



Our Reference:
Date: 27 April 2021
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To the Registry of the Enlarged Board of Appeal
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***Amicus curiae* brief – Written statement for case G 1/21 before the Enlarged Board of Appeal**

About us

Ericsson is one of the leading providers of Information and Communication Technology (ICT) to service providers. We enable the full value of connectivity by creating game-changing technology and services that are easy to use, adopt, and scale, making our customers successful in a fully connected world.

At Ericsson we are dedicated to research and innovation, leading the development of cellular technology- from 2G to 5G. Around 17 percent of Ericsson's annual global revenue is invested in research and development (R&D), and we have the leading portfolio in the industry, with over 57,000 granted patents.

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Question referred to the Enlarged Board of appeal in case T 1807/15

The Technical Board of Appeal has, in its decision T 1807/15, referred the following question to the Enlarged Board of Appeal:

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?

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This question should be answered “no” based on the following considerations:

1. Oral proceedings according to Art. 116 EPC are an important element for implementing and ensuring the Right to be heard as codified in Art. 113 EPC; this right is very fundamental and founded in basic law and constitutions of the Member States of the EPC. Thus, care must be taken to conduct oral proceedings in an appropriate format, as otherwise Art. 116 EPC and the right to be heard as granted by Art. 113 EPC could be violated.
2. In order to establish what is meant by “oral proceedings” in the sense of Art. 116 EPC, the understanding of the legislator at the time of establishing this provision must be determined. Therefore, the usual procedure of legal bodies of the member states is to be taken into account.
At the time when the EPC came into force, and also at the time of major updates like the EPC 2000, the usual conduct of oral proceedings in the member states was by means of a personal meeting at the premises of the respective authority, be it a Court or a public authority such as e.g. the German Patent and Trademark office (in which so-called hearings were conducted *in personam* at the premises of the GPTO).
It can thus be concluded that the term “oral proceedings” in Art. 116 EPC is meant to relate to a personal meeting of the party or parties with members of the EPO or the Boards of Appeal at the respective premises, in which arguments could be presented orally and/or by demonstration.
3. It has been put forward e.g. in BoA decision T 2068/14 that the “essence of oral proceedings” would be constituted by the fact that the board and the parties/representatives can communicate with each other simultaneously. This cannot be followed. First of all, the EPC does not define any “essence of oral proceedings”, thus the considerations of point 2. above apply.
It is further noted in this respect that the EPO always used to make a clear distinction between telephone consultations and oral proceedings. While a telephone consultation certainly fulfils the criterion of simultaneous communication as proposed by T 2068/14, it was apparently never considered to be an adequate substitute for oral proceedings. Accordingly, also in the established practice of the EPO oral proceedings in the sense of Art. 116 EPC required a personal meeting between the party/parties and the deciding body.



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4. From the foregoing it is apparent that holding oral proceedings by Videoconference is no generally admissible procedure under the EPC.
5. An exception to this general rule can apply if all parties request videoconference as the format to run them. Doing so, the parties are limiting, by their requests, on their own and in agreement, their right under Art. 116 EPC. In other words, the exception can apply if the parties are waiving their right to a personal meeting as the format for oral proceedings by requesting videoconference. Of course, such an exception should be subject to the approval of the deciding body.
It shall be noted that said limitation of rights under Art. 116 EPC would only be required from all those parties that exercise their right under Art. 116 EPC. In other words, a party that does not intend to show up in the oral proceedings shall not be decisive about its format.
6. Similarly, a hybrid format is conceivable, in which some participants meet in person at the premises of the EPO or the Boards of Appeal, and some participants take part remotely via audio and video transmission. While it may be technically more demanding to ensure equal treatment for onsite and remote participants, such format would be possible given the agreement of all parties and the deciding body.
7. Another exception to the general rule shall be available during a general disruption that prevents attendance to oral proceedings in person, like a situation of a public state of emergency as in the current pandemic. In a situation where in general physical meetings are not applicable or even not allowed at all, it can be justified or even required to resort to videoconferences in order to enable access, in particular timely access, to justice, which is an important factor to be considered under Art. 113 EPC. The right to be heard under Art. 113 EPC is a basic right that can overturn in such an exceptional situation the right to personally meet for oral proceedings under Art. 116 EPC.
To apply this exception, there shall be prerequisites: A general determination of the exceptional situation is required, i.e. the determination shall not be performed on a per-case base. The territorial scope of the exception needs to be defined. There shall be a fixed termination date of the exception. The termination date can be extendable, but the exception shall not have an open end.
8. However such exceptions can not be taken as an indication that generally a videoconference constitutes an admissible format of oral proceedings under Art. 116 EPC, even if many participants have a positive opinion thereon.



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9. It would also not be admissible to tacitly introduce videoconferences based on such exceptions.
After all, the considerations brought forward under points 1 to 4 still apply, and particularly it would be the original task of the legislator to introduce according provisions in the required democratic procedure.
The right of a party to proceedings before the EPO and the Boards of Appeal to have oral proceedings is codified in Art. 116 EPC, i.e. in a primary source of law. It can thus not be changed or overruled by provisions issued by a secondary authority, as has e.g. been done with Art. 15a RPBA.
10. It is undisputed that holding oral proceedings by videoconference has many positive aspects, like reduced time consumption, costs and damage to the environment due to less travel. However these are secondary considerations that cannot overrule the general right to oral proceedings under Art. 116 EPC and the right to be heard under Art. 113, which always must have prevalence.

We thus are of the firm opinion that videoconferences are no generally admissible and adequate substitute for oral proceedings under Art. 116 EPC. Any change in this respect would have to be introduced by the original legislator. Conducting oral proceedings by videoconference must therefore be restricted to the exceptions mentioned above under sections 5, 6 and 7; particularly, nothing speaks against doing so on a voluntary basis, i.e. when all parties and the deciding body agree. But otherwise there is no reason or legal basis to compel any party to do without oral proceedings in person.

Accordingly, the question referred to the Enlarged Board of Appeal is to be answered with "no".

Yours faithfully,

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