

BOAC/16/20

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Munich, 10.12.2020

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

SUBMITTED BY: President of the Boards of Appeal

ADDRESSEES: Boards of Appeal Committee (for decision)

SUMMARY

The President of the Boards of Appeal proposes that the Boards of Appeal Committee adopts the amendment to the Rules of Procedure of the Boards of Appeal set out in Part II of this document. The amendment involves inserting in the Rules of Procedure of the Boards of Appeal (RPBA 2020) new Article 15a, which clarifies that the Boards of Appeal may hold oral proceedings pursuant to Article 116 EPC by videoconference.

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PART I

I. STRATEGIC/OPERATIONAL

1. Operational.

II. RECOMMENDATION

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

III. MAJORITY NEEDED

3. Simple.

IV. CONTEXT

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

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

V. EXPLANATORY REMARKS

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

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

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

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

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

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

VI. PROPOSED NEW PROVISION

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

Article 15a
Oral proceedings by videoconference

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

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

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

VII. LEGAL BASIS

24. Rule 12c(2) EPC.

VIII. DOCUMENTS CITED

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

IX. RECOMMENDATION FOR PUBLICATION

26. Yes.

PART II

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

THE BOARDS OF APPEAL COMMITTEE,

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

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

HAS DECIDED AS FOLLOWS:

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

Article 1

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

Article 15a

Oral proceedings by videoconference

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

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

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

Article 2

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

Done at Munich, [date of decision]

For the Boards of Appeal Committee
The Chairman

Derk-Jan De Groot