

EPLIT

EUROPEAN PATENT LITIGATORS ASSOCIATION



***EPLIT – c/o Multiburo Paris Chatelet
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Registry of the Enlarged Board of Appeal

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Amicus Curiae Brief of EPLIT concerning G 2/21

Summary

A clear majority of EPLIT members are of the opinion that the referral G 2/21 should be admitted and that, in reply to the first question referred to the Enlarged Board of Appeal, there should be no exception to the principle of free evaluation of evidence.

About EPLIT

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, 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.

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.

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Member Survey

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.

A member survey was conducted in January to February of 2022, where EPLIT members were asked to provide their preferred outcome of the questions referred to the Enlarged Board of Appeal through G2/21.

Admissibility

Initially, the EPLIT members were asked whether the questions referred in G 2/21 should be admitted by the Enlarged Board of Appeal.

78 % of the respondents answered in the affirmative.

Comments from the respondents cite the diverging case law and the need for predictability as main motivations for admissibility.

67 % of the respondents replied that the questions referred to the Enlarged Board of Appeal are sufficiently formulated.

Question 1

Referring to question 1, as referred to the Enlarged Board of Appeal, 89 % of the respondents answered that there should be no exception to the principle of free evaluation of evidence.

Respondents' comments refer to the importance of the principle of free evaluation of evidence, coupled with the fact that the European Patent Convention provides no legal basis for disregarding, or limiting, the principle of free evaluation of evidence.

Question 2

43 % of the respondents answered this question in the affirmative, while 43 % answered in the negative.



Among the negative answers, it was noted that ab initio plausibility would still be a very high standard for patent applicants and proprietors to meet.

Question 3

Again, 43 % of the respondents answered this question in the affirmative, while 43 % answered in the negative, with some respondents noting that this option would be the second best option, should the Enlarged Board of Appeal answer question 1 in the affirmative.

Conclusion

From the above it is clear that EPLIT members view that the questions referred under G2/21 should be admitted by the Enlarged Board of Appeal. While the majority of EPLIT survey respondents view that there should be no exception to the principle of free evaluation of evidence, the subsequent questions show an equal split in the preferred outcome. This is also perhaps representative of parties being on either side of this issue depending on the facts of a case and which party is making use of post published evidence.

Accordingly, EPLIT asks the EPO Enlarged Board to consider the questions referred and to provide direct answers in full with clear guidance on how plausibility is assessed and to be taken into account when deciding whether or not to admit post published evidence.

Yours faithfully,

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

Leythem Wall

President, EPLIT