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BASF SE, 67056 Ludwigshafen, Deutschland

European Patent Office – Enlarged Board of Appeals
Mr Nicolas Michaleczek

by email only

Amicus curiae letter of BASF SE in case G1/21

Dear Mr. Michaleczek,

please find enclosed an amicus curiae letter of BASF SE in view of the above mentioned EBA case.

Yours sincerely,

Heiko Sendrowski

BASF SE
67056 Ludwigshafen, Germany

Phone: +49 621 60-0
Fax: +49 621 60-42525
E-mail: global.info@basf.com
Internet: www.basf.com

Registered Office:
67056 Ludwigshafen

Registration Court:
Amtsgericht Ludwigshafen
Registration No.: HRB 6000

Chairman of the Supervisory Board:
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Statement of BASF SE according to Art. 10 (1) RPEBA in case G1/21

The question referred to the enlarged board of appeal for decision:

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?

In our opinion, the question is at least fourfold, because it covers both proceedings before administrative departments and boards of appeal of the EPO, and the subject matter of the question refers not only to the party or parties but also tacitly impinges on the rights of the public. For the sake of conciseness we abstain from commenting on issues of admissibility and scope of the referral (Art. 112 (1) a EPC). We will also generally leave aside the question if video conferences should be available for any party requesting so.

Hereinafter we first comment on general principles underlying oral proceedings, thereby comparing in person hearings to video conferences. In a second part we address issues pointed out by the technical boards of appeal in view of video conferences. Finally, we will these principles to the four aspects indicated above.

1. General observations on oral proceedings in person and by video conference
- 1.1 Oral proceedings in the presence of all participants vouch for the fairness of judicial procedure to the parties.

By oral proceedings in the presence of all participants each party is immediately and permanently informed of the persons of the judges deciding the case. The party concerned can personally and continuously verify that the persons hearing the case and the persons rendering the decision are identical. The party can also immediately ascertain that the judges are those appointed according to the business distribution scheme of the court [1] and that no judge is missing. And the party can immediately and permanently verify that no further person is performing duties as a judge, be it in the hearing itself or in the delivery of the decision.

Oral proceedings in the presence of all participants also provide immediate and full access of each party to the information presented to the judges by the party and vice versa. They are not conveyed by an intermediary, be it a scribe [2] or a technical means, whose truthfulness the party is forced to believe in without the party having to their disposal any means of full and continuous verification of such truthfulness. The same applies in view of information exchanged between the judges and the other party, witnesses, experts etc., as may be.

Oral proceedings in the presence of all participants also immediately convey the reaction of every judge and, as may be, other party, witness, expert or other participant to any argument, objection or notion produced by a party. Unlike written proceedings, oral proceedings allow for a fast exchange of information between all participants, notably the parties and judges. They enable each party as far as possible to verify that its motions have been recognized and understood. Thus, such oral proceedings serve the interest of procedural economy [3]. They also prevent against any suspicion of partiality which may arise if a judge or other participant is separated from a party even by the thinnest veil.

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1.2 Public oral proceedings in the presence of all participants also guarantee to the public that justice is administered in due form [4]. The public serves as twofold safeguard against miscarriages of justice: The parties benefit from the presence of the public not only by the appeal to the judges' conscience and carefulness exerted by public supervision but also by constituting a potential pool of impartial witnesses to aid any party in the event of procedural violations. The judges, on the other hand, also benefit from the presence of the public, because it relieves them, by virtue of appeal to conscience and by threat of witness testimony, from any attempt of alteration of the course of justice, be it by threat or promise emanating from the parties, from members of the legislative or the executive. Furthermore, public oral proceedings held in the physical presence of all parties, witnesses, experts etc. also serve to reduce the likelihood of an unsolicited recording of the hearing, because everyone present can be fully aware of any person's actions, including the start of recording devices even outside of the meeting room.

1.3 The above principles apply to administrative proceedings only to a limited extent. In contrast to judicial proceedings, administrative decision proceedings inherently do not enjoy independence from instructions as is characteristic for judicial proceedings [5]. Administrative decision bodies notably can be instructed to adhere to an official interpretation of the respective law regardless of the arguments of the parties; the right for remonstrance is no full ersatz of the independence enjoyed by the judiciary.

These general reservations notwithstanding oral proceedings in the presence of all participants also benefit from the above described characteristics. In particular, oral proceedings in the presence of all participants likewise guarantee a swift exchange of arguments and clarifications unimpeded by postal delivery times. Furthermore, the parties and the public (unless excluded for cogent reasons) are fully and immediately aware of all information presented to the administrators.

1.4 Video conferences cannot provide, to the parties or to the public, an immediate and continuous possibility to verify the aforementioned most basic characteristics of a fair trial. All intelligence about the oral proceedings are inherently not immediate but necessarily mediated by technical facilities and operators. These facilities and the actions of the operators are beyond the control of the party and of the public. The proper functioning of the technical devices cannot fully be analysed nor supervised by any party, nor are the persons required to operate the devices known. In video conferences ordered ex officio instead of a personal oral hearing the party can only take the assurance of the judge as indication that its rights in view of the aforementioned most basic formalities are being respected. Furthermore, such assurance cannot even be based on the judge's personal full examination; the assurance is only based on plausibility and a presumption of good intent [6]. The parties and public cannot even ascertain that no further persons are present in the room together with any respective judge or administrator.

Video conferences also restrict the sensual information which can be gathered by the party and the public. Not only is the spectrum of information transmitted between the participants limited compared to in-person meetings, there is also additional distortion and possibly a phase delay between the auditory and visual channels. Such technical limitations create an unfair obstacle for any person (notably any party) which is hard of hearing and/or visually impaired. Persons with sensual limitations rely the more on the unimpeded flow of sensations conveyed by their remaining senses. Thus, persons with auditory or visual restrictions are subjected to unfair difficulties when they try to follow the course of oral proceedings and make their point.

Restrictions and distortions of information transmission in video conferences also complicate any assessment by the affected party to ascertain that its arguments have been heard, understood, accepted or have elicited any other specific reaction. Particularly in those cases where several

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persons are filmed by a single video camera, mimics of these persons are generally unrecognizable on any standard computer screen or monitor [7].

The technical limitations of information transmission also lead to a marked delay in the conduct of oral proceedings. Providing new or amended documents takes considerably more time and special resources than in oral proceedings in the presence of all participants. Furthermore, fast answers are not possible, and the pleading person cannot be passed notes or whispered advice by accompanying persons on the fly. This, in turn, limits each parties' capacity to exercise their right to be heard compared to the extent possible in oral proceedings in the presence of all participants. Furthermore, while any party may ask for a short break to internally discuss matters, each interruption necessarily amounts to a delay of the proceedings and thus reduces the "arguments per minute" capacity of such proceedings and either force the deciding body to adjourn oral proceedings or force the pleading party to cut short on its submissions.

The transmission of oral proceedings to the public also entails problems. Not only does it provide an unfair advantage to straw men at least in those video conferences where the members of the public have not been identified to the parties [8]. Furthermore it opens the possibility to any kind of recording and subsequent use thereof, e.g. in non-European court proceedings. Thus, the presence of unidentified members of the public who are, according to today's technical standards, not prevented from creating a recording of sufficient quality, obliges the parties and their representatives to carefully weight every word in order to avoid prejudicing their position in parallel or subsequent court proceedings [9].

But even in those cases where representatives may not fear liability issues in view of parallel or subsequent proceedings, parties and judges have to fear that representatives may give statements not only (or not even!) to further their client's case, but to demonstrate their skilfulness to a broader audience in the hope of soliciting further business. Likewise, unassuming representatives have to fear that their unspectacular demeanour could leave an impression in the uninformed public of a lack of vigour or interest in the client's case, thereby reducing the prospects of obtaining new clients. These problems can be steered to some degree by procedural decisions of the chair [10], but it is clearly preferable to conduct oral proceedings in the presence only of a "Saalöffentlichkeit" (limiting access of the public to those present in the room) [11]. However, such limitation essentially amounts to a discrimination against those members of the public which do not happen to live close to the seat of the court in question [12].

Video conferences furthermore differ from oral proceedings in the presence of all participants by the requirement to use a video conferencing software. This software is not chosen by the parties but by the administration of the deciding body. However, the installation of software on another person's computer creates all sorts of secondary problems concerning data protection and espionage prevention. Thus, video conferencing software in EPO proceedings must be safe to use in compliance with the law of the member states. For the time being, this is apparently not the case. For example, the state data protection officer of Berlin has recently issued a warning that, e.g in the case of Zoom, "there are deficiencies which preclude the use of the service in accordance with the law and the elimination of which will probably require significant adjustments to the business processes [by Zoom]" [13]. Due to the complexity of the software it is beyond any party to analyse compliance with the relevant law. Instead, either blind faith in the assurance that no breach of data protection will happen is required, or an investment in a completely separated IT infrastructure is necessary. Both creates an unwarranted advantage to a less scrupulous party and is thus inherently unfair.

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- 1.5 In defence of video conferences secondary aspects have been relied on, in particular prevention of infections, ease of bringing in experts, witnesses and further accompanying persons, lack of travel expenses, reduction of carbon dioxide emissions, reduction of administrative overhead for reserving appropriate rooms and the possibility of using additional media via screen sharing.

Preventing the spread of infectious diseases is of course an important goal. In a Kantian sense nobody can want to have personal appearance enforced in oral proceedings if there is a significant risk of transmission of infectious diseases. However, transmission of infectious diseases can be reduced or prevented by appropriate measures of hygiene. Thus, enforcing video conferences can only be a temporary, extraordinary measure in situations where otherwise a standstill in the administration of justice would be inevitable, provided that plausible measures are taken to remove the extraordinary situation, e.g. by the installation of proper hygienic measures.

Other practical considerations are necessarily not commensurate to the above described legal considerations. The right to a fair trial cannot be weighted against the comfort for the administration, for the parties or other persons unless the lack of comfort amounts to a denial of justice. While it is to be hoped that most parties will consent to video conferences in the interests of a smooth procedure, it cannot be said that oral proceedings in the presence of participants have in the past generally amounted to widespread unfairness. And speed is no substitute for justice [14].

2. Arguments raised in key decisions of the EPO boards of appeal

- 2.1 We note that a number of decisions have already decided in favour of video conferences in lieu of traditional oral proceedings despite the protest of at least one party, e.g. T 2068/14, T 1378/16 and T 2320/16. The arguments of these decisions are, however, unconvincing, because the respective boards in their decisions either did not address the above aspects of oral proceedings at all or failed to fully appreciate the significance thereof.

- 2.2 The approach taken in decision T 2068/14 rests on the assumption (see sec. 1.2.2) that the boards of appeal have

“a discretion regarding the organisation of oral proceedings, including, in principle, holding them by video conference. This discretion is exercised according to the circumstances in any given case.”

This alleged discretion is not derived from any particular reasoning, it is a mere assertion. However, the right of the parties to fair proceedings is not an object of discretion of the boards. In particular, the boards of appeal cannot demand that a party merely takes their word for a fact that the correct persons adjudicate the case etc. as detailed in section 1.1 supra. While a party may voluntarily refrain from making full use of its fundamental rights to oral proceedings, the boards of appeal cannot command a party's consent to any such limitation without committing a substantial procedural error.

- 2.3 A further approach taken in decision T 2068/14 (sec. 1.2.3) and affirmed in decision T 1378/16 is the argument that

“while a video conference does not allow such direct communication as the face-to-face meeting involved in conventional oral proceedings, it nevertheless contains the essence of oral proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously.”

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This argument is unfounded because it would equally apply to telephone conferences without any visual feedback. However, telephone conferences only aggravate the problems inherent in video conferences. In both cases, neither the parties nor the public can be sure that their case is decided by and only by the judge(s) appointed by law on the basis of the full case as presented.

2.4 Decision T 2320/16, in turn, asserts that (section 1.5.2)

“a prerequisite of oral proceedings is that the parties can see the members of the board and vice versa. This distinguishes oral proceedings pursuant to Article 116 EPC from a telephone conference in which the board members and parties are not visible to each other. At the same time, it must be possible in real time for the board to interrupt or question the parties where necessary. This distinguishes oral proceedings from an exchange by letter, fax or E-mail, where an exchange of views in real time, i.e. essentially simultaneously, is not possible.

Apart from the above constraints, the form in which the parties orally present their arguments - with or without physical presence - is not predetermined by Article 116 EPC.”

However, contrary to the above assertion the rights of the parties are not safeguarded merely by the possibility to receive a visual transmission showing the members of the board (which, as indicated above, may be further limited for visually impaired persons). Instead, it is the immediacy of interaction combined with the possibility to inform themselves fully about the setting in which the proceedings take place which, together, guarantee to the parties and to the public alike that justice is done indeed.

- 2.5 The board in decision T 2320/16 further argues that in oral proceedings held in the presence of all participants, differences in visibility are inevitable, e.g. due to the fact that the participants may be seated at different distances to the members of the board (see section 1.5.3). However, visibility is hardly the decisive criterion. Otherwise, blind or visually impaired persons could not participate in or preside over oral proceedings. And it is also not decisive if the extent of variation in visibility is larger or smaller in oral proceedings conducted in the presence of the participants compared to video conferences [15]. Again, it is instead the question of whether the party and the public have to take someone else's word for it that the oral proceedings are properly conducted.

3. Conclusions

In view of the difference between administrative and judicial procedures, a differentiated response to the question referred to the enlarged board of appeal is advised:

- 3.1 Judicial proceedings, notably before the boards of appeal and the enlarged board of appeal of the EPO, enjoy absolute protection of the right to a fair trial. This necessitates that the parties and the public can personally verify that justice is indeed administered by the right judges without interference. Thus, no party can, in principle, be precluded from appearing in person in oral proceedings against the will of such party [16]. 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.

This notwithstanding each participant should be allowed to attend oral proceedings by videoconference on his own volition regardless of the mode of attendance of other participants, unless personal attendance is required for convincing reasons (e.g. judicial function).

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- 3.2 In administrative procedures, notably in oral proceedings before the search, examination and opposition divisions, video conferences may in principle be ordered even against the explicit will of the parties. These proceedings do not as such enjoy the absolute protection of fundamental rights. Thus, it is allowable to balance practical considerations against the right of the parties and of the public to fully see by themselves that justice is done. In the absence of a judicial procedure, justice is not done anyway, so a trade-off is not excluded by principle.

However, even in administrative proceedings oral hearings must be held in the presence of any person invoking convincing reasons to this effect. For example visually impaired or hearing-impaired representatives may depend on the full input to their other senses to fully follow oral proceedings and to adequately make their point. This notwithstanding each party should be allowed to attend by video conference on the party's request (e.g. unforeseen delays in flights).

- 3.3 In any video conferenced oral proceedings (voluntary or involuntary) proper precautions must in place to prevent recordings and attendance of unidentified persons.

Notes

- [1] The EPO publishes the appointments of appeal board members via the public section of the patent register.
- [2] See A. Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege*, Gießen 1821, page 104f: "... the presence of the party involved cannot be excluded either with regard to the acts to be authenticated or with regard to the judicial act of authentication itself, if confidence in that judicial document is not to rest on a mere legal presumption or legal fiction and the party is to consider its rights severely endangered by involuntary or even voluntary errors."
- [3] Article 116 (1) 1st sentence 2nd alternative EPC
- [4] See e.g. ECHR case of *Martinie v. France* [GC], no. 58675/00, § 39: "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society."
- [5] See e.g. Art. 23 (4) EPC
- [6] See, however, L. Wittgenstein, *Tractatus logico-philosophicus*, proposition 5.1363: "If the truth of a proposition does not follow from its plausibility, then its plausibility is no justification for our belief in its truth."
- [7] It would be unfair to demand that a party invest in professional video conferencing equipment where this party had not even consented to video conferencing in the first place and alternatives (i.e. personal presence) are available.
- [8] Nobody would accept a masked figure in court (other than for the obvious sanitary reasons), and there is no reason apparent why unidentifiable persons must be accepted in video conferences either.

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- [9] Forbidding such recordings is no sufficient or suitable assurance to the parties and their representatives. Theft is also forbidden by law, but is not abolished by the promulgation of any such law.
- [10] See e.g. Art. 15 (4) RPBA
- [11] This limitation is standard in most if not all jurisdictions of EPC member states and thus constitutes a principle of procedural law generally recognised in the Contracting States according to Art. 125 EPC; see also e.g. decision of the German Federal Court of Constitution, BvR 2623/95 of 2001-01-24, paragraph 73 et seq.
- [12] This problem is particularly exacerbated in multinational constructs like the EPC, where the citizens of some contracting states would need to travel 500 km or more to reach Haar. This amounts to a denial of access by imposition of an undue burden.
- [13] See https://www.datenschutz-berlin.de/fileadmin/user_upload/pdf/orientierungshilfen/2021-BInBDI-Hinweise_Berliner_Verantwortliche_zu_Anbietern_Videokonferenz-Dienste.pdf
- [14] See A. Feuerbach, op. cit., page 236: "Swiftness as the highest law sacrifices truth and justice to an early peace and applies especially to justice in violent states (despotisms), which care far more that all should be quiet than that each individual should receive his justice."
- [15] Shortcomings in traditional oral proceedings should be remedied instead of being used as an excuse to perpetuate them in other proceedings
- [16] The public is not entitled to file requests. However, the rights of the public are not open to the disposition of the parties. It is thus the task of the jurors to safeguard the trust of the public in the fairness of proceedings by ordering video conferences only in suitable cases.