislative process do not fall within the terms of Article 116 EPC.
30. The Enlarged Board therefore concludes that oral proceedings in the form of a videoconference are oral proceedings within the meaning of Article 116 EPC.
31. It is further noted that, if videoconference hearings were not oral proceedings according to Article 116 EPC, they would take place in a legal vacuum, meaning that the provisions and practices relating to oral proceedings would not apply either. This in turn would give rise to questions as to legal status of a videoconference, and for example whether parties can be asked to state their final requests or whether the board can close the debate and announce the decision at the end of it. Such questions would moreover arise irrespective of the consent or non-consent of all of the parties, because if videoconferences are not oral proceedings this also applies when the parties have consented to them. In the referring decision, the Board reasoned that a videoconference held with the consent of the parties would be legally unproblematic under Article 116 EPC because parties are entitled to waive their right to oral proceedings. That may be true, but it still leaves open a number of important legal questions as to the nature of these hearings. The Enlarged Board holds that, because videoconferences are a form of oral proceedings under

Article 116 EPC, the rules and practices applicable to oral proceedings also apply to them.

32. In a number of submissions reference was made to decisions G 2/19 and T 1012/03, both of which deal with the place where oral proceedings are to take place. It was argued that because holding oral proceedings at another place than provided for in the EPC could infringe a party's rights under Article 113 and Article 116 EPC, oral proceedings by videoconference which do not take place at the geographical location specified in the EPC also infringe these rights. However, the Enlarged Board finds that these decisions cannot be relied upon to argue against oral proceedings being held by videoconference. The question of geographical location does not arise in the case of a videoconference. No party is obliged to appear in a particular place, nor therefore in a place that would be detrimental to its right to be heard. To deduce from these decisions an obligation to hold oral proceedings at a specific location and thus not to hold them as a videoconference is to overlook that videoconferences were not in issue in those cases and that the reasons for each decision addressed quite a different question.

**C.4 Is a videoconference equivalent to in-person oral proceedings and, if not, is it a suitable format for conducting oral proceedings?**

33. A much-debated question in the comments of the appellant, the President of the EPO and in amicus curiae submissions is whether a videoconference is equivalent to an in-person hearing and whether it is a suitable format for conducting oral proceedings.

34. In R 3/10 the Enlarged Board gave the following description of the purpose of oral proceedings: "... to allow each party to make an oral presentation of its arguments, to allow the Board to ask questions, to allow the parties to respond to such questions and to allow the Board and the parties to discuss issues, including controversial and perhaps crucial issues. The value of oral proceedings is that matters may as a result be clarified and the Board may ultimately be satisfied that a party's position is the right one, although it was not so satisfied by the written submissions alone."
35. The President of the EPO argued that a videoconference enables these essential features of oral proceedings: an opportunity for the parties to present their case orally, to have an interactive exchange of arguments between the competent department in its entirety and the other parties, if any, in real time and, as a consequence, the possibility to immediately respond to inquiries and to act according to any procedural development. He also cited T 2068/14, in which the Board considered that "... a videoconference ... contains the essence of oral proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously. Thus each party's case can be presented to the board in real time, and the board can put questions to the parties/representatives." This was also the view taken in T 2320/16.
36. It seems also that the Board has no doubt either that videoconferencing technology is suitable for holding oral proceedings, see the passages of the referring decision cited in para. 17 above.
37. On the other hand, the appellant and many third parties argued that videoconferences are not equivalent and that they lack essential features of what constitutes oral



proceedings. Reference was made in particular to the missing feature of "immediacy" that is present in in-person oral proceedings, the inherent limitation of transmitting communication by digital means, the instability of transmission means, and the obligation on the side of the parties to be equipped with the necessary tools. It was argued that those constraints result in less effective communication and thus for the parties an inferior means by which to present and argue their case. Furthermore, concerns were expressed as to whether the requirement that oral proceedings are public is met in an appropriate manner. Therefore, forcing oral proceedings by videoconference upon a party was seen as a limitation or infringement of the right to be heard in oral proceedings and the right to fair proceedings. This would result in a violation of Article 113 EPC and, in a wider context, Article 6 of the European Convention on Human Rights.

38. The Enlarged Board's view is that communicating via videoconference cannot, at least for the time being, be put on the same level as communicating in person. Although the Enlarged Board subscribes to the view that videoconferences can ensure the essential features of oral proceedings stated above, communication by this means is less direct and subject to limitations as a result of the constraints of the technology used. In terms of communication, in-person oral proceedings are for now the optimum format. The technology used in videoconferences is aimed at establishing as close an approximation as possible to this direct human interaction. Video technology has certainly improved in recent times, but cannot yet be said to provide the level of communication which is possible when all participants are physically present in the same room. It is also true that those participating in oral proceedings by videoconference must familiarise themselves with the technology and learn to

cope with technical problems as they arise. This can put a certain strain on both the members of the deciding body and the parties, and even distract them from the issues to be discussed during oral proceedings.

39. Holding court hearings in person is also preferable from the point of view of the transparency of the justice system and its function in society. In-person hearings held at an appropriate location better reflect the importance of the exchange between a court and the parties seeking justice, before a final decision is taken. These considerations are just as pertinent for the Boards of Appeal of the EPO, whose task it is to hand down final decisions within the European patent system.
40. However, it does not follow from the above that the right to be heard or the right to fair proceedings cannot be respected when oral proceedings are held by videoconference. In this context it must be borne in mind that the proceedings before the EPO are mainly in writing. The written submissions form the basis of the proceedings, and are complemented where necessary or where requested by an opportunity for a party to present and argue its case orally. Even if the videoconference format has certain shortcomings, it provides parties with an opportunity to present their case orally. In combination with the written part of the proceedings this normally is sufficient to comply with the principles of fairness of proceedings and the right to be heard.
41. It was frequently asserted that in a videoconference before a board of appeal it is not possible for a party to read the body language of the board members or otherwise visually gauge how its pleadings are received by the board, and that this format is therefore inherently unsuitable. The Enlarged

Board is not persuaded by this argument. It is not the case that people's body language, in particular their facial expressions, is not visible in videoconferences. How clear an impression a party can form of the board members' reception of its oral submissions during in-person oral proceedings or during a videoconference is rather a matter of degree, and is determined by such factors as the set-up of the courtroom or the distance of the members of the board in the in-person format or the quality of the cameras, screens and transmission in videoconferences. In that respect videoconferences are distinct from telephone conferences in which only sound is transmitted. This means of communication is clearly not suitable as a format for oral proceedings, because the total absence of the visual element significantly reduces the overall quality of the interaction among the participants.

42. Moreover, the members of the board will normally respond to a party's argument by way of questions or comments, rather than just a nod, a querying look or other such gesture. Thus, in the opinion of the Enlarged Board, it cannot be concluded that, because the participants in a videoconference cannot fully witness each other's every possible physical expression, something essential is thereby lost or it is intrinsically unsuitable to hold oral proceedings in this format.

43. All in all, the Enlarged Board considers that the limitations currently inherent in the use of video technology can make it suboptimal as a format for oral proceedings, either objectively or in the perception of the participants, but normally not to such a degree that a party's right to be heard or right to fair proceedings is seriously impaired. If in an individual case these rights

cannot be respected, it is of course the duty of the deciding body to take appropriate measures to remedy this.

#### **C.5 The role of the parties' consent**

44. In the preceding paragraphs the Enlarged Board set out the reasons for its conclusion that oral proceedings by videoconference are oral proceedings within the meaning of Article 116 EPC and, although not fully equivalent to oral proceedings held in person, normally do not infringe a party's right to be heard or the right to fair proceedings. This leads to a further question: can oral proceedings by videoconference be imposed on a party? Or put differently, has a party a right to oral proceedings in person? In this respect, too, the appellant, the President of the EPO and the amicus curiae briefs provided diverging comments. The President of the EPO argued that it is up to the deciding body to determine in what form the oral proceedings take place. According to the President of the EPO, the parties are only entitled to ask for oral proceedings to be held but not to request a specific form. This position seems to be linked to the view that oral proceedings held in person and via videoconference are equivalent. This view was also expressed in a number of amicus curiae briefs. On the other hand, the appellant and many amicus curiae briefs argued that parties have a right to oral proceedings in person and thus have to give their consent to a different format. Of those who supported this position some argued that this right is absolute and thus also to be respected in situations of emergency, while a larger number of submissions argued that this right is to be respected under normal circumstances but may be overruled in cases of emergency.

45. The Enlarged Board holds that the parties have a fundamental right to oral proceedings that provide them with the opportunity to be heard in accordance with Article 113 EPC and Article 6 ECHR. Without doubt, in-person oral proceedings provide such an opportunity. As stated earlier, a hearing in person is the optimum format or, to use a term well known in the field of European patent law, it is the gold standard. It definitely fulfils the requirements of Article 113 EPC and Article 6 ECHR. It is also the format that the legislator had in mind when drafting Article 116 EPC. Therefore, in-person hearings should be the default option. Parties can only be denied this option for good reasons.
46. It was also argued that the choice of format is an administrative matter which, like other organisational aspects of oral proceedings, can be decided by the instance scheduling the oral proceedings. However, under the EPC it is a party's right to request oral proceedings. This demonstrates that the holding of oral proceedings is seen as serving the interests of the parties. The vast majority of oral proceedings are held upon request by a party. It therefore makes sense that the choice of format for these oral proceedings can be made by the party who requested them and not by the board of appeal, especially as this concerns more than just an organisational matter. As stated earlier, the Enlarged Board holds that at this point in time videoconferences do not provide the same level of communication possibilities as in-person oral proceedings. A party may thus have good reasons to prefer in-person oral proceedings to a videoconference.
47. As for the reasons that could justify denying a party its wish to have the oral proceedings held in person, the Enlarged Board makes the following observations.

48. Firstly, there must be a suitable, even if not equivalent, alternative. As explained above, the Enlarged Board holds the view that a videoconference normally provides the basic conditions for an opportunity to be heard and to present a case. If in a particular case a videoconference is not suitable, the oral proceedings will need to be held in person. In the case underlying the referral, the Board expressed the view that the reasons brought forward why a videoconference would not be suitable for this particular case were not convincing. There was thus, in the Board's assessment, a suitable alternative which could be used to bring the appeal case to a conclusion.
49. Secondly, there must also be circumstances specific to the case that justify the decision not to hold the oral proceedings in person. These circumstances should relate to limitations and impairments affecting the parties' ability to attend oral proceedings in person at the premises of the EPO. In the case of a pandemic, such circumstances could be general travel restrictions or disruptions of travel possibilities, quarantine obligations, access restrictions at the EPO premises, and other health-related measures aimed at preventing the spread of the disease. This decision should not be influenced by administrative issues such as the availability of conference rooms and interpretation facilities or intended efficiency gains. It is the EPO's responsibility to make available the necessary resources for facilitating the conduct of proceedings provided for in the EPC.
50. Thirdly, the decision whether good reasons justify a deviation from the preference of a party to hold the oral proceedings in person must be a discretionary decision of the board of appeal summoning them to the oral proceedings.

51. In the case underlying the referral, the option of in-person oral proceedings was not available at the relevant time because of the COVID-19 pandemic. Excluding oral proceedings by videoconference, as was requested by the parties, would have meant postponing the oral proceedings for an unknown length of time. Also relevant was that the oral proceedings had already been postponed once. Their continued postponement would have led to a further delay in taking a decision on the appeal. During a pandemic delays in finalising appeals could apply to a great number of pending cases and therefore seriously impair the administration of justice. In these circumstances it was justified to overrule the wish of the parties and to hold oral proceedings by videoconference.

#### **C.6 Comparison with developments in the Contracting States**

52. A further aspect of relevance is that many of the EPC Contracting States have recently introduced or expanded the possibility of holding court hearings by videoconference and that these measures are almost always linked to the COVID-19 pandemic.

53. In some states the use of the videoconference format in a particular case is still dependent on the consent of the party or parties, whereas in others the court may opt for this format irrespective of the wish of the parties. Therefore it cannot be said that a clear line has emerged one way or the other. The position of the Enlarged Board thus cannot be said to be either in agreement with or in conflict with the practice of the Contracting States.

54. On the other hand, it must be borne in mind that, unlike in national jurisdictions, the parties to appeal proceedings

before the Boards of Appeal of the EPO and their representatives often come from different countries. During the pandemic the host state of the Boards of Appeal, Germany, has taken measures to restrict travel from abroad. The continuity of the functioning of the Boards of Appeal has therefore been more affected than has been the case in court proceedings in national systems, for which the parties or their representatives normally do not have to cross borders.

55. In that respect, the European Court of Human Rights, for example, is more comparable to the Boards of Appeal. The first two points of the Court's "Guidelines on Hearings by Videoconference", adopted on 22 December 2020 ([www.echr.coe.int/Documents/Guidelines\\_videoconference\\_hearings\\_ENG.pdf](http://www.echr.coe.int/Documents/Guidelines_videoconference_hearings_ENG.pdf)) state:

"1. In light of the sanitary conditions prevailing in Europe, and in particular in the Court's host State and in the States where the parties to a case are based, it may be necessary to adapt the usual format for hearings before the Court, conducting the proceedings through videoconference technology.

2. This assessment is for the President of the Grand Chamber or of the Chamber to make (Rule 64 of the Rules of Court)."

These guidelines appear similar to the approach developed by the Enlarged Board in the present decision.

56. Finally, it would appear that while in some cases Contracting States and international courts have introduced the possibility of imposing videoconference hearings on the parties during the COVID-19 pandemic, there has so far been



considerable reticence about prolonging this measure beyond the current emergency situation. In a similar way, the Enlarged Board has limited the scope of its answer in the present referral to a period of general emergency.

## ORDER

**For these reasons it is decided that the question referred to the Enlarged Board is answered as follows:**

During a general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises, the conduct of oral proceedings before the boards of appeal in the form of a videoconference is compatible with the EPC even if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference.

The Registrar:

The Chairman:



A. Voyé

F. Blumer

Decision electronically authenticated