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Registry of the Enlarged Board of Appeal
Attn. Mr. Nicolas Michaleczek
Richard-Reitzner-Allee 8
85540 Haar
German

By Email to EBAamicuscuriae@epo.org

27 April 2021

Dear Mr Michaleczek,

Amicus Curiae Brief for EBA Referral G1/21
Arising from Appeal Case T1807/15
European Patent Number EP1609239
European Patent Application Number 04758381.0
Oral Proceedings scheduled for 28 May 2021

Please find attached our amicus curiae brief for G 1/21 pursuant to Article 10(1) RPEBA and Article 4(1) RPEBA.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ilya K.' with a stylized flourish at the end.

Ilya Kazi
IK-IP Ltd

Amicus Curiae Brief for EBA Referral G1/21

Introduction and basic legal background

The referring Board discussed the legal issues well. Several other briefs have commented ably and in detail on the underlying legal framework, including the EPC and the travaux préparatoires. This brief does not therefore repeat the various helpful discussions and analyses but summarises what seem to be the key issues. To us it seems there is a legal question tied up with a broader policy concern and we think care should be taken not to conflate the two.

In essence it seems to be unarguable and largely undisputed that:-

- 1) The scope of Oral Proceedings under EPC Article 116 is not precisely defined.
- 2) What was originally contemplated was an in-person appearance.
- 3) The use of technology as a substitute was neither expressly permitted nor ruled out.
- 4) The EPC does not stipulate practical details such as room facilities, start time, minimum duration of Oral Proceedings.
- 5) Oral Proceedings have been happening by videoconference in Examination for several years. Article 116 does not make special provision for this to happen.
- 6) A party has a right to be heard under EPC Article 113.
- 7) The right to be heard is not open-ended, there is a practical time allowance and limit on what is accepted before proceedings are concluded.
- 8) An extended pandemic was not contemplated nor explicitly catered for in the EPC.
- 9) The Appeal Boards (EPC Article 23) have independence and are entitled to direct conduct.
- 10) The recent amendment to Article 15a RPBA (unless found improper) seemingly deals with the matter.

In summary, whilst the EPC is clear that Oral Proceedings is a fundamental right it does not specify or constrain precisely how that right must or may be exercised.

Custom and practice have left such matters to the EPO, to Boards and to chairpersons to conduct proceedings in a way which is reasonable in the circumstances to ensure parties have an adequate opportunity to present their case, balanced with the needs of procedural economy.

This has variously included conducting Oral Proceedings in Munich, in Rijswijk, in Berlin, by videoconference, in Haar.

The fundamental question of whether “appearing” by video *per se* can meet the requirements of Article 116 has already been accepted by established practice.

The question is thus not of having a hearing in a *novel manner* but in one that has already been deemed *acceptable*. It is simply *not agreed to* by a particular party. A parallel can be drawn with having a hearing in one location when a party has a preference for another. T689/05 held that the EPO can decide where to hold a hearing, without consent of the party. G2/19 concluded the Haar is an acceptable venue despite not being specifically mentioned within the EPC.

More colourfully, an applicant may feel rightly or wrongly that he or she can present a particular case, for example relating to a game, more convincingly in costume or with musical accompaniment. A chairperson may state that it can be presented adequately, spoken normally in a respectful suit and tie. Denying that extra element may, as a matter of fact, inhibit the presenter and detract from the impact, but it does not fundamentally take away the right to be heard.

Detail of Oral Proceedings is primarily an administrative question

Unless it is considered that a particular practical arrangement *materially or fundamentally* prevents a party from presenting a case it seems to be not an outstanding legal question but rather a policy or practical question that the EBA is being asked to rule upon in this referral.

We note that administrative issues can be referred to the Appeal Boards (see Point 3.2.3 in T831/17 which gave rise to G2/19). However, that is of course not to say that Appeal Boards or the EBA should *set* administrative policy, merely decide if a policy is compatible with the EPC.

For example, if an EPO department decided that the requirement of Article 116 may be met by offering a party a short telephone call, that might give rise to a legitimate substantive question.

However in the question here, it seems to be already well accepted that the EPC does not *preclude* Oral Proceedings by videoconference as an alternative to in-person appearance. The precise circumstances under which they are held, provided it respects the fundamental right to be heard, is a practical matter for the EPO, Divisions, Boards and chairpersons to resolve having regard variously to the law, policy, prevailing circumstances and individual cases.

We would therefore respectfully suggest the correct *legal* conclusion is simply for the EBA to confirm that videoconference is not precluded as a means of holding Oral Proceedings, whether or not all parties consent. In other words, the referred question should be answered in the affirmative.

General observations and policy considerations

Having stated that the question should correctly be answered in the affirmative, I would state that I have considerable personal sympathy with the various negative views expressed.

As a first-hand observation, presenting in person *is* different to videoconference. Whilst videoconference has some of its own advantages, personal presence does offer something else. I do not think the distinction is so great as to justify a *legal* conclusion that videoconference is *incompatible* with Article 116(1). However, I would express a hope firstly that the disruption due to the pandemic will come to an end for everyone and secondly that in-person oral proceedings, even if less frequent, will not disappear entirely as an indirect consequence of this referral.

The EBA is not called upon to express a hope. However, EBA rulings rightly carry considerable weight and longevity. This issue will continue to be debated amongst my respected professional colleagues. I would respectfully ask the Board to be extra cautious that any decision is phrased to minimise the risk of improperly being construed as supporting unintended policy conclusions.

Yours faithfully,



Ilya Kazi
IK-IP Ltd