

Kluwer Patent Blog

EPO oral proceedings by videoconference: 47 amicus curiae briefs in case G 1/21

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The ‘new normal’ at the EPO and more particularly plans to allow oral proceedings by videoconference even if parties don’t want it, have been leading to extensive debate over the last weeks. No less than 47 amicus curiae briefs were filed with the Enlarged Board of Appeal in case [G 1/21](#), where the crucial referral question will be answered: “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?”



Videoproceedings have gained a lot of ground since the Covid pandemic broke out over a year ago. In the view of the European Patent Office they are a way to conduct hearings without health risks and to prevent severe backlogs. But the EPO’s proposal to enforce oral proceedings by videoconference even if one of the parties is opposed to it, as laid down in a new [Article 15a of the Rules of Procedure of the Boards of Appeal \(RPBA\)](#), was highly controversial.

The article was envisaged to enter into force on 1 April 2021. It was even before that date that in case [T 1807/15, Andrew AG vs. Rohde & Schwarz](#), the Technical Board scheduled an oral proceeding in the form of a videoconference without the parties’ consent, which led to the [G 1/21](#) referral to the Enlarged Board of Appeal, the EPO’s highest judicial body.

The Board will hear the crucial submission on 28 May 2021, via video conference ironically, which will enable any interested party to follow the case. And it can be expected that many will do so. [Not unlike other changes at Europe’s patent organisation](#), it seems the introduction of Article 15a is pushed through regardless of criticism and/or results of consultations concerning the ‘new normal’ president António Campinos is propagating.

As has earlier been explained in [this blogpost of IP Kat](#), the “hasty scheduling of the oral proceedings [regarding [G 1/21](#)] with limited time for third parties to comment, and (...) the potential conflicts of the appointed members of the Enlarged Board” has been met with criticism. This concerns, among others, Carl Josefsson who helped introduce article 15a and, as chairman of the EBA, is now responsible for deciding whether the article complies with the European Patent Convention.

Suspicion of partiality

In a [‘preliminary brief’](#), the Institute of Professional Representatives before the European Patent Office epi writes it: “considers that the question under consideration in G 1/21, concerning oral proceedings under Article 116 EPC, is very important. epi also notes that a number of questions have been raised about the operation of the EPO and the Boards of Appeal, not least in complaints to the German Constitutional Court. It is therefore, in epi’s view, essential for the European patent system to show that the Enlarged Board not only is but also appears to be a proper judicial body. (...) In Article 24(3) EPC, it is made clear that, if a member is suspected of partiality, this is a possible reason for exclusion. (...) In this respect, it is pointed out the President of the Boards of Appeal (...) and some other members of the Panel were involved in the drafting of new Article 15a RPBA and it is this involvement which gives rise to a suspicion of partiality.”

The criticism is also voiced, in stronger words, in an anonymous brief by [‘A. Schauinsland’](#): “Manifest partiality of the president of the boards of appeal in case G 1/21 The president of the boards of appeal, Mr Josefsson, has decided to put himself as chair in G 1/21. The succession of facts mentioned above would impose that Mr Josefsson deports himself in G 1/21. Not only he is chairing the case, has contributed to the drafting of Art 15aRPBA2020, but at the same time he has contributed in rushing the whole affair by abiding to the bare minimum foreseen under R 115 when summoning to oral proceedings. In view of his attitude, there is not even the perception that Mr Josefsson would be not prejudiced, he actually is.”

Apart from the preliminary document, epi also filed a [‘substantive brief’](#): “As explained in detail below, a thorough application of the methods of interpretation usually applied by the Enlarged Board of Appeal to construe legal provisions of the EPC leads to the conclusion that the conduct of oral proceedings by videoconference without the consent of the parties is not in conformity with Article 116 EPC: epi is therefore of the opinion that the answer to the question of law should be negative.”

Seven large German patent attorney firms submitted a joint comment. As is [summarized on the website](#) of one of the firms: “Video proceedings can be a useful option for a party, but should not be made mandatory. Only under very exceptional circumstances, e.g. in the case of a pandemic and if one of the parties appears to refuse its consent to video proceedings with the intention to abuse the proceedings, may an exception to this rule be conceivable. Hoffmann Eitle have therefore joined with six other renowned patent attorney firms and filed a joint amicus curiae brief to the EPO, accompanied by a legal opinion of Justice Professor Dr. Siegfried Broß, who has served as a judge at both the German Federal Constitutional Court and in the patent panel of the Federal Court of Justice. The brief (in German only) can be found [here](#).”

In the majority of the amicus curiae briefs it is argued, based on legal arguments, experiences with oral proceedings online or lack of clarity concerning the EPO’s reasoning behind enforcing videoconferencing, that article 15a RPBA is in violation of the European Patent Convention. Other briefs focused on conditions in which oral proceedings can be held, even without consent of both parties. Some submissions are positive about oral proceedings. The author of this blog wasn’t able to read and analyse every brief in detail, but below you’ll find a series of quotes from them.

[The IP Federation](#) “believes that, in order to ensure natural justice and protect parties’ rights to a fair hearing, the short answer to the question referred to the Enlarged Board of Appeal should be no: 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 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 **International Federation of IP Attorneys**: “FICPI believes that oral proceedings in the form of a videoconference are compatible with the right to oral proceedings as enshrined in Article 116(1) EPC. However, as already explained in FICPI’s opinion on new Article 15a of the Rules of Procedure of the Boards of Appeal, “a party’s right to an in-person oral hearing is a fundamental principle of any judicial system. Once the Covid emergency is over, therefore, parties should always have the right to attend oral proceedings in person, at least in inter partes proceedings, even if oral proceedings by videoconference become a standard option for conducting oral proceedings in the future. In this connection, FICPI notes that proceedings before the Boards are last instance proceedings and it is very important that parties are seen to have full access to justice.” Therefore, parties should always have the right to request (well in advance) and obtain to attend oral proceedings in person, at the presence of the members of the Division or Board in question, except during periods where extraordinary circumstances, such as public health emergencies or security reasons, makes this impossible.”

The **Swiss Association of Patent Attorneys VESPA**: “The evidence-based research clearly shows that videoconferences do currently have an impact on the outcome of court proceedings. It is thus evident that videoconferences have an impact on the true «essence of oral proceedings» as they used to be, i.e. in-person. (...) Forcing videoconferences as ‘oral proceedings’ on unwilling parties is a major change to an essential element of the parties’ right to be heard, i.e. the oral proceedings in-person as they used to be, when there is no indication at all available that the legislator had ever even thought about compromising the quality of communication of in-person interaction. (...) Restricting the right to be heard and the right to a fair trial would require legislative measures. This should not be taken lightly by way of judicial legislation, and it should not be rushed.”

Bayer: “The EPO cannot use the pandemic situation as a backdoor to establish new standards and to introduce mandatory oral proceedings by videoconference as a *fait accompli*.”

BASF: “no party can, in principle, be precluded from appearing in person in oral proceedings against the will of such party. An exception is only possible for the duration of an objectively life-threatening, uncontrollable pandemic, and only if such exception is objectively necessary to safeguard life and health of the very persons in question.

APEB: “Examples of situations in which in-person oral proceedings must be held would include, but not be limited to: A representative or party would be impeded from correctly participating via videoconference format due to health issues (temporary or permanent); The conduct of oral proceedings by video conference would lead to or increase a significant imbalance between the parties, for example because of the lack of a party’s access to appropriate videoconferencing tools; Oral Proceedings where witnesses are to be heard; Oral proceedings with a large number of opponents (...), or a large number of parties wishing to attend the oral proceedings; Oral proceedings in a complex case where in-person presence is required for correct presentation of the case (examples: a prototype of an invention needs to be demonstrated; complex drawings need to be displayed)”

REPI (Réseau Entreprises – Propriété Intellectuelle) “is thus of the opinion that a range of circumstances need to be taken into account in deciding whether to conduct oral proceedings in-

person or via videoconference, keeping in mind the overarching principles of access to justice and quality of EPO decisions. In order for all parties to have legal certainty, if the Enlarged Board of Appeal reaches a positive decision on the question asked, it would be essential that the EPO engages in a consultation process with stakeholders with a view to establish and publish guidance on the criteria that will be used to decide on the manner in which oral proceedings will be conducted in the future.”

Laine IP: “in case the Enlarged Board of Appeal decides to answer to the referred question in the affirmative, i.e. that the conduct of oral proceedings in the form of a videoconference is compatible with the right to oral proceedings as enshrined in Article 116(1) EPC even without consent by all of the parties, the Enlarged Board of Appeal is respectfully requested also to clarify: What are the minimum requirements that a videoconferencing technology must fulfil in order for a videoconference to be compatible with the entitlement to a fair and public hearing in oral proceedings before the opposition divisions and the Boards of Appeal 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?”

Philips International: “The conduct of oral proceedings in the form of a videoconference is compatible with the right to oral proceedings as enshrined in Article 116(1) EPC whenever a videoconference adequately provides a fair hearing in which the parties concerned have an opportunity to orally and interactively present their comments while the parties and the EPO can see each other. This also holds 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.”



EPO, Rijswijk. (Rob Oo, CC BY 2.0 via Wikimedia Commons)

Medicines for Europe: “we urge the Enlarged Board of patients to confirm that the conduct of oral proceedings in the form of a videoconference is compatible with the right to oral proceedings as enshrined in Article 116(1) EPC, in order to avoid unjustifiable postponements or the possibility to a single party of opting-out unless there is an imperative reason.

Plasseraud IP: “there does not exist any right for a party to give consent to the conduct of Oral Proceedings in the form of a videoconference. In inter partes proceedings, there would in fact be an unlawful unbalance if a party situated close to the EPO premises could force another party to travel over long distances, simply by refusing to give such consent. We have indeed received overtures from Munich-based firms who have been lobbying IP firms and even our clients, requesting support on their anti-videoconference position. The intention appears to be to protect their own interests which have been served for decades by the need for non-Munich firms to bear travel expenses in order to avoid disadvantages to their clients in inter partes oral proceedings. Answering “Yes” to the question currently before the Enlarged Board of Appeal would remove this long entrenched competitive advantage and result in greater fairness to all parties. Furthermore, we have full confidence in the EPO’s capacity to continue to render decisions of high quality. We do not agree with certain allegations whereby videoconference Oral Proceedings would lead to lower quality of decisions from the EPO.”

The Chartered Institute of Patent Attorneys: CIPA has previously stated its support for videoconference oral proceedings, subject only to the underlying systems being fit for purpose. We welcome the speed at which the Enlarged Board has convened oral proceedings in this reference and urge similar expedience in issuing a decision to minimise the period of uncertainty. We are aware that concerns have been raised over an appearance of partiality of the Enlarged Board as constituted. CIPA strongly believes that the impartiality of the Enlarged Board is essential for the rule of law. We note the detailed construction by the referring Board of the term “oral proceedings” in Article 116 EPC (point 5 of the referral). We agree with the Board’s recognition at 4.1.3 that “running videoconferences using a technology that generally functions properly is compatible with both the right to be heard and the right to a fair trial”. Neither the wording of Article 116 nor its intent would appear to preclude videoconferencing.

Carpmaels & Ransford: “As summarised above, the present provisions allow oral proceedings before the examining and opposition divisions to be held in-person if serious reasons are provided as to why oral proceedings being held by videoconference are inappropriate. Boards have discretion to decide the suitability of the case to be heard by videoconference. Providing that there is clear guidance and consistency of application with regard to situations where oral proceedings may be held in-person on request, parties would appear to be adequately safeguarded.”

On Tuesday, the deadline for filing briefs, EPO president António Campinos [submitted written observations](#) to the Enlarged Board of Appeal himself as well. In a letter to the chairman of the EBA, Carl Josefsson, he thanks for the invitation to give “written comments on the points of law referred to by Decision T 1807/15”. His conclusion doesn’t come as a surprise:

“Article 116 doesn’t stipulate the form of oral proceedings, it only determines the minimum requirements, which can be fulfilled by videoconference oral proceedings held in accordance with EPO’s practice. The decision as to the form in which oral proceedings are held, lies with the competent department, not the parties. Accordingly, the question of whether oral proceedings can be held by videoconference cannot depend on the consent, a waiver or similar procedural declaration of the parties.”

The number of amicus curiae briefs is not 44, as was stated in an earlier version of this post, but 47, and has been corrected.

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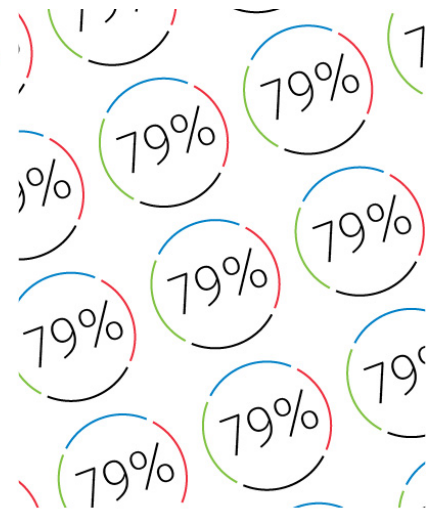
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