

have given their consent to the conduct of oral proceedings in the form of a videoconference?

In G 1/21 of 16 July 2021, the Enlarged Board held that 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 the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference. The Enlarged Board found 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, a general emergency (i.e. the COVID-19 pandemic), into account.

The Enlarged Board interpreted Art. 116 EPC and taking in particular the object and the purpose of oral proceedings into account, namely to give parties an opportunity to plead their case orally, came to the conclusion that oral proceedings in the form of a videoconference were oral proceedings within the meaning of Art. 116 EPC. Even if the videoconference format has certain shortcomings, it provides parties with an opportunity to present their case orally.

The Enlarged Board then considered whether a videoconference is equivalent to an in-person hearing and whether it is a suitable format for conducting oral proceedings. It acknowledged that oral proceedings by videoconference cannot, at least for the time being, provide the same level of communication as is possible when all participants are physically present in the courtroom. The Enlarged Board concluded that the limitations currently inherent in the use of video technology made this format suboptimal for oral proceedings, though normally not to such a degree that a party's right to be heard or right to fair proceedings was seriously impaired.

The Enlarged Board also discussed whether a party has a right to oral proceedings in person. Parties wishing to have oral proceedings held in person could only be denied this option for good reasons. Firstly, there must be a suitable alternative. If in a particular case a videoconference is not suitable, the oral proceedings will need to be held in person. 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. 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.

In T 1197/18 the board concluded that the pandemic was a general emergency and that, as had been ruled in G 1/21, its holding oral proceedings via a videoconference in these circumstances was compatible with the EPC, even if the appellant had not given their consent.