

27 April 2021

Enlarged Board of Appeal  
European Patent Office  
80298 Munich  
Germany  
Attn. Mr. Nicolas Michaleczek, registry  
[EBAamicuscuriae@epo.org](mailto:EBAamicuscuriae@epo.org)

Dear Members of the Enlarged Board of Appeal,

**Re: Amicus Curiae Brief on questions referred to the Enlarged Board of Appeal in case G1/21**

IPO makes the present submissions in response to the EPO's Communication dated 24 March 2021, inviting third parties wishing to make a written statement under Article 10(1) of the Rules of Procedure of the Enlarged Board of Appeal regarding case **G 1/21**.

IPO is pleased to be able to provide its opinion on the questions referred and thanks the Enlarged Board of Appeal for its invitation to file amicus briefs in this case.

Intellectual Property Owners Association is an international trade association representing companies and individuals in all industries and fields of technology that own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, executive, law firm, or attorney members.

The members of the IPO Board of Directors, which approved the filing of this brief, are listed in the appendix of this letter. IPO procedures require approval of positions in briefs by a two-thirds majority of Directors present and voting.

**Legal Summary and Background**

The question put to the Enlarged Board of Appeal by Technical Board of Appeal 3.5.02 in case **T 1807/15** dated 12 March 2021 is as follows:

*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?*

IPO believes that the answer to this question should be “Yes”.

IPO refers herein to recent decision **T 2320/16** handed down on 4 February 2021 by Technical Board of Appeal 3.3.02. Said Board of Appeal, in a reasoned decision, arrived at the conclusion that

*... oral proceedings by videoconference are consistent with the right to oral proceedings pursuant to Article 116 EPC.”* (See points 1.1 to 1.6 of the Reasons for Decision).

The Board of Appeal in case 2320/16 further affirmed that

*... the discretion to hold oral proceedings by videoconference lies with the board* [Board of Appeal]. (See point 1.7 of the Reasons for Decision).

IPO endorses decision **T 2320/16** and the reasons set out therein and concludes that oral proceedings by videoconference are indeed compatible with the right to oral proceedings as set out in Article 116 EPC, without requiring consent of the parties.

In particular, IPO believes that giving one party an unrestricted right to refuse the videoconference format would allow parties to delay proceedings for tactical reasons, thereby leading to an increase in the backlog of cases and being contrary to the legitimate interests of other parties.

With specific reference to the consent of the parties, requiring the consent of all parties would impact the length of the proceedings, and thus a substantial aspect of the effectiveness of justice, which is crucial for the respect of the rule of law. Without efficient justice, there is no rule of law, no effective application of the law, no business-friendly environment and no mutual trust.

In this regard, IPO draws the Enlarged Board of Appeal’s attention to the considerations made by the Board of Appeal 3.5.06 in decision T 2608/14, which has recognized, well before the introduction of oral proceedings by videoconference during the COVID pandemic, that a videoconference may be a practice falling within the definition of oral proceedings as provided by Art. 116 EPC. In Board of Appeal 3.5.06’s view:

*while a video conference does not allow such direct communication as the face-to-face meeting involved in conventional oral proceedings, it nevertheless 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.* (See point 1.2.3 of decision T 2608/14).

IPO submits that, on the one hand, the in-person practice followed by the EPO before the pandemic, according to which oral proceedings pursuant to Article 116(1) were in-person face-to-face hearings, should have no impact in the interpretation of Art. 116(1) EPC, and that, on the other hand, the videoconference practice established during the pandemic should

provide guidance for the practice after the pandemic, which should be adapted depending on the circumstances of the case.

Specifically, IPO is of the opinion that holding oral proceedings via videoconference improves access to justice for all parties, puts parties on an even footing insofar as travel costs are avoided, travel time is saved, which is also very important in the context of the environment and climate change. Additionally, the public nature of opposition and appeal proceedings is further enhanced when oral proceedings are conducted by videoconference when compared to oral proceedings held at the premises of the EPO.

However, IPO submits that a “Yes” response does not preclude the fact that video oral proceedings might not always be the best solution in a particular case. Indeed:

- Of course, if all parties agree to a videoconference, then the presumption should be that a videoconference is indeed suitable, absent compelling reasons to require an in-person hearing.
- But if all parties object to a videoconference, we believe that the EPO should take their reasons under serious consideration in deciding nonetheless to have the hearing via videoconference.
- And if only some of the parties object to a hearing via videoconference, the presumption should be to have a videoconference, but there may be compelling reasons to have an in-person hearing. Such reasons include:
  - inter partes proceedings with a certain complexity,
  - exhibits that cannot be viewed or discussed easily via videoconference,
  - numerous opponents,
  - need for translations,
  - need for witnesses to be heard,
  - full access to videoconference technology by both parties

Guidelines for such situations could be identified to provide clear rules for all parties involved (as for example the President’s Notice regarding the circumstances in which it is possible to request a change of date of oral proceedings). The EPO Opposition Divisions and Boards of Appeal should thus consider the parties’ arguments in that respect when making the decision to hold oral proceedings by videoconference and not by in person-meetings. In making these decisions, we believe the EPO should always keep in mind that the parties should have equal access to the technology needed to ensure full and fair participation via videoconference.

IPO understands that the EPO intends to review the results of their pilot program before coming to a decision as to how oral proceedings via videoconference should be implemented in the future after the pandemic.

IPO again thanks the Enlarged Board of Appeal for the possibility to provide these comments for consideration.

Yours sincerely,

A handwritten signature in blue ink that reads "Daniel Staudt". The signature is written in a cursive style with a horizontal line through the middle of the name.

Daniel Staudt  
President

## APPENDIX<sup>1</sup>

### Members of the Board of Directors Intellectual Property Owners Association

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<sup>1</sup> IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

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