

## **0. Summary**

In cases where all parties to the proceedings provide their consent, I welcome the ability to use the videoconference (VICO) format for oral proceedings before the Boards of Appeal. However, for the reasons outlined below, I believe that:

- the current composition of the Enlarge Board of Appeal (EBA) compromises the independence and (perceived) impartiality of the Enlarged Board;
- the question referred by Board 3.5.02 is admissible; and
- that question should be answered in the negative.

Moreover, I believe that there are a number of important points that still need to be clarified regarding the general legal framework for conducting oral proceedings in VICO format before the Boards of Appeal.

## **1. The Question Referred**

In connection with appeal number T 1807/15, Board 3.5.02 has referred the following question to the EBA pursuant to Article 112(1)(a) EPC:

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?

The decision of Board 3.5.02 that contains this question shall hereinafter be referred to as “the Referral”.

## **2. Exclusion of Certain EBA Members (Article 24 EPC)**

### **2.1. Background**

In G 1/21, the EBA is called upon to decide whether the consent of parties to the proceedings is required in order for a Board of Appeal to conduct oral proceedings in VICO format.

However, the Board of Appeal Committee (BoAC) has already adopted a decision that takes a definitive stance on this question. That is:

- at a meeting in December 2020, BoAC decided to adopt the amendment to the Rules of Procedure of the Boards of Appeal (RPBA) that was proposed in document no. BOAC/16/20; and
- the amendment adopted (namely, introduction of Article 15a RPBA) presupposes that the consent of parties to the proceedings is not required in order for a Board of Appeal to conduct oral proceedings in VICO format.

The President of the Boards of Appeal is a statutory member of BoAC. Moreover, document no. BOAC/16/20 indicates that he was responsible for proposing the adoption of Article 15a RPBA.

### **2.2. Legal Context**

As confirmed by the EBA in G 3/19, the European Patent Organisation (EPOrg) is governed by the rule of law, including by principles underpinning the rule of law.

Amongst the most important of the principles underpinning the rule of law are:

- the doctrine of the separation of powers; and
- principles governing the independence of the judiciary.

In G 3/19, the EBA indicated that the precise scope of such principles and their implementation needs to reflect the specific nature and organisational structure of the EPOrg. Nevertheless, for the reasons discussed below, neither of the above principles can be applied in such a manner as to permit a judge to sit in a case in which he or she is effectively called upon to decide the lawfulness / constitutionality of rules the making or implementing of which he or she had any involvement in a non-judicial (i.e. executive) capacity.

### 2.2.1. Separation of powers

Regardless of whether EPOrg can be said to have a legislature in the traditional sense, certain positions within the organisation clearly form part of the executive branch of the organisation.

According to the Cambridge Dictionary, the executive branch is "*the part of a government that is responsible for making certain that laws and decisions are put into action*". Under this definition, BoAC clearly serves an executive function. This is because it is:

- wholly responsible for "making", i.e. drafting, certain laws (Rules of Procedure of the Boards of Appeal); and
- together with the Administrative Council (AC), is responsible for putting those laws into action.

The fundamental concepts underlying the doctrine of the separation of powers are that:

- the major institutions of a state (or organisation) should be functionally independent of one another; and
- no individual should have powers in respect of more than one of those independent institutions.

Thus, because BoAC serves an *executive* function with respect to the RPBA, the doctrine of the separation of powers demands that members of BoAC be excluded from also serving a *judicial* function with respect to any matters for which BoAC has responsibility.

### 2.2.2. Independence of the judiciary

In view of the doctrine of the separation of powers, it is unsurprising that judicial conduct in EPOrg Contracting States is governed by rules that prohibit judges from sitting in cases in which their prior public statements (or their prior participation in public office) could be perceived to compromise their independence or impartiality.

For example, the United Kingdom Supreme Court's Guide to Judicial Conduct (2019) (copy enclosed) contains the following statements.

"3.14 **Previous participation in public office or public debate on matters relevant to an issue in a case will not normally be a cause for a Justice not to sit, unless the Justice has thereby committed himself or herself to a particular view irrespective of the arguments presented to the Court**".

"5.7 **Justices may serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge**".

By way of his membership of BoAC, his publicly stated position as a supporter / proposer of Article 15a RPBA and his participation in the BoAC meeting in December 2020, the President of the Boards of Appeal has previously participated in both "public office" and "public debate" in connection with a matter that is relevant to the question referred in G 1/21.

It is also important to note that:

- the President of the Boards of Appeal's participation in BoAC continues to this day; and
- BoAC has not taken any action to suspend the application of Article 15a RPBA pending resolution of the question referred in G 1/21.

This makes it clear that, in his role as a statutory member of BoAC, the President of the Boards of Appeal has "*committed himself ... to a particular view irrespective of the arguments presented to the Court*". In other words, the President of the Boards of Appeal's publicly stated position as a supporter / proposer of Article 15a RPBA makes his membership of the EBA for G 1/21 inconsistent with the perceived impartiality and political neutrality of a judge.

### **2.3. Conclusions**

Based upon the doctrine of the separation of powers, as well as principles governing the independence of the judiciary, the inclusion of the President of the Boards of Appeal as a member of the EBA for G 1/21 would compromise the independence and impartiality of the Enlarged Board.

The EBA is therefore invited to consider whether the current composition of the EBA (which includes the President of the Boards of Appeal) is in accordance with Article 24 EPC. In particular, the EBA is invited to consider whether the facts discussed above give rise to grounds to exclude the President of the Boards of Appeal under:

- Article 24(1) EPC (e.g. on the grounds that his publicly stated position as a supporter / proposer of Article 15a RPBA provides him with a "personal interest" in the question referred in G 1/21); and/or
- Article 24(3) EPC (e.g. on grounds outlined in the statement filed by epi on 12 April 2021).

The EBA is also invited to consider whether decisions taken by the President of the Boards of Appeal's in connection with G 1/21 (including decisions dated 17 March 2021 on the composition of the EBA for G 1/21 and the date and format of oral proceedings in G 1/21) have been taken in conformity with Article 24(1) EPC.

Finally, the EBA is invited to consider whether the prior involvement of other members of the EBA in drafting, proposing and/or supporting Article 15a RPBA provide grounds under Article 24 EPC for their exclusion from the Enlarged Board for G 1/21.

### **3. The Referral Is Admissible**

Firstly, the question of whether Article 116(1) EPC requires the consent of all parties to the proceedings for oral proceedings to be conducted in the form of a videoconference is point of law of fundamental importance. This is because it affects the procedural rights of parties to an unlimited number of proceedings before both first and second instance departments of the EPO. Moreover, because the format of oral proceedings can affect the outcome of those

proceedings<sup>1</sup>, the question referred also has implications for the right of parties to be heard (according to Article 113(1) EPC).

Secondly, as explained below, an answer to the question referred is required in order to ensure uniform application of the law.

Prior to 2021, the Boards of Appeal of the EPO had consistently interpreted Article 116(1) EPC as meaning that a party to oral proceedings before the EPO has a right to appear **in person**. For example, at points 4.3 to 4.5 of the reasons for the decision in T 677/08, Board 3.5.01 concluded that Article 116(1) EPC confers upon parties to proceedings before the EPO a right to in person oral proceedings, but **not** a right to VICO oral proceedings:

*“4.3 According to Article 116 EPC, an applicant has a right to oral proceedings **which means he has a right to appear in person before the Examining Division in order to discuss the case**. In proceedings before the Examining Division, the applicant can request that oral proceedings be held as a video conference, as set out in the Notice from the Office (OJ EPO 2006, 585). The decision to accept the request for a video conference falls under the discretion of the Examining Division...*

*4.5 ... Article 116 EPC gives the applicant the right to present his case orally before the Examining Division **but does not give him the right to do so in the form of a video conference**” (emphasis added).*

Further, prior to 2020, the absence of a legal basis for VICO oral proceedings<sup>2</sup> was consistently raised as a reason for rejecting requests to conduct proceedings in that format before the Boards of Appeal.

The interpretation of Article 116(1) EPC established in decisions such as T 677/08 is directly contradicted by Decisions of the President of the EPO (dated 1 April, 10 November and 17 December 2020) relating to the conduct of oral proceedings before Examining and Opposition Divisions. It is also contradicted by Article 15a RPBA.

In the light of Article 164(2) EPC, it is clear that neither the President of the EPO nor the AC has the power to overturn established interpretations of provisions of the EPC. In this respect, it is important to note that Article 33(1)(b) EPC does not afford the AC any competence to amend Article 116(1) EPC. This is because there is no "*international treaty relating to patents*" or "*European Community legislation relating to patents*" that contains any provisions that remotely resemble those Article 15a RPBA.

Further, whilst T 2320/16 adopts a different interpretation of Article 116(1) EPC, the Referral makes it clear that not all Boards of Appeal are prepared to accept that different interpretation.

An opinion of the EBA is therefore required in order to clarify whether the above-mentioned decisions of the President of the EPO (and/or Article 15a RPBA) are consistent with Article 116(1) EPC.

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<sup>1</sup> In this regard, I refer to the evidence-based research discussed in section 3.3 of the 8 April 2021 statement filed by the Swiss Association of European and Swiss Patent Attorneys (VESPA).

<sup>2</sup> See the discussion at point 1 of the Reasons for the Decision in T 1266/07, as followed, for example, by T 0985/15, T 2313/12, T 2008/12, T 1942/12, T 1930/12, T 1081/12, T 2425/10, T 1427/10 and T 0663/10.

In conclusion, the question referred is admissible because it clearly meets both of the two (alternative) criteria specified in Article 112(1)(a) EPC.

#### **4. Discussion of the Question Referred**

I endorse the reasoning of the referring board, as well as the reasoning in section 1 of the 8 April 2021 statement filed by the Swiss Association of European and Swiss Patent Attorneys (VESPA).

I also have the following comments.

##### **4.1. Conflicting Interpretations of Article 116 EPC**

As discussed above, in its 28 June 2011 decision in T 677/08, Board 3.5.01 interpreted Article 116(1) EPC as meaning that a party to oral proceedings before the EPO has a right to appear **in person**.

By way of contrast, in its 4 February 2021 decision in T 2320/16, Board 3.3.02 concluded that "*oral proceedings by videoconference are consistent with the right to oral proceedings pursuant to Article 116 EPC*".

Because they reach contradictory conclusions, the decisions in T 677/08 and T 2320/16 are mutually incompatible. It is therefore important to establish whether there are any fundamental flaws that underly the logic of either decision.

The decision in T 2320/16 contains a fundamental flaw in that, at point 1.5.2 of the Reasons for the Decision, the Board makes unexplained and unjustified assumptions regarding the qualifying criteria for "*oral proceedings*" under Article 116 EPC:

*"In the board's view, a prerequisite of oral proceedings is that the parties can see the members of the board and vice versa. 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. At the same time, it must be possible in real time for the board to interrupt or question the parties where necessary. This distinguishes oral proceedings from an exchange by letter, fax or E-mail, where an exchange of views in real time, i.e. essentially simultaneously, is not possible. Apart from the above constraints, the form in which the parties orally present their arguments - with or without physical presence - is not predetermined by Article 116 EPC (in agreement with T 1378/16, reasons, 1.3)".*

In essence, Board 3.3.02 assumes that, to qualify as "*oral proceedings*" in the sense of Article 116(1) EPC, proceedings before the Board need only satisfy the following criteria:

- (a) the parties must be able to see the members of the board (and *vice versa*); and
- (b) it must be possible in real time for the board to interrupt or question the parties where necessary.

The Board does not explain how criteria (a) and (b) above can be derived from the EPC. In particular, the Board does not explain how criteria (a) and (b) together:

- represent the *objective* meaning of Article 116 EPC; or
- serve to ensure that Article 116 EPC complies with the object and purpose of the EPC.

As will be evident from the following, it is clear that criteria (a) and (b) above are not derivable from the provisions of the EPC.

Firstly, the objective meaning of the word "*oral*" does not in any way imply:

- any particular *visual* characteristics; or
- a requirement for the board (but not any other party to the proceedings) to be able to interrupt or question the parties.

Secondly, it is notable that (a) and (b) are both characteristics of in-person oral proceedings. This implies that the Board in T 2320/16 viewed that format of proceedings as representing the "gold standard" under Article 116 EPC, i.e. the format which is to be used as a reference for assessing whether any possible alternative complies with Article 116 EPC.

There are no principles of the Vienna Convention that can be used to arrive at an interpretation of "*oral proceedings*" for which:

- some characteristics of in-person oral proceedings, i.e. those described at (a) and (b) above, are deemed essential (and therefore limit the meaning of "*oral proceedings*"); but
- other characteristics of in-person oral proceedings are not essential, and thus do not limit the meaning of "*oral proceedings*".

In other words, there is no basis in the EPC (or in subsequent agreement or practice of the Contracting States to the EPC) for an interpretation of Article 116 EPC that is derived by way of a process involving the cherry-picking of only a small number of the many different characteristics of in-person proceedings.

For this reason, the decision in T 2320/16 is clearly (both legally and logically) unsound, and should be rejected by the EBA.

#### 4.2. Dynamic Interpretation

According to G 3/98 a "*dynamic*" interpretation of the EPC may come into play where considerations have arisen since the Convention was signed which might give reason to believe that a literal interpretation of the wording of the relevant provision would conflict with the legislator's aims.

It is therefore relevant to assess whether any relevant considerations have arisen since 29 November 2000 that might affect the interpretation of Article 116(1) EPC.

In this regard, it is noteworthy that the EPO has published various announcements relating to the conduct of VICO oral proceedings, the first of which took place in December 1997 (OJ EPO 12/1997, 572, copy enclosed).

This announcement demonstrates two important points.

Firstly, it indicates that VICO oral proceedings could only take place if a request for proceedings in that format was accompanied by the following waiver declaration:

*"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"* (emphasis added).

This point is particularly relevant to the interpretation of EPC2000.

Compared to all subsequent announcements relating to VICO oral proceedings, the announcement from December 1997 was published far closer to the date that EPC2000 was signed. This means that the interpretation of Article 116(1) EPC that is evident in the December 1997 announcement is by far the most likely to reflect the prevailing understanding of the meaning of "*oral proceedings*" at the date that the Convention was signed.

Secondly, the above-mentioned announcements demonstrate that VICO technology has been readily available to both the EPO and its users since at least 1997.

Later announcements relating to VICO oral proceedings (from 2006, 2016 and 2018<sup>3</sup>) took the view that a waiver declaration would no longer be required. Whilst that view was never challenged, it is important to note that this was because VICO oral proceedings previously only took place at the request of (and hence always with the consent of) the parties to the proceedings.

The historical record therefore demonstrates that:

- VICO technology suitable for conducting oral proceedings was available (to both the EPO and its users) *before* EPC2000 was signed; and
- close to the date that EPC2000 was signed, the EPO (and hence presumably also the legislators for the EPC) clearly took the view that parties to proceedings before the EPO had a right to oral proceedings being held in "*the traditional form*" at the EPO premises.

There is no evidence that, subsequent to the date that the Convention was signed, any considerations have arisen that might give rise to a different interpretation of Article 116(1) EPC. In particular, given the ready availability of VICO technology in 2000, the availability of slightly different (more modern) forms of that technology provides no reason in law to adopt an interpretation of Article 116(1) EPC which completely contradicts that clearly evident from that in the enclosed announcement from December 1997.

For the sake of completeness, and in view of G 3/19, it is important to note that there is no basis for a "dynamic" interpretation based upon any form of actual or perceived "*legislative intent*". This is because the legislators for Article 116 EPC are the Contracting States (at a Conference according to Article 172 EPC). However, it is also because, at least at this time, the AC:

- is not competent to amend Article 116 EPC; and
- has not even attempted to amend that Article.

With regard to the AC's competence, it is important to note that:

- according to Article 33(1)(b) EPC, the AC is only competent to amend certain provisions of the EPC "*to bring them into line with an international treaty relating to patents or European Community legislation relating to patents*"; but
- at this time, there is no international treaty (or EC legislation) relating to patents that contains any provisions that either explicitly or implicitly interpret a right to "*oral proceedings*" as permitting proceedings to be conducted in VICO format against the wishes of one or more parties to the proceedings.

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<sup>3</sup> OJ EPO 11/2006, 585, 4/2016, 206 and 2018, A96

### 4.3. Legal Basis

As mentioned above, prior to 2020, the absence of a legal basis for VICO oral proceedings<sup>4</sup> was consistently raised as a reason for rejecting requests to conduct proceedings in that format before the Boards of Appeal.

Despite this consistent line of case law, in T 1378/16, Board 3.5.03 decided that oral proceedings in VICO format could nonetheless proceed before Boards of Appeal. However, it is important to note that:

- in connection with concerns previously raised by other Boards of Appeal regarding the absence of a general (legal) framework for conducting oral proceedings in VICO format, Board 3.5.03 effectively concluded that those concerns were addressed by the creation of a facility for the public to "attend" hearings in VICO format; and
- the VICO oral proceedings in T 1378/16 were conducted with the consent of the appellant.

The decision in T 1378/16 does not answer the question of whether merely granting some form of public access to VICO oral proceedings addresses the concerns about the absence of a general legal framework for conducting such proceedings before the Boards of Appeal, in particular where a party to the proceedings does not consent to use of the VICO format.

Regardless of the EBA's answer to the question referred, I believe that it is particularly important for the Boards of Appeal to ensure that VICO oral proceedings are only ever conducted in accordance with a clear and reliable legal framework. In this respect, I note that certain important points have not yet been clarified by Article 15a RPBA. For example, I believe that it will be particularly important for the EBA to consider the following questions when providing their answer to the question referred.

- (1) To comply with the requirement for oral proceedings before the Boards of Appeal to be "public", in which manner or manners must the public be able to "attend" oral proceedings in VICO format?

For example, is it sufficient that the public be provided with a link to connect to the audio and video feed of the proceeding, or must the public (also) be provided with a dedicated room located at the premises of the Boards of Appeal in Haar?

- (2) What technical measures, if any, must be implemented to prevent those "attending" VICO oral proceedings from taking (and then using in related legal proceedings in a different jurisdiction) a recording of the proceedings?
- (3) What technical measures, if any, must be implemented to prevent the coaching of witnesses that appear before the Boards of Appeal in proceedings that are conducted in VICO format?
- (4) What technical measures, if any, must be implemented to prevent witnesses that appear before the Boards of Appeal from watching proceedings conducted in VICO format before the point in time that they provide their evidence to the Boards?

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<sup>4</sup> See the discussion at point 1 of the Reasons for the Decision in T 1266/07, as followed, for example, by T 0985/15, T 2313/12, T 2008/12, T 1942/12, T 1930/12, T 1081/12, T 2425/10, T 1427/10 and T 0663/10.

- (5) Does Article 15a RPBA address the absence of a general legal framework for conducting oral proceedings in VICO format? If so, did it also do this in the period from January to March 2021, i.e. *prior* to its entry into force?

**5. *Proposed Answer to the Question Referred***

In the light of the above, the question referred to the EBA should be answered in the negative.

Yours faithfully,

SNODIN, Michael David

Enc: United Kingdom Supreme Court's Guide to Judicial Conduct (2019)  
OJ EPO 12/1997, 572-574

# **United Kingdom Supreme Court**



## **Guide to Judicial Conduct (2019)**

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**FOREWORD BY THE RT HON LADY HALE  
PRESIDENT OF THE UK SUPREME COURT**

Every court should have a Code of Judicial Conduct that sets out the standards of ethical conduct to be expected of the Court. Such a Code serves a number of purposes. It provides guidance to the members of the Court. It informs those who use the Court of the standards that they can reasonably expect of its judges. It explains to members of the public how judges behave and should help to secure their respect and support for the judiciary. This Guide was first prepared by and for the Justices of the Supreme Court when the Court was established in 2009 and has been revised to coincide with the Court's tenth anniversary in 2019. It has the approval and support of each of the Justices.

A separate guide exists for the Judicial Committee of the Privy Council.

# GUIDE TO JUDICIAL CONDUCT

## 1 INTRODUCTION

- 1.1 The President, Deputy President and Justices of the United Kingdom Supreme Court (collectively referred to hereafter as 'the Justices') have decided to adopt this Guide to their judicial conduct. Such guides have become commonplace in recent years.<sup>1</sup> There are now equivalent guides for the judiciary in England and Wales, Scotland and Northern Ireland.<sup>2</sup>
- 1.2 The Justices have drawn upon the *Bangalore Principles of Judicial Conduct*, endorsed by the United Nations Human Rights Commission in 2003 and published with a commentary in 2007. The intention of the *Principles* is to establish standards of ethical conduct for judges, to provide guidance for individual judges and the judiciary in regulating judicial conduct, and also to assist members of the executive and legislature, lawyers and the public, better to understand and support the judiciary. The principles are stated as six "values":
- (i) Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
  - (ii) Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
  - (iii) Integrity is essential to the proper discharge of the judicial office.
  - (iv) Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.
  - (v) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
  - (vi) Competence and diligence are prerequisites to the due performance of judicial office.

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<sup>1</sup> Eg Canadian Judicial Council, *Ethical Principles for Judges* (1998); Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2002).

<sup>2</sup> Courts and Tribunals Judiciary, *Guide to Judicial Conduct* (2018); *Statement of Principles of Judicial Ethics for the Scottish Judiciary* (revised December 2016); *A Statement of Ethics for the Judiciary of Northern Ireland* (2<sup>nd</sup> Revision 5 August 2011).

- 1.3 The Justices believe that those principles are already well understood by the judiciary, executive and legislature in the United Kingdom. The specific guidance given below, much of which might be thought to go without saying, follows the same pattern. There is considerable overlap between the principles.
- 1.4 The primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual Justice. The interests of justice must always be the overriding factor. There is also a range of reasonably held opinions on some points. In cases of doubt, a Justice should seek the advice of the President or Deputy President of the Court.

## **2 INDEPENDENCE**

- 2.1 The judiciary of the United Kingdom have been independent of the government since at least the early 18th century. The Supreme Court of the United Kingdom was established in order to achieve the physical separation of the country's highest court from the House of Lords and thus to clarify the Justices' independence both of government and of Parliament. Judicial independence is a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. The Justices will take care that their conduct, official or private, does not undermine their institutional or individual independence or the public appearance of independence.
- 2.2 The Justices have all sworn the judicial oath, which states:

"I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will."

In taking that oath, each Justice has acknowledged that he or she is primarily accountable to the law which he or she must administer. This involves putting aside private interests and preferences and being alert to attempts to influence decisions or curry favour.
- 2.3 The Justices may consult with their colleagues when points of difficulty arise on matters of conduct. But they are solely responsible for the decisions that they take in the performance of their judicial duties.
- 2.4 The Justices must be immune to the effects of publicity, whether favourable or unfavourable. But that does not mean ignoring the profound effect which their decisions are likely to have, not only on the parties before the Court, but also upon the wider public whose concerns may well be forcibly expressed in the media.

- 2.5 The Justices accept their responsibility to promote public understanding of their work and of their decisions. But they will show appropriate caution and restraint when explaining or commenting publicly upon their decisions in individual cases.
- 2.6 If a Justice is misquoted or misrepresented in the media, the matter will be handled by the Court's communications officer in consultation with the Justice.

### **3 IMPARTIALITY**

- 3.1 Each Justice will strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the individual Justice and of the Court.
- 3.2 Each Justice will seek to avoid extra-judicial activities that are likely to cause him or her to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.
- 3.3 Each Justice will refrain from any kind of party political activity and from attendance at political gatherings or political fundraising events, or contributing to a political party, in such a way as to give the appearance of belonging to a particular political party. They will also refrain from taking part in public demonstrations which might diminish their authority as a judge or create a perception of bias in subsequent cases. They will bear in mind that political activity by a close member of a Justice's family might raise concern in a particular case about the judge's own impartiality and detachment from the political process.
- 3.4 However, the Justices recognise that it is important for members of the Court to deliver lectures and speeches, to take part in conferences and seminars, to write and to teach and generally to contribute to debate on matters of public interest in the law, the administration of justice, and the judiciary. Their aim is to enhance professional and public understanding of the issues and of the role of the Court.
- 3.5 In making such contributions, the Justices will take care to avoid associating themselves with a particular organisation, group or cause in such a way as to give rise to a perception of partiality towards that organisation (including a set of chambers or firms of solicitors), group or cause in the conduct of their judicial duties.

- 3.6 In their personal relations with individual members of the legal profession, especially those who practise regularly in the Supreme Court, the Justices will avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

### **Bias and the appearance of bias**

- 3.7 The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a Justice from taking part in a particular case is the subject of United Kingdom and Strasbourg jurisprudence which will guide the Justices in specific situations. Leading UK cases include *Porter v Magill* [2002] 2 AC 357, *Locobail (UK) Ltd v Bayfield Properties Ltd* [2002] QB 451, *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700, *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 and *Stubbs v The Queen* [2018] UKPC 30.
- 3.8 Circumstances will vary infinitely and guidelines can do no more than seek to assist the individual Justice in the judgment to be made, which involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have. What follows are merely signposts to some of the questions which may arise.
- 3.9 A Justice will not sit in a case where:
- (i) he or she has a close family relationship with a party or with the spouse or domestic partner of a party;
  - (ii) his or her spouse or domestic partner was a judge in a court below;
  - (iii) he or she has a close family relationship with an advocate appearing before the Supreme Court.
- 3.10 Sufficient reasons for not sitting on a case include:
- (i) personal friendship with, or personal animosity towards, a party; friendship is to be distinguished from acquaintance, which may or may not be a sufficient reason depending upon its nature and extent;
  - (ii) current or recent business association with a party; this includes the Justice's own solicitor, accountant, doctor, dentist or other professional adviser; it does not normally include the Justice's insurance company, bank or a local authority to which he or she pays council tax.

- 3.11 Reasons which are unlikely to be sufficient for a Justice not to sit on a case, but will depend upon the circumstances, include:
- (i) friendship or past professional association with counsel or solicitors acting for a party;
  - (ii) the fact that a relative of the Justice is a partner in, or employee of, a firm of solicitors or other professional advisers involved in a case; much will depend upon the extent to which that relative is involved in or affected by the result in the case;
  - (iii) past professional association with a party as a client; much will depend upon how prolonged, close, or recent that association was.
- 3.12 A Justice will not sit in a case in which he or she or, to his or her knowledge, a member of his or her family has any significant financial interest in the outcome of the case. 'Family' for this purpose means spouse, domestic partner or other person in a close personal relationship with the Justice; son, son-in-law, daughter, daughter-in-law; and anyone else who is a companion or employee living in the Justice's household. It is for the Justices to inform himself or herself about his or her personal financial and fiduciary interests and to take reasonable steps to be informed about the interests of members of his or her family.
- 3.13 A significant financial interest could arise, not from an interest in the outcome of the particular case, but where the decision on the point of law might have an impact upon the Justice's own financial interests. The Justice will have regard to the nature and extent of his or her interest and the effect of the decision on others with whom he or she has a relationship, actual or foreseeable.
- 3.14 Previous participation in public office or public debate on matters relevant to an issue in a case will not normally be a cause for a Justice not to sit, unless the Justice has thereby committed himself or herself to a particular view irrespective of the arguments presented to the Court. This risk will seldom, if ever, arise from what a judge has said or decided in other cases, or from previous findings against a party in other litigation.
- 3.15 If circumstances which may give rise to a suggestion of bias, or the appearance of bias, are present, they should be disclosed to the parties well before the hearing, if possible. Otherwise the parties may be placed in a difficult position when deciding whether or not to proceed. Sometimes, however, advance notification may not be possible.
- 3.16 Disclosure should be to all parties and, unless the issue has been resolved before the hearing, discussion should be in open court. Even where the parties consent to the Justice sitting, the Justice should recuse himself or

herself if, on balance, he or she considers that this is the proper course. Conversely, there are likely to be cases in which the Justice has thought it appropriate to bring the circumstances to the attention of the parties but, having considered any submissions, is entitled to and may rightly decide to proceed notwithstanding the lack of consent.

#### **4 INTEGRITY**

- 4.1 As a general proposition, the Justices are entitled to exercise the rights and freedoms available to all citizens. There is a public interest in their participating, insofar as their office permits, in the life and affairs of the community. The Justices also have private and family lives which are entitled to the same respect as those of other people.
- 4.2 However, the Justices accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience. They are conscious that it is a privilege to serve the community in this capacity. They will try to avoid situations which might reasonably lower respect for their judicial office, or cast doubt upon their impartiality as judges, or expose them to charges of hypocrisy. They will try to conduct themselves in a way which is consistent with the dignity of their office.
- 4.3 In Court, the Justices will seek to be courteous, patient, tolerant and punctual and to respect the dignity of all.
- 4.4 No Justice, or member of a Justice's family, will ask for or accept any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the Justice in connection with his or her judicial duties.

#### **5 PROPRIETY**

- 5.1 The Justices will avoid impropriety and the appearance of impropriety in all of their activities. They will not exploit the prestige of their office to obtain personal favours or benefits.
- 5.2 A Justice may not practise law while in full time office: see Courts and Legal Services Act 1990, s 75 and Schedule 11.
- 5.3 The Justices will not use or lend the prestige of their office to advance their own private interests, or those of a member of their family or of anyone else, nor will they convey or permit others to convey the impression that anyone is in a special position improperly to influence the Justice in the performance of his or her judicial duties.
- 5.4 Confidential information acquired by a Justice in his or her judicial capacity will not be used or disclosed by the Justice for any purpose not related to his or her judicial duties.

## **Outside activities**

- 5.5 Justices may form or join associations of judges or participate in other organisations representing the interests of judges.
- 5.6 Justices may appear at a public hearing before a Parliamentary committee or official body concerned with matters relating to the law, the legal system, the administration of justice or related matters.
- 5.7 Justices may serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge.
- 5.8 Justices may engage in other academic, voluntary, charitable or religious activities which do not detract from the dignity of their office or otherwise interfere with the performance of their judicial duties.
- 5.9 Subject to those constraints, Justices may properly be involved in the management of educational, voluntary, charitable or religious organisations. Care should be taken in allowing their name to be associated with an appeal for funds, even for a charitable organisation, lest it be seen as inappropriate use of judicial prestige in support of the organisation or creating a sense of obligation in donors.
- 5.10 Justices who hold high office in universities and similar institutions bear in mind the desirability of avoiding involvement in controversial situations. Moreover, in considering whether to accept office and what role to play, Justices should bear in mind the trend of some such bodies to be more entrepreneurial and to resemble a business. The greater the move in that direction, the less appropriate judicial participation may be.

## **Commercial activities**

- 5.11 The requirements of a Justice's office and terms of service place severe restraints upon the permissible scope of his or her involvement with any commercial enterprise. Some guidance is given in the decided cases referred to earlier.
- 5.12 The management of family assets and the estates of deceased close family members, whether as executor or trustee, is unobjectionable, and may be acceptable for other relatives or friends if the administration is not complex, time consuming or contentious. However, the risks, including the risk of litigation, associated with the office of trustee, even of a family trust, should not be overlooked and the factors involved need to be weighed carefully before office is accepted.

- 5.13 A full-time Justice will not receive any remuneration other than a judicial salary except for fees and royalties earned as an author or editor but may of course receive money from investments or property.

### **Gifts and hospitality**

- 5.14 Caution should be exercised when considering whether to accept any gift or hospitality. Justices will be wary of accepting any gift or hospitality which might appear to relate in some way to their judicial office and might be construed as an attempt to attract judicial goodwill or favour.
- 5.15 Although Justices cannot be remunerated for giving talks or lectures or participating in events, the acceptance of a gift or hospitality of modest value, as a token of appreciation, may be unobjectionable, depending on the circumstances. For example, a Justice who makes a speech or takes part in some public or private function should feel free to accept a small token of appreciation; this may include a contribution to charity.
- 5.16 By way of further example, the acceptance of invitations to lunches and dinners by legal and other professional and public bodies or officials, where attendance can be reasonably seen as acting in a public or professional capacity, carrying no degree of obligation, is entirely acceptable.
- 5.17 There is a long-standing tradition of association between the bench and the bar, the solicitors' profession and other professions providing legal services. This occurs both on formal occasions, such as dinners, and less formal ones. However, Justices will be cautious when invited to take part in what may be legitimate marketing or promotional activities, for example by barristers' chambers or solicitors' firms, or professional associations, where the object of judicial participation may be perceived to be the impressing of clients or potential clients. They will also take care not to associate with individual members of the profession who are engaged in current or pending cases before the Court in such a way as to give any appearance of partiality.

### **References and social activities**

- 5.18 Justices may give references for professional competence or character for people who are well known to them. A person should not be deprived of a reference because the person best able to give it is a Justice. Giving character evidence in court or otherwise is not excluded, particularly where it may seem unfair to deprive the person concerned of the benefit of such evidence, but this should be undertaken only exceptionally. Consultation with the President or Deputy President of the Court is advisable before taking a decision to give evidence.

- 5.19 Justices will assess social and other activities in the light of their duty to maintain the dignity of their office and not to permit associations which may affect adversely their ability to discharge their duties.

### **Online presence and social media**

- 5.20 Justices are aware that their extra-judicial activities include their online presence; they will bear in mind that online discussions are not private, that comments may be copied and have an unintended readership and longevity; and that it is increasingly easy to piece together information on a Justice from a variety of sources. They will be wary of publishing online any more personal information than is necessary and will exercise extreme caution in discussing both judicial and personal matters. This includes their participation in social media.

## **6 EQUALITY**

- 6.1 A Justice should be aware of, and understand, diversity in society and differences arising from matters such as gender, race, ethnicity, colour, national origin, religion, caste, disability, birth or marital status, sexual orientation, socio-economic or educational or occupational background, and the like. A Justice will not, by words or conduct, show any bias against or preference towards any person or group on any such ground.
- 6.2 In court, the Justices will strive to ensure that no one in the court is exposed to any display of bias or prejudice on any such ground and that all are treated with equal respect by the Justices, their staff and everyone appearing in or attending the court. The court will strive to make reasonable adjustments for people with disabilities and for those who wish to manifest their religion, so far as it is practicable to do so.

## **7 COMPETENCE AND DILIGENCE**

- 7.1 As Lord Bingham of Cornhill stated in his 1993 lecture to the Society of Public Teachers of Law, entitled *Judicial Ethics*:

"It is a judge's professional duty to do what he reasonably can to equip himself to discharge his judicial duties with a high degree of competence."

Plainly this requires the judge to take reasonable steps to maintain and enhance the judge's knowledge and skills necessary for the proper performance of judicial duties, to devote the judge's professional activity to judicial duties and not to engage in conduct incompatible with the diligent discharge of such duties.

- 7.2 Beyond stating those general propositions, it is not seen as the function of this guide to consider judicial duties and practice with respect, for example, to judgment writing and participation in judicial education. These topics are better dealt with, insofar as they are not prescribed in the rules of the Supreme Court, in Practice Directions or in case law, by guidance from the President or Deputy President of the Court, and in discussion amongst the Justices.

## MITTEILUNGEN DES EURO- PÄISCHEN PATENTAMTS

### Informationen über die Durch- führung von Rücksprachen und mündlichen Verhand- lungen als Videokonferenz

Ab 1. Januar 1998 steht ein neues System für die Kommunikation zwischen dem EPA und den Benutzern des europäischen Patentsystems zur Verfügung: Anmelder und ihre Vertreter können dann beantragen, daß Rücksprachen oder mündliche Verhandlungen vor einer Prüfungsabteilung als Videokonferenz durchgeführt werden. Ob diese neue Dienstleistung auf andere Verfahren wie Einspruchsverfahren und Verfahren vor dem EPA als mit der internationalen vorläufigen Prüfung beauftragte Behörde nach dem PCT ausgedehnt werden kann, wird später entschieden, wenn ausreichend Erfahrung mit dem europäischen Patenterteilungsverfahren gesammelt worden ist.

#### 1. Antrag auf Durchführung einer Videokonferenz

Anträge auf die Durchführung von Rücksprachen oder mündlichen Verhandlungen als Videokonferenz sollten beim EPA in der gleichen Weise eingereicht werden wie alle anderen Anträge betreffend eine anhängige europäische Patentanmeldung. Insbesondere ist die Anmeldenummer anzugeben. Soll eine mündliche Verhandlung als Videokonferenz abgehalten werden, wird der Anmelder aufgefordert, vorab auf seinen Anspruch zu verzichten, daß nach der Videokonferenz eine mündliche Verhandlung in der herkömmlichen Form in den Räumlichkeiten des EPA stattfindet. Daher sollte der Antrag folgende Erklärung enthalten:

"Der Anmelder verzichtet vorab und unwiderruflich auf sein Recht, nach der beantragten Videokonferenz eine mündliche Verhandlung in der herkömmlichen Form in den Räumlichkeiten des EPA über denselben Gegenstand durchführen zu lassen."

#### 2. Behandlung des Antrags auf Durchführung einer Videokonferenz

Der Antrag wird dem beauftragten Prüfer, der mit der Bearbeitung der

## INFORMATION FROM THE EUROPEAN PATENT OFFICE

### Information concerning inter- views and oral proceedings to be held as a video conference

From 1 January 1998 on, a new means of communication between the EPO and users of the European patent system will be available: applicants and their representatives will be able to request that an interview or oral proceedings before an examining division be held as a video conference. Whether this new service can be extended to other proceedings, such as opposition proceedings and proceedings before the EPO acting as International Preliminary Examining Authority under the Patent Cooperation Treaty, will be decided at a later stage once sufficient experience has been gained in European patent grant proceedings.

#### 1. How to request a video conference

Any request for an interview or oral proceedings to be held as a video conference should be filed with the EPO in the same way as any other request concerning a pending European patent application. In particular, the number of the application concerned has to be indicated. If oral proceedings are to take place as a video conference, the applicant will be asked to forgo in advance his right to oral proceedings being held in the traditional form at the EPO premises after the video conference. In such a case, the request should therefore contain the following declaration:

"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."

#### 2. How the EPO will deal with a request for a video conference

The request will be forwarded to the primary examiner in charge of the

## COMMUNICATIONS DE L'OFFICE EUROPEEN DES BREVETS

### Note d'information concer- nant les entretiens et les procédures orales à organiser sous forme de visioconférence

Un nouveau moyen de communication entre l'OEB et les utilisateurs du système de brevets européen sera disponible à compter du 1<sup>er</sup> janvier 1998: les demandeurs et leurs mandataires pourront demander qu'un entretien ou qu'une procédure orale devant une division d'examen soient organisés sous forme de visioconférence. La décision d'étendre éventuellement ce nouveau service à d'autres procédures, telles que les procédures d'opposition et les procédures devant l'OEB agissant en qualité d'administration chargée de l'examen préliminaire au titre du Traité de coopération en matière de brevets, sera prise à une date ultérieure lorsqu'une expérience suffisante aura été acquise dans le cadre de la procédure de délivrance de brevets européens.

#### 1. Modalités de demande d'une visioconférence

Toute demande d'entretien ou de procédure orale à organiser sous forme de visioconférence doit être déposée auprès de l'OEB selon les modalités en vigueur pour toute autre requête concernant une demande de brevet européen en instance. En particulier, le numéro de la demande concernée doit être indiqué. Si une procédure orale doit être organisée sous forme de visioconférence, le demandeur sera prié de renoncer par avance à son droit à la tenue d'une procédure orale sous forme traditionnelle dans les locaux de l'OEB après la visioconférence. Dans ce cas, il est par conséquent recommandé d'inclure dans la demande la déclaration suivante:

"Le demandeur renonce par avance et de manière irrévocable à son droit à la tenue d'une procédure orale sous forme traditionnelle dans les locaux de l'OEB pour le même objet après la visioconférence demandée."

#### 2. Examen de la demande de visio- conférence par l'OEB

La demande sera transmise pour décision au premier examinateur

betreffenden Akte befaßt ist, zur Entscheidung zugeleitet. Soll eine mündliche Verhandlung als Videokonferenz durchgeführt werden, so ist die Prüfungsabteilung für die Entscheidung zuständig. Je nach Sachlage entscheidet der beauftragte Prüfer bzw. die Prüfungsabteilung nach eigenem Ermessen und im Einzelfall, ob eine Videokonferenz zweckdienlich ist. Kann dem Antrag nicht stattgegeben werden, so erhält der Antragsteller eine Mitteilung, in der die Gründe für die Ablehnung angegeben sind. In dieser Angelegenheit ergeht keine beschwerdefähige Entscheidung.

Wird dem Antrag stattgegeben, so wird mit dem Antragsteller ein Termin an einem Werktag während der Arbeitszeit des EPA abgesprochen. Dieser Termin wird in einem Schreiben oder per Fax bestätigt, das gegebenenfalls weitere sachdienliche Informationen enthält. Gleichzeitig wird nach dem amtsinternen Reservierungsverfahren ein Videokonferenzraum reserviert.

### 3. Erforderliche Ausstattung

Die Videokonferenzräume des EPA sind mit je einer ISDN-Videokonferenzanlage ausgestattet (H.261/H.320 ITU-kompatibel, Kanalbündelung oder H.244 Videocoding CIF H.261, Audiocoding G.722, maximale Übertragungsrate 384 Kbit/s bei Ausnutzung von 6 Kanälen). Darüber hinaus stehen in jedem Videokonferenzraum ein Faxgerät und eine Dokumentenkamera mit Zoomfunktion zur Verfügung. Videokonferenzen müssen mit einer Übertragungsrate von mindestens 256 Kbit/s durchgeführt werden. Der Anmelder oder sein Vertreter hat zu gewährleisten, daß seine Videokonferenzanlage diese Übertragungsrate anbietet. Der Einsatz von PC-basierten Anlagen mit einer maximalen Übertragungsrate von 128 Kbit/s ist in Verfahren vor dem EPA nicht zulässig.

### 4. Standorte der Videokonferenzräume des EPA

Die Videokonferenzräume des EPA in München, Den Haag und Berlin werden in europäischen Patenterteilungsverfahren zur Verfügung stehen. Die vom Anmelder zu benutzende Videokonferenznummer wird ihm in der Mitteilung bekannt gegeben werden, in der die Videokonferenz zugelassen wird.

corresponding file for decision. In the case of oral proceedings to be held as a video conference, the competence for the decision lies with the examining division. The first examiner or the examining division, as the case may be, has a discretionary power and will, on a case by case basis, decide on the suitability of video conferencing. If the request cannot be allowed, the person making the request will be informed by a communication indicating the reasons for the refusal. No appealable decision will be issued on the matter.

If the request is allowed, the person making the request will be contacted in order to arrange the date and time of the video conference, which has to be on a working day within Office working hours. This will be confirmed by a written communication or fax containing any further appropriate information. In parallel, the internal procedure for reserving the Office video conference studio will be followed.

### 3. Equipment required

The EPO video-conference studios employ ISDN technology (H.261/H.320 ITU compatible, channel bonding or H.244 Videocoding CIF H.261, Audiocoding G.722, max. transmission rate 384 Kbit/s using 6 channels). Each studio has a fax device and a document camera with zoom function. Video conferences must be carried out at a transmission rate of at least 256 Kbit/s. The applicant or representative has to ensure that his video-conference equipment will meet the minimum transmission rate. The use of video-conference equipment linked to personal computers with a maximum transmission rate of 128 Kbit/s is not possible in proceedings before the EPO.

### 4. Location of the video-conference studios of the EPO

The video-conference studios of the EPO in Munich, The Hague and Berlin will be available in European patent grant proceedings. The video conference call number to be used by the applicant will be indicated in the communication allowing the video conference.

responsable du dossier correspondant. En cas de demande de procédure orale sous forme de visioconférence, la compétence en matière de décision relève de la division d'examen. Le premier examinateur ou la division d'examen, selon le cas, sont investis d'un pouvoir discrétionnaire et décideront au cas par cas de l'opportunité d'une visioconférence. S'il ne peut être fait droit à la demande, le requérant sera informé par une notification des motifs du refus. Les décisions rendues ne seront pas susceptibles de recours.

S'il est fait droit à la demande, le requérant sera contacté afin de fixer la date et l'heure de la visioconférence, qui devra se tenir un jour ouvrable et lors des heures de travail de l'Office. Cette décision sera confirmée par une notification écrite ou par télécopie avec mention de toutes les informations supplémentaires nécessaires. Parallèlement, la procédure interne de réservation du studio de visioconférence sera suivie.

### 3. Equipement nécessaire

Les studios de visioconférence de l'OEB font appel à la technologie RNIS (H.261/H.320 compatible UIT, liaison par canaux ou H.244 codage vidéo CIF H.261, codage audio G.722, débit de transmission maximum de 384 Kbit/s avec utilisation de 6 canaux). Chaque studio dispose d'un télécopieur et d'une caméra pour documents équipée d'une fonction de zoom. Les visioconférences doivent se dérouler à un débit de transmission minimum de 256 Kbits/s. Le demandeur ou son mandataire doivent s'assurer que leur équipement de visioconférence répond au débit de transmission minimum. L'utilisation d'un équipement de visioconférence branché à des PC d'un débit de transmission maximum de 128 Kbits/s n'est pas possible pour les procédures devant l'OEB.

### 4. Liaison téléphonique avec les studios de visioconférence de l'OEB

Les studios de visioconférence de l'OEB à Munich, La Haye et Berlin pourront être utilisés lors des procédures de délivrance de brevets européens. Le numéro d'appel de visioconférence sera communiqué au déposant dans la notification autorisant la visioconférence.

**5. Kosten**

Das EPA erhebt keine spezielle Gebühr für Rücksprachen oder mündliche Verhandlungen, die als Videokonferenz durchgeführt werden. Der Antragsteller hat die Verbindungskosten zu tragen; er wird vom EPA aufgefordert, zum abgesprochenen Termin die angegebene Nummer des Videokonferenzraums des Amtes anzuwählen.

Für weitere Informationen steht Herr Prussen, Referat Gebäudeverwaltung (Tel.: (+49-89) 23 99-44 20) zur Verfügung.

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**5. Costs**

The EPO does not require the payment of a specific fee for an interview or oral proceedings to take place as a video conference. The person making the request will have to bear the transmission costs, and will be asked by the EPO to dial the indicated number of the video-conference device of the Office on the date and at the time which have been agreed.

Further information can be obtained by contacting Mr Prussen, Building Administration Department (Tel.: (+49-89) 23 99-44 20).

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**5. Coûts**

L'OEB n'exige le paiement d'aucune taxe particulière pour un entretien ou une procédure orale à organiser sous forme de visioconférence. Le requérant devra prendre à sa charge les coûts de transmission et sera invité par l'OEB à composer le numéro du système de visioconférence de l'Office indiqué à la date et à l'heure convenues.

Des informations supplémentaires peuvent être obtenues auprès de M. Prussen, service de l'administration des bâtiments (Tél.: (+49-89) 23 99-4420).

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