



Registry of the Enlarged Board of Appeal
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Amicus Curiae Brief of EPLIT concerning G1/21

27 April 2021

Summary

The members of EPLIT welcome the possibility of holding oral hearings by videoconference provided that all parties agree and that the technical means of communication are state of the art and allow for effortless conversation.

However, in order to guarantee each party's right to be heard, a party should always have the right to attend oral hearing in person. This also applies if (all) other parties have decided to participate in the hearing by videoconference.

EPLIT is therefore of the opinion, that:

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

The Composition of the Panel of the Enlarged Board

EPLIT is of the opinion that the Chairman of the Enlarged Board of Appeal, due to reasonable concern of bias under Art. 24 (3) EPC, cannot chair the Board in these proceedings.

Firstly, it should be clarified that EPLIT has no concerns about the competence and personal integrity of the Chairman Mr Carl Josefsson.

However, the Chairman was directly involved in the drafting and introduction of Rule 15(a) RPBA in an important and responsible position.

We refer to the interlocutory decision R 19/12, in which the Enlarged Board of Appeal followed the request of the applicant there to exclude the then Chairman from participating in the decision due to concerns of bias.



In the conclusion of its extensively reasoned decision, the Board of Appeal states in paragraph 24.3 of the grounds:

„Es ist für die vorliegend zu treffende Entscheidung nicht maßgebend, ob der ersetzte Vorsitzende tatsächlich befangen ist, und ob seine weiterbestehende Einbindung in das Verwaltungshandeln ihm subjektiv zugerechnet werden kann. Es ist auch nicht maßgebend, ob die Große Kammer in der vorliegenden Besetzung den ersetzten Vorsitzenden für befangen hält. Maßgeblich ist, ob ein vernünftiger, objektiver und informierter Betrachter unter Berücksichtigung der Umstände des Falles zu dem Schluss gelangen würde, dass der Beteiligte die Unbefangenheit des abgelehnten Mitglieds mit gutem Grund in Zweifel ziehen könnte (s.o. Nr. 8).“

Or in English (our translation):

For the decision to be made presently it is not decisive whether the replaced Chairman is in fact biased, and whether his continuing integration in action by administration can be attributed to him on a subjective level. Nor is it decisive whether the Enlarged Board in the present composition considers the replaced Chairman biased. What is decisive is whether a reasonable, objective and informed observer, taking into account the circumstances of the case, would arrive at the conclusion that the party has good reason to place in doubt the impartiality of the objected member (see above No. 8).

Such is the situation here: in the view of a reasonable, objective and informed observer the chairman cannot judicially review an administrative decision in the making of which he himself played a decisive role.

About EPLIT

1. EPLIT was founded in 2013 as the association of European Patent Attorneys who represent and advise clients in patent disputes before the European Patent Office and national patent offices, and in patent litigation before national courts and, hopefully, in the future, before the Unified Patent Court (UPC).

EPLIT's main objectives are to promote user-friendly, fair, efficient and cost-effective patent disputes in Europe and to promote any measures for improving patent disputes and in particular litigation, including advocacy.

2. For EPLIT, it is of fundamental importance to strike a balance between, on the one hand, procedural efficiency and predictability and, on the other, the right of the parties to be heard.



A further aim of EPLIT is to strengthen the relationship between practitioners entitled to represent parties in patent disputes in Europe.

Member Surveys

3. EPLIT is an association with a diverse membership. The Board and the chairs of the working groups can only speak on behalf of EPLIT if it is ensured that they represent the opinion of the majority of the members. We therefore conducted two member surveys, a first in November 2020 with respect to the introduction of Art. 15a RPBA, and now a second in April 2021 in light of this amicus curiae brief.

EPLIT also provided its input with a letter dated November 27, 2020 to Mr Carl Josefsson, President of the Boards of Appeal and still Chairman of the Enlarged Board of Appeal in the present case when introduction of the new paragraph 15a (oral proceedings by videoconference) of the Rules of Procedure of the Boards of Appeal was discussed.

4. A period of about six months has lapsed between the two member surveys, and in that time EPLIT's members have gained considerably more experience in conducting oral proceedings by videoconference. Of course, the experience of the members of EPLIT is not representative for all European patent attorneys. However, as there are many patent attorneys involved in EPLIT who are very active in patent disputes, it can be assumed that the result of the member survey reflects the opinion of a significant section of the European patent attorneys.

We summarise the results of the surveys in the following key points:

- a. Our members expressly welcome the possibility of holding oral proceedings as a videoconference. It is seen as advantageous that time and costs can be saved and, in particular, that the impact on the environment can also be reduced.
- b. However, a very large majority (75%) of all participants in the November survey oppose the possibility of the EPO or the Boards of Appeal being able to determine, against the will of a party, that oral proceedings should take place in the form of a videoconference. Oral proceedings should only take place as a videoconference if all parties agree. A party or parties should however be able to attend Oral Proceedings by videoconference should they so choose.

The corresponding question was also answered in the April survey by members who had already participated in oral proceedings via videoconference. The question was whether oral proceedings - in this case before the Boards of Appeal - should also take place as videoconferences once the pandemic is over.



Here are the answers:



Consequently, the majority of the members are of the opinion that the hearings should take place either in person or - if all parties agree - also as videoconferences. The scenario that a Board on its own motion and without consent can determine whether an oral hearing should be held by videoconference is supported by only 17.3% of the participants.

- c. The April survey shows that the technical problems, which were already criticized in the October survey, have not been fixed. The members complain in particular that the video and audio connection is often not good enough. However, experiences are different, many members found the connection quality to be good. Generally, the members prefer the use of Zoom versus Skype for Business.
- d. Even if the connection quality is considered more or less satisfactory, most members complain about the essentially complete loss of "non-verbal" communication.

Some representative statements of the April survey are reproduced in the following:

My major point of criticism is the inevitable loss of (subconscious) human interaction (e.g., through eye contact which is impossible to achieve in a ViCo with more than two participants) and level of attention through the "digital filter". This results in the loss of an important element of advocacy which should not be underestimated from my experience of more than 200 oral proceedings throughout the past 6 years.

The interaction between us attorneys and the EPO or BoA members is rather limited! No face reading possible.



This was also criticized in the November survey:

There is hardly any non-oral communication and feedback due to the small images on the screen.

A lot is lost in VC. Not only is it important to meet the examiners in person and get a feel for them, there is a lot of nonverbal interaction that is completely lost during the VC.

The situation is very artificial and a truly focussed debate about the topics is difficult to perform. Non-verbal communication gets lost to a high extent.

VC is really good for sharing information. VC lacks many important 'dimensions' of proper human communication.

- e. An important aspect of proceedings before the EPO is that for applicants and patentees, the Boards of Appeal are the last resort if they lose. This is not the case for opponents as they can initiate revocation actions before national courts or, possibly, before the UPC in the near future.

Although the technical conditions are considered to be similar, videoconferencing is viewed more critically before the Boards of Appeal when compared with oral proceedings before the examining or opposition divisions: the fact that this is the final instance at the EPO, lack of non-verbal communication and the limited possibilities to use visual aids in the presentation become even more critical.

In the following, some quotations on this issue are reproduced:

Apparently, BA cases are very important to the client. Therefore, the attorney should have the best options to represent his/her client.

It is the final instance - no further chances. ViCo. is good but sub-optimal.

If all parties involved agree to hold the proceedings by videoconference, it is fine by me. If one party does not wish a videoconference, OP should be held at the EPO.



- f. The participants of the survey do not only see problems in communicating with the Board, but also in communicating with their own clients who typically are in a different location than the attorney attending the videoconference. Again some statements are reproduced:

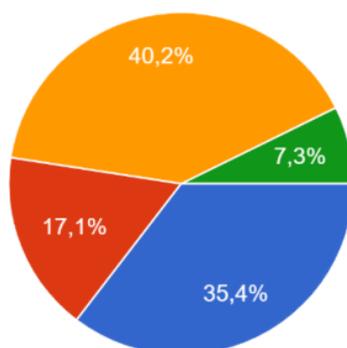
A videoconference cannot adequately replace looking in each others' faces, reading the body language of the division/board/opposed party, conferring back with the client/colleague by simply whispering to the person sitting next to me

Several of my clients expressed concern about the possibility to discuss with the team.

We had to set up a parallel communication channel (separate videoconference) with my colleague for internal communication. Handling two videoconferences at the same time is not easy. In ex parte it was possible to focus on only one speaker at a time. Inter partes seems to be much more complex and difficult to handle.

- h. For completion, we show a further diagram that reflects the opinions of the participants quite well. This is taken from the original survey in November 2020:

When asked whether oral proceedings before the Boards of Appeal should continue to be held as videoconferences after the Corona pandemic, the participants replied as follows:



- No, OPs before BA should be held at the EPO premises
- Yes, but OPs by videoconference should only be at the request of at least one party
- Yes, but OPs by videoconference should only be at the request of all parties
- Yes, and OPs by videoconference may be decided by the BA on their own motion



Oral Proceedings

5. The right to have civil claims decided at a hearing is a human right. The first sentence of Art. 6 of the European Convention on Human Rights reads:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

As is well known, all Contracting States of the European Patent Convention are also Contracting Parties of the European Convention on Human Rights and the latter is therefore directly applicable in proceedings before the EPO (interlocutory decision R 19/12).

This provision concerns judicial proceedings, so strictly speaking it is only applicable to proceedings before the Boards of Appeal, however, opposition proceedings before the first instance in particular opposition cases, are also quasi-judicial proceedings for which this provision should also apply.

In Art.116 EPC this right is implemented. If the EPO or the Board of Appeal deems it necessary, or if one of the parties so requests, oral proceedings are held, which except in exceptional cases, are public.

Art. 116 EPC further provides that oral proceedings shall be held *before* the appropriate judicial body.

The right to be heard

6. Art. 113 (1) EPC reads (emphasis added):

The decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

Thus, the decisive question is whether a hearing by videoconference takes place before the respective adjudicating body and whether it gives the parties sufficient opportunity to present their full case.

7. The majority of our members are rather concerned that the right to be heard will be affected by being compelled to participate in a videoconference, even if the party has objected to it.



Para. 5 of the explanatory remarks to Art. 15a RPBA states that Article 116 EPC does not require that the parties and the Board members be physically present in the hearing room.

This is true, but this is only because on 5 October 1973, nobody considered the possibility that oral proceedings could take place via videoconference.

8. On the other hand, oral proceedings by videoconference could well have been considered when the EPC was revised on 22 November 2000. For example, on 1 January 2001, § 128a ZPO was introduced into the German Code of Civil Procedure, allowing parties to participate in oral proceedings remotely.

Obviously, the revision of the EPC did not lead to the conclusion that oral proceedings could or should take place via videoconference. At least, the *travaux préparatoires*, according to our research, do not indicate that this was considered at the time of the revision.

9. Because a plurality of cases are very important for the parties and the appeal procedure is the last chance for applicants or patentees to obtain or maintain the patent, they must have the opportunity to present their arguments in the same way as they would in a face-to-face oral hearing.

This includes the possibility of making explanatory sketches or presenting three-dimensional designs. Both are not possible or only possible to a limited extent in a videoconference.

In addition, the question of technical quality is not addressed in the "Notice from the European Patent Office dated 10 November 2020 concerning oral proceedings before examining and opposition divisions, and consultations, by videoconference" dated November 10 2020, nor in the new Art. 15a RPBA. At what point is the quality of the oral proceedings impaired? How often and how long may an oral hearing be interrupted in the event of transmission problems? These are all problems that do not arise in a face-to-face hearing.

10. In its decision G 4/95, the Enlarged Board of Appeal points out in para. 4.c of the grounds:

Article 116 EPC provides that oral proceedings shall take place either at the instance of the EPO, or at the request of any party to proceedings. Thus oral proceedings are an optional extra. Both opposition and opposition appeal procedures are primarily written procedures. Nevertheless, oral proceedings are of critical importance to the decision-making process.



According to our members, an oral hearing by videoconference is more similar to a written procedure than a real oral hearing. Since, as the Enlarged Board of Appeal rightly observes, the oral hearing takes place at a critical stage of the decision-making process, it is a clear violation of Art. 113(1) EPC if an oral hearing takes place by videoconference against the will of the party.

11. In the decision G 2/19, the Enlarged Board of Appeal writes on page 39, paragraph IV:

1. Im Ausgangspunkt mag durchaus ein Zusammenhang zwischen Gewährung bzw. Verletzung des rechtlichen Gehörs und dem räumlich-zeitlichen Rahmen für eine anberaumte mündliche Gerichtsverhandlung anzuerkennen sein. Wird dafür ein gänzlich aus dem üblichen Rahmen fallender Ort oder Zeitpunkt gewählt, kann dies den Rechtssuchenden als mangelnde Bereitschaft erscheinen, sich mit ihrem Anliegen zu befassen und sie können sich dadurch in zu missbilligender und rechtlich erheblicher Weise in der Wahrnehmung ihrer Rechte beeinträchtigt sehen.

In English (our translation):

At the outset, a connection between the granting or violation of the right to be heard and the spatial and temporal framework for an oral court proceedings may be recognised. If a place or time is chosen that is completely out of the ordinary, this may appear to the litigants as a lack of willingness to deal with their matter and they may see themselves impaired in the exercise of their rights in a way that is to be disapproved of and legally significant.

This is a concern that our members share.

Contrary to Art. 116 EPC, the oral proceedings in a videoconference do not take place before the judicial body, but before a video screen. This is not the same, as all our members report, the communication is completely different compared to the situation where all those participating in the hearing are in the same room.

Whether the judicial body has the "*willingness*" to "*deal with the party's request*" which is a precondition that the Enlarged Board of Appeal considers so important is no longer or only insufficiently ascertainable for the parties.



The right to be heard from the perspective of an attorney

12. For the representative of a party, irrespective of whether said representative is an employee of the party or its European patent attorney, representing the party in oral proceedings is always a particular task and challenge, even if the representative has the benefit of experience of a large number of previous hearings.

The first part of this particular task concerns the preparation of the representative, who must know all the technical and legal aspects of the case and must prepare for developments that are not necessarily foreseeable, for example new arguments, surprising new aspects voiced by the Board (or the Division) and filing or reacting to new Auxiliary Requests.

13. This preparation does not change if the oral proceedings are held by videoconference.

During the actual hearing, the representative must, on the one hand, be highly concentrated when pleading himself. On the other hand, he must be highly concentrated when listening to remarks by the chairman or the members of the respective judicial body or the opponent. While listening, he has to plan his strategy for a reply, find the right arguments, etc., i.e. the representative has to think on different levels at the same time. It is particularly important for the representative, during the proceedings, to keep an eye on the judicial body, to gauge the reaction to different arguments, to classify any reactions correctly and to react to them properly.

14. An oral hearing is already a very complex process for the representative. It becomes significantly more complex when the hearing takes place via video conferencing. This applies, in particular, for representatives with less experience in holding Oral Proceedings, for example company representatives from small and medium-sized companies. The level of complexity and difficulty increases if translations are required, which are also generally more difficult to comprehend in a videoconference setting, in particular in the "90%-setting", in which the translation dominates but any immediate reaction of the Board (or the Division) can be heard in the background.

The representative is also responsible for ensuring that his technical equipment works. Therefore, he must constantly pay attention not only to say the right words, but also to operate his equipment correctly during the proceedings. This is not difficult in itself, but this also increases the complexity of the process.

15. Above and beyond, one essential problem for the representative, as reported in unison by the members of EPLIT, as is also in line with the experience of the authors of this letter, is the lack of feedback. Even if one uses a large screen, the images of the participants are too small and too blurry to capture their reaction in the way that



is possible when one is seated in the same room. If one chooses to display in such a way, which videoconferencing technology readily allows, that the speaker is shown enlarged, the video image of the other participants becomes even smaller and it is even less possible to discern their reaction.

16. In another perhaps trivial but nevertheless important observation, it is commonly accepted that artists perform better in a performance with an audience than when they have to speak or sing in front of an empty hall.

European patent attorneys are not artists - at least most of them are not - but even for them the reaction and the mood in the hearing room is important. They recognize when the chairman is bored by a lecture and can then change the focus of their arguments accordingly. They also recognize e.g. when the other side's attorney gets nervous and then know that they have hit a point that is also important in his opinion.

This feedback, this personal perception of the other attendants, is what is referred to, for example, in the German Code of Civil Procedure as the "*immediacy of oral proceedings*." And exactly this feedback and this personal perception is the quintessence of oral proceedings, which is guaranteed by Art. 116 and Art. 113 (1) EPC.

Therefore, the scheduling of oral proceedings by videoconference without the consent of all parties violates Art.116 and Art. 113(1) EPC.

Art. 125 EPC

17. Since the question of videoconferencing is not regulated in the EPC, Art. 125 EPC provides that the principles of procedural law generally recognised in the Contracting States must be taken into account.

In the short time available, it has not been possible to obtain a comprehensive picture of how the issue of videoconferencing is handled by national patent offices and courts.

18. In Italy, court hearings are held by videoconference because of the Corona pandemic. However, particularly important hearings are being postponed.

In Germany, the possibility of holding a hearing in court by videoconference is regulated in § 128a Code of Civil Procedure, which was introduced in 2001 and revised in 2013.



This provision reads as follows:

§ 128a Oral Hearing by means of sound and vision transmission

(1) The Court may, upon request or of its own motion, authorise the parties, their agents and advisers to be present in any other place during oral proceedings and to perform procedural acts from there. The hearing shall be transmitted simultaneously in sound and vision to that place and to the hearing room.

(2) The Court may, on application, permit a witness, expert or party to be present in another place during questioning. The questioning shall be transmitted simultaneously in sound and vision to that place and to the hearing room. If parties, agents and advisers have been permitted to be present in another place in accordance with paragraph 1 sentence 1, the questioning shall also be transmitted to that location.

(3) The transmission shall not be recorded. Decisions under paragraph 1, sentence 1 and paragraph 2, sentence 1 cannot be contested.

19. In other words, the Court cannot force the parties to participate in an oral hearing in the form of a videoconference. It can only allow a party to take part in the hearing by videoconference.

In the relevant literature, this provision is generally regarded as being required by the Constitution since the court is located in a courtroom to which all parties and the public must have access.

20. The X. civil senate of the Bundesgerichtshof, the German Federal Court of Justice, which is responsible for patent nullity appeal proceedings, has made the following arrangement for oral hearings in these proceedings during the Corona pandemic: Only nine people may be present in the courtroom, owing to its size. In addition to the five judges, two people, usually two attorneys, may therefore be present for each party. The other participants on the parties' side are connected by videoconference. In order to meet the requirement of public access, the hearing will be transmitted to a separate room. Recording is prohibited.

In our opinion, national provisions such as those in § 128a of the German Code of Civil Procedure should be taken into account by the EPO, in accordance with Art. 125 EPC.



Oral Proceedings by videoconference with the consent of all parties

21. We share the view of referral decision T 1807/15 that, under Art. 116 EPC, it is possible to hold oral proceedings by videoconference without infringing Art. 113 (1), but only if all parties agree.

It is undisputed that a party has the right to not attend an oral hearing. If we consider - for discussion purposes only - participation in the oral proceedings in person as a 100% participation and non-participation as 0% participation, the participation via videoconference should be somewhere between for example 50-70%, depending on the individual perception of the respective party. Thus, no reason can be seen why oral proceedings via videoconference *with the consent of all parties* should not be possible for legal reasons.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Leythem Wall', written over a horizontal line.

Leythem Wall

President, EPLIT