



## G1/21

### Written Statement in accordance with article 10 of the Rules of Procedure of the Enlarged Board of Appeal

#### Introduction

UNION of European Practitioners in Intellectual Property (UNION-IP) is an association of practitioners in the field of Intellectual Property, that is of individuals whose principal professional occupation is concerned with Patents, Trade Marks or Designs and related questions and who carry on their profession independently or as employees. It aims on the one hand to work continuously on current developments in intellectual property in Europe, especially by making submissions during the preparation of proposed laws and treaties with the intention of influencing them; and on the other hand to devote itself to the improvement of professional and personal understanding between European practitioners in the intellectual property field in different countries and different branches of the profession.

This amicus curiae brief to the Enlarged Board is filed on behalf of UNION-IP in line with the provisions announced by the Enlarged Board by a communication according to Article 10(2) RPEBA on 24 March, 2021, allowing third parties to submit written statements in the course of proceedings under Article 112 EPC in G 1/21. These proceedings were initiated upon a referral of a question of law by Technical Board of Appeal 3.5.02 in T 1807/15.

#### The referred point of law:

The referred point of law is the following:

Is the conduct of oral proceedings in the form of a videoconference compatible with the right to oral proceedings as enshrined in Article 116(1) EPC if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference?

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**Rui Gomes – Patents Commission President**

[www.union-ip.org](http://www.union-ip.org)

UNION OF EUROPEAN PRACTITIONERS IN INTELLECTUAL PROPERTY, AISBL (ENT. NO.0548.830.057), BOULEVARD GENERAL WAHIS 15, 1030 BRUSSELS (BE)

Email: [ruigomes@jpcruz.pt](mailto:ruigomes@jpcruz.pt)

Tel.: [+351 213 475 020]

Fax:

UNION-IP c/o J. Pereira da Cruz

Rua Vitor Cordon 10A

1249-103 Lisboa, Portugal



### Position of UNION-IP

The referred question has turned out to be quite controversial amongst the members of UNION-IP. Part of our membership strongly believes that Oral Proceedings are in principle to be held in person; that the drafters of the EPC did not consider other forms of oral proceedings; at the time of drafting the EPC conference calls were already technically possible; during the revision of the EPC ViCo was already available; and that there are principles of procedural law generally recognised in the Contracting States indicating that oral proceedings should be in person and that the EPO should take account of these principles under Art. 125 EPC. Another part of our membership is equally strong in their position that ViCo, while introduced as emergency measure in response to the current pandemic, meets the requirements of Art. 116 (1) and has proven to be a well-functioning alternative to in person hearings with the added benefits of increased efficiency for all parties and the creation of a more level playing field for parties and patent attorneys regardless of their place of business.

In view of these strongly diverging opinions, it is UNION-IP's position that even if hearings by video conference fall in principle within Art. 116(1), and even though ViCo has been, and will most likely be in the future, a useful tool, parties should not be altogether deprived of the right to attend hearings in person.

In the view of UNION-IP, oral proceedings held by ViCo have enabled procedures to continue during the pandemic in a rather convenient manner and have provided a good solution to most cases. Travels within Europe have been and are still discouraged, safety measures at borders including possible quarantines are still in place, and these and other constraints would have provoked delays or even cancellation of the oral proceedings were they to have been held physically. However, even though oral proceedings held by ViCO have been useful during the pandemic, there is no reason why they should be mandatory, as the pandemic declines.

The main question that arises is with regard to the maintenance of oral proceedings by ViCo as a default solution in the post-pandemic times, and more specifically when:

- i) at least one party does not wish to conduct oral proceedings through ViCo, or
- ii) where the case may be more complex, namely when it includes taking evidence.

In relation to point i), UNION-IP believes that in most cases the parties will be willing to conduct oral proceedings through ViCo. So, we believe that only in very particular cases will requests be made to hold oral proceedings at the EPO premises. However, UNION-IP considers that issues with ViCo arise when one of the parties wishes to have them in person, where there are good reasons for that wish.

In what regards taking of evidence, there is a general principle existent in national laws – called immediacy or *immédiateté* in French – that translates into the need of personal contact of the judge when taking evidence (for instance, through witness hearings). In our view, this principle tells us that there must be a direct, in-person contact, personal, between the judge and the person that it is being heard. This allows the judge to be aware of all the relevant facts and to properly evaluate the evidence produced. It serves the purpose of avoid misperceptions, errors and “false” statements.

Conducting oral proceedings with ViCo causes no major problem when only attorneys are being heard in first instance proceedings. However, if any witness needs to be heard the case is different, as several questions may arise, such as lack of certainty on which documents are in the possession of the witness during the hearing or which kind of guidance is the witness receiving. Of course, parties can agree in having the proceedings by ViCo, even when witnesses need to be heard but in fact, it would be prudent that in person proceedings would be the normal rule in appeal proceedings or where witnesses are to be heard, and not ViCo.

It is our view that a party should have the right to appear in person at least once during proceedings.

This would mean that:

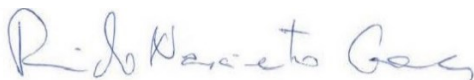
In first instance proceedings (both Opposition and Examination) without witnesses, the division would decide when oral proceedings by ViCo are appropriate.

In first instance proceedings with witnesses (taking of evidence), for using ViCo all parties would have to approve.

Before the Boards of Appeal, all parties would have to give their approval to the use of ViCO.

In conclusion, UNION-IP believes that ViCo oral proceedings have been quite positive during the pandemic, and have provided to be a convenient solution to expedite proceedings that otherwise would have been delayed or even cancelled. However, this should not mean that ViCo should become the standard once the pandemic declines.

*Signed at Brussels on 27 April 2021*



Rui Gomes  
President of the Patents Commission



Fabian Edlund  
President of UNION-IP



Francisco J. Sáez  
Member the Patents Commission